Neutral Citation [2015] IEHC 321

THE HIGH COURT

[2013 No. 2190 S]

BETWEEN

IRISH BANK RESOLUTION CORPORATION LIMITED (IN SPECIAL LIQUIDATION)

PLAINTIFF

AND

PETER LAVELLE

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 21st day of May, 2015

1. This is a motion by Stapleford Finance Limited ("Stapleford") to be substituted as sole plaintiff in these proceedings in place of Irish Bank Resolution Corporation Ltd. (In Special Liquidation), ("IBRC"). Stapleford claims to have purchased the defendant's credit facilities including all rights and benefits thereunder from IBRC and makes the application for substitution in that context.

2. The defendant opposes the application for substitution, and contends that IBRC ought not be removed from the proceedings. While the opposition to the application was originally voiced as opposition to the joining of Stapleford to the proceedings, in the course of argument counsel for the defendant accepted that her opposition was primarily to the removal of IBRC as plaintiff, and she does not object to the continuation of the proceedings by IBRC and Stapleford as co-plaintiffs.

3. IBRC supports the application by Stapleford.

The law

4. Counsel accept that the law on the substitution of parties is found in a number of recent High Court authorities starting with *IBRC v. Comer & Anor*. [2014] IEHC 671, and thereafter, *IBRC (In Special Liquidation) v. Morrissey* [2014] IEHC 470, *IBRC (In Special Liquidation) v. McCaughey* [2014] IEHC 517, *Lombard Ireland Limited v. Kevin Devlin Transport Limited & Anor.* [2014] IEHC 653 and *IBRC (In Special Liquidation) v. O'Driscoll* (Unreported, High Court, 6th February 2015, Peart J.)

5. Each of the judgments listed above were applications for substitution following the sale of loan books by lending institutions, and indeed most of them are made in proceedings in which IBRC had commenced proceedings. In each case IBRC was removed from the proceedings and substituted by the purchaser of the relevant loan book. Counsel for the defendant does not contend that Stapleford may not make the application although it is not yet a party to the proceedings: *Bank of Ireland Finance Limited v. Browne* (Unreported, High Court, 24th June 1996, Laffoy J.).

6. Although the law is well established, and ought not to have caused much difficulty, the defendant raises a number of issues in respect of which no authority expressly on point has been identified. It is contended by counsel for the defendant that certain proofs have not been met by the applicant as follows:-

> 1) That the applicant has not shown evidence of a legal assignment for the purposes of s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877.
>
> 2) That a substitution application may not be made under to O.17 r.4 of the Rules.
>
> 3) That a substitution order may not be made under O.15 r.14, and that a party may be added and not substituted under that Order.
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> 4) That O.15 r.2 is available to an applicant in limited circumstances only, not applicable in this case, namely where there was a bona fide mistake at the commencement of the action.
>
> 5) Because this defendant has advanced a counterclaim to which s. 12(2)(b) of the Irish Bank Resolution Corporation Act 2013 applies, and by virtue of which IBRC retains obligations, it ