THE HIGH COURT
CHANCERY

[2017 No. 6137 P.]

BETWEEN

MICHAEL BLANCHFIELD, LARRY O'GARA, ZITA McDERMOTT, STEPHEN FAHERTY, EAMON HUSSEY, MAIREAD SHANNON and EMER GIBSON

PLAINTIFFS

- AND -

EDMUND GARVEY and THE CONGREGATION OF CHRISTIAN BROTHERS

DEFENDANTS

RULING of the Hon. Ms. Justice Stewart delivered on the 27th day of March, 2018.

1. This is a ruling on an application for an order pursuant to O. 15, r. 2 of the Rules of the Superior Courts (ROSC) to remove the currently named plaintiffs as the moving parties *simpliciter* in these proceedings and replace them with the Board of Management (hereafter referred to as "BOM") of Clonkeen College, a corporate entity established pursuant to s. 14(2) of the Education Act 1998. When this case commenced, the named plaintiffs were members of the BOM and it is acknowledged in the defence that they comprised the members of the BOM. Order 15, r. 2 of the ROSC states:-

> "2. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court may, if satisfied that it has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

2. The defendants have entered into a contract for the sale of part of the lands located at Clonkeen College, which have been used and enjoyed as playing fields by the College's pupils since the College was founded. The plaintiffs oppose the sale of the lands and rely on a proprietary estoppel arising from alleged explicit representations made by the defendants, their servants or their agents in or around September, 2006, to the effect that the plaintiffs, as the Board of Management, could enjoy and use the playing fields for so long as Clonkeen College remained in operation as a school. The lands in question are held by trustees acting on behalf of the Congregation of Christian Brothers and are the subject of a five year licence for sporting use, which is due to expire in August, 2018. The licence was granted by the trustees to the Edmund Rice Schools Trust, which is the owner and patron of Clonkeen College.

3. The hearing in this matter was scheduled to commence on the 15th March, 2018, but did not actually commence until the following day, with the Court's ruling on this motion being formally reserved on Friday, 23rd March, 2018. On the 9th March, 2018, the plaintiffs issued the notice of motion giving rise to this ruling, which seeks the following:-

> "An order pursuant to Order 15 Rule 2 amending the title of the within proceedings to read as follows:
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> "The Board of Management of Clonkeen College" as the Plaintiff and "Edmund Garvey and the Congregation of Christian Brothers" as Defendants.""

4. The application is grounded upon the affidavit of Mark Heslin, a partner in Beauchamps, the solicitors' firm on record for the plaintiffs, which was sworn on 6th March, 2018, contained at Tab 2 of the motion booklet. The replying affidavit is that of Cara Walsh, a solicitor in Mullany Walsh Maxwells, the solicitors' firm on record for the defendants, contained at Tab 3 of the motion booklet. At para. 4 of Mr. Heslin's affidavit, he avers, *inter alia*:-

> "4. …At the date of the institution of the proceedings, the seven individuals named comprised in fact the entire of the then Board of Management. It is accepted that it may have been more appropriate to name the Board of Management as the Plaintiff rather than its individual members, but at all stages the Defendant was aware that the Board of Management was bringing the proceedings, not the individual members thereof.
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> 5. Currently, the Board of Management consists of the named Plaintiffs, save for Zita McDermott, the Third Named Plaintiff, who is no longer a member of the Board of Management, and Anne Healy and Declan MacDaid... At all material times, the Board of Management of Clonkeen College has acted and continues to act on a majority basis.
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> 6. Section 14(2) of Education Act 1998 provides that the BOM of a school is a body corporate and, as such, is entitled to sue and be sued in its corporate name."

5. In response to a question from the Court as to what alleged mistake had occurred, the Court was informed that the plaintiffs should in fact have sued as the BOM or included an addendum in the title of the proceedings stating that they were "suing in their capacity as members of the Board of Management of Clonkeen College", rather than in their own individual names. It was submitted that the plaintiffs were mis-named because it is in the name of the BOM that they are suing. However, it was also submitted that, while the 1998 Act permits the BOM to sue and be sued as the BOM, the Act does not require the BOM to be the specific party suing in order to move an action on behalf of the school. In response to submissions on behalf of the defendants, the plaintiffs further maintained that the requested change in title would not in any way prejudice the defendants. The defendants strongly disagree with that submission and are opposed to the granting of the reliefs sought.

6. The leading authority put before the Court and relied on by the parties in relation to applications of this nature is the decision of Shanley J. in *Southern Mineral Oil (In Liquidation) & Anor v. Cooney & Ors No. 2* [1999] 1 I.R. 237. Given the relative urgency of this ruling, and so as to ensure that these proceedings can promptly resume when term re-commences, the Court's findings in *Southern Mineral Oil* will be summarized using the head note attached thereto:-

> *"Held by the High Court (Shanley J.), in dismissing the application:*
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> *1. That the cause of action in relation to which relief was sought was pursuant to s. 297 of the Act of 1963 accrued prior to the winding up of the company in question and the application was therefore statute barred.*
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> *2. That proceedings pursuant to s. 297 of the Act of 1963 were "an action to recover any sum recoverable by virtue of any enactment" as envisaged by s. 11(e) of the Statute of Limitations, 1957 and, accordingly, the limitation period was*

six years from the date of the alleged fraudulent trading and misfeasance of the respondents…

3. That the court would not permit a party to be added to an existing action at a time when he could rely on the Statute of Limitations as barring a fresh action being brought against him…

4. That, in order for a court to exercise the jurisdiction given by O. 15, r. 2 of the Rules of the Superior Courts, 1986, to substitute a new plaintiff in an existing action, two requirements must be satisfied:

(i) the mistake sought to be corrected must be a genuine mistake, and

(ii) the mistake was not misleading or such as to cause any reasonable doubt as to the identity of the intended plaintiff…

5. That, although the liquidator had acted in the mistaken belief that the companies in liquidation were possessed of the cause of action as opposed to the liquidator himself, this was not a category of mistake to which O. 15, r. 2 applied. Furthermore, it was clear that the respondents at all material times were of the view that the applicants were the companies in liquidation and not the liquidator. In the absence, therefore, of any evidence of the occurrence of a bona fide mistake, the jurisdiction given by O. 15, r. 2 could not be exercised…

7. Shanley J. proposed what might be termed as a four pronged test for an application such as this:-

(1) The mistake to be corrected must have been a genuine mistake;

(2) There must have been a mistake as to the name of the intended plaintiff and not a mistake as to the choice of plaintiff;

(3) The mistake must not be misleading or cause any reasonable doubt as to the identity of the intended plaintiff; and,

(4) The substitution must not give rise to the bringing of a new cause of action.

8. The 1998 Act and the various manuals produced to provide guidance as to the function and governance of BOMs do not state that it is mandatory for proceedings such as this to be instituted in the name of the BOM. Rather, they state that the BOM has the power to sue and may be sued in its corporate name. Bearing this provision and its intended effect in mind, it is a rather large step to then commence a High Court action in the name of individually-named plaintiffs. In correspondence dated 20th October, 2017, the defendants' solicitor stated, *inter alia:-*

"We understand that it is your position that these proceedings are intended to function as proceedings taken by the Board of Management of Clonkeen College. If so, your clients will have to bring an application to reconstitute the proceedings as such."

9. It may well be that, given the heavily contested nature of these proceedings, this statement was intended to include an implication that such an application, if brought, would be strenuously opposed. An explicit statement to that effect was certainly not made. In any event, the statements that were made do not contain any hint or suggestion that the defendants would consent to the application.

10. In considering the error that the plaintiffs submit they made, it cannot be ignored that the mistake alleged is not set out in any affidavit put before the Court. The height of the plaintiffs' evidence is that "it is accepted that it may be more appropriate" to have sued in the name of the BOM of Clonkeen College. If there was evidence before the Court that instructions were received by and on behalf of the BOM to institute proceedings in its own name and a mistake occurred, the Court might have had sufficient scope on foot of said evidence (accompanied by an explanation as to how that mistake had come about and survived the thorough case management overseen by Baker J. in the months before the matter was assigned to this Court for hearing) to view the situation in a different light. However, no such evidence has been put before the Court. It is difficult to understand why s. 14(2) was not availed of and why the plaintiffs instead appear to have elected to sue in their own individual names. The fundamental test of jurisdiction under O.15 r. 2 and the first hurdle for an applicant to overcome is that there be evidence of a *bona fide* mistake. An averment by Mr. Heslin that it might have been more appropriate to have elected otherwise than they did when they instituted these proceedings does not, in my view, even begin to approach the evidential threshold required to satisfy the Court that there was an error or a mistake, irrespective of whether it was *bona fide* in nature.

11. The motion was served four days in advance of the trial date. The trial date was fixed following case management in Michaelmas Term 2017. I am at a loss to understand why any question as to change of title was not addressed during the case management process. The defendants rightfully argue that the Court does not have the jurisdiction to make the order sought, as O. 15 r. 2 presents a number of hurdles clearly identified in the jurisprudence and the plaintiffs have failed to engage them. In their submissions, the plaintiffs argued that they had met the *Southern Mineral Oil* test, but they have not produced the evidence necessary to substantiate that claim. There is no evidence before this Court of a *bona fide* mistake. On that ground alone, O. 15, r. 2 is not engaged.

12. The plaintiffs also rely on Geoghegan J.'s decision in *B.V. Kennemerland Groep v. Montgomery* [2000] 1 I.L.R.M. 370. I am satisfied that that decision can be distinguished on several grounds. Firstly, there was agreement between the parties that a *bona fide* error had occurred. There was also extensive affidavit evidence put before Geoghegan J. to engage the thresholds set out in the jurisprudence and discharge the necessary evidential burdens. For the sake of completeness, the Court will address the entirety of the case made by the plaintiffs in seeking the reliefs set out in the notice of motion.

13. Firstly, there is no evidence on affidavit, as there has to be in an application pursuant to O. 15 r. 2, that the wrong plaintiffs were named or that there was doubt as to whether the individuals currently named were the correct plaintiffs. The second ground is that there has to be evidence of a *bona fide* mistake as to nomenclature. This must be a mistake as to the name of the plaintiff, not the choice of the plaintiff (emphasis added). If there is any evidence of a mistake before the Court, it relates entirely as to the choice of plaintiff, rather than the name. A decision was taken to name individual plaintiffs. There is a different legal person, being the BOM, who was not named. At paras. 10 and 11 of Mr. Heslin's affidavit, he relies on an extract of the replies to particulars. On a superficial reading of the quoted section, it would seem abundantly clear in response to the direct question being asked that the plaintiffs were

suing qua the BOM. This is an incomplete account of the reply and it is worth quoting both the request and reply of particular 32(d) in full:-

> "Please confirm that the Plaintiffs make claim in respect of interests claimed in their capacity as the Board of Management of Clonkeen College and in no other capacity."
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> "This is a matter for evidence and for legal submissions at the Trial. Strictly without prejudice to the foregoing, the representations were made to the BOM. The BOM is the group which raised substantial funds to develop the school. The BOM is the group which caused Planning Applications to be prepared. The BOM is the group which spent significant sums on developing the school including playing fields. The BOM is in control of the school grounds comprising playing fields, which are the subject of the present proceedings in light of the Defendants purported attempt to sell same. The BOM is the only body, other than individual pupils, parents of pupils and teaching staff, in a position to assert and protect the rights of the school to the full use of the playing fields, by school pupils, current and present, for so long as a school operates. The nature of the representations made by Brothers Murray and O'Keeffe on behalf of the Congregation were to the effect that school grounds and playing fields (with the exception of the extended Monastery site) would always be available for the use of the school for so long as the school operated at Clonkeen and that the Congregation would sell and develop for non-school use only the area of land described in the Statement of Claim as the extended Monastery site. It is self-evident that a school comprises the then staff and pupils. The Plaintiffs comprise members of the Board of Management of Clonkeen College. The Plaintiffs also include members of the teaching staff of Clonkeen. Furthermore, a number of Plaintiffs currently have children in the school."

14. Any *bona fide* mistake made initially at the commencement of these proceedings in July, 2017 could not have survived an express plea in the defence that these plaintiffs have neither the capacity nor the standing to sue in specific performance, nor the capacity to sue for proprietary estoppel. A reply was delivered which specifically takes issue with this and, by way of special reply to the defence, it was pleaded that these plaintiffs do have capacity to sue in specific performance. It is not even stated then that the plaintiffs are suing as the BOM or in such a capacity. Instead, it is also pleaded that these plaintiffs do have capacity to sue in proprietary estoppel. Allowing for the sake of argument an initial *bona fide* mistake, I am of the view that it is impossible to envisage how said mistake could have survived detailed pleadings on the very point in which it is alleged there was an error.

15. The second leg of the test under O. 15, r. 2 is that the proposed amendment or change in parties be necessary for the determination of the real matters in dispute. Again, there is no evidence on affidavit that the amendment sought is necessary for the determination of the true issue in dispute. There is also no evidence on affidavit that the proposed new plaintiff, the BOM, has consented to be joined. There is no minuted decision of the BOM before the Court which deals with this issue. At the very least, there must be evidence of a decision of the BOM consenting to be so joined and to effectively take over the liabilities in the case. Counsel for the plaintiffs conceded, in response to a question from the Court, that there was no such recorded decision available to put in evidence before the Court.

16. The fourth limb of the test in *Southern Mineral Oil* has also not been satisfied, as the proposed recasting of the proceedings would, in reality, amount to fresh proceedings. The BOM holds different standing, a different contract and a different equity to that of the plaintiffs currently named.

17. In addition to *Southern Mineral Oil (supra),* a further relevant authority is the decision of Kearns P. in *Sandy Lane Hotel Ltd v. Times Newspapers Ltd & Ors* [2010] IEHC 443. An additional requirement is imposed by that decision: relief under O. 15, r. 2 should not be granted if it would prejudice the defendant. Given the considerations outlined above regarding the fourth limb of the *Southern Mineral Oil* test, I am satisfied that the making of the order sought would visit prejudice upon the defendants.

18. Even if all the requirements under O. 15, r. 2 had been met, the Courts still retain an inherent discretion in granting such relief. I would be satisfied to exercise that discretion in favour of the defendants and refuse the reliefs sought on foot of the requirements of justice, which cannot be satisfied by the granting of such an application at this late juncture. In considering those requirements, it is worth reflecting on the cause and effect of these rules, as explored by analogy in the English Court of Appeal's decision in *Evans Ltd. v. Charrington & Co. Limited* [1983] Q.B. 810. Donaldson L.J. stated therein at p. 821:

> *"In applying Ord. 20, r. 5 (3) it is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B. The rule is designed to correct the latter and not the former category of mistake. Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding circumstances."*

19. There is no evidence, either from Mr. Heslin or the plaintiffs on affidavit, as to intent and all the surrounding evidence indicates that the intended plaintiffs are the currently named plaintiffs. In *Southern Mineral Oil*, Shanley J. states at p. 247:-

> *"In the more recent case of Re Probe Data Systems [1989] B.C.L.C. 561, the Secretary of State for Trade and Industry in England and Wales applied to the court under the Rules of the Superior Courts, O. 20, r. 5(3) for leave to amend an originating summons to substitute himself as applicant instead of the official receiver. Millet J., refusing the application, said at p. 563:-*
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> *"At first sight it may appear that in order to substitute a new plaintiff there are only two requirements which must be satisfied. First, that the mistake sought to be corrected was a genuine mistake; and second, that it was not misleading or such as to cause any reasonable doubt as to the identity of the intended plaintiff. That is not the case, for not every mistake can be corrected by amendment under Ord. 20, r. 5(3). The mistake must have been a mistake as to the name or identity of the intended party."*

20. Shanley J. continues on p. 247 to conclude:-

> *"I deal firstly with the claim that the liquidator can be substituted as applicant pursuant to O. 15, r. 2, of the Rules of the Superior Courts. In my view he cannot. The applicant has not sought to lead any evidence of the occurrence of abona fide mistake such as would be necessary to establish before the jurisdiction given by O. 15, r. 2, could be exercised. The liquidator clearly intended to institute the proceedings in the name of the companies in liquidation and he did so believing this was the correct way to proceed. As Millet J. said in Re Probe Data Systems [1989] B.C.L.C. 561, the intended applicant and the actual applicant were one and the same person. The liquidator's mistake (if mistake it be)*

was to sue in the companies' name in the mistaken belief that the companies were possessed of the cause of action as opposed to the liquidator himself. This is not a category of mistake to which O. 15, r. 2, applies. Equally, adopting the second of the requirements cited by Millet J., it seems clear that the respondents at all material times were of the view that the applicants were the companies in liquidation and not the liquidator. To now allow an amendment would be to suggest that the respondents at all material times were in no real doubt but that the intended applicant was in fact the liquidator. This is patently not the case and for these reasons liberty to substitute the liquidator for the companies in liquidation pursuant to O. 15, r. 2, will be refused."

21. The Court cannot ignore the fact that a *lis pendens* was registered in the name of seven individuals, along with seven individuals' addresses, and not in the name of a statutory body corporate or by any reference at all to the BOM. The pre-litigation letter sent by the plaintiffs' solicitor (exhibit CW1 to the affidavit of Cara Walsh) to the Congregation of Christian Brothers and certain named members thereof, dated 21st June, 2017, is titled "Our clients: Michael Blanchfield, Larry O'Gara, Zita McDermott, Stephen Faherty, Eamon Hussey, Mairead Shannon and Emer Gibson". It commences:-

"Dear Sirs,

We act for the above named. Our clients comprise the members of the current Board of Management (BOM) of Clonkeen College Secondary School, Clonkeen Road, Blackrock, Co, Dublin…"

22. It is clear that the letter does not refer to a "client", but rather to "clients", plural, which is consistent with the seven plaintiffs in whose name the proceedings were ultimately issued. The plenary summons was issued in the name of the seven individuals, with individual addresses and occupations given, and, once again, no reference at all was made in the title to the statutory BOM. At para. 3(a) of the replies to particulars, it is stated that the plaintiffs sue as the current BOM. But, at para. 32(d), the question was asked "are you claiming rights in your capacity as the Board of Management" and the answer was given that such a question was a matter for legal argument but that parents, teachers and the BOM have a set of interests to consider. The defence engages the issue of whether the plaintiffs are entitled to make a claim in specific performance and whether they have sufficient capacity to make an argument in proprietary estoppel and the reply to the defence disputes that claim further. To my mind, no argument or mistake as to nomenclature could survive specific issue being taken as to standing.

23. In summary therefore, the Court must refuse this application in the absence of any evidence that there was a mistake as to nomenclature, any doubt as to the identity of the plaintiffs and any occurrence of a *bona fide* mistake. The naming of the individual plaintiffs appears to have been a matter of choice. The Court being so satisfied, I have no option but to refuse the application pursuant to O. 15, r. 2.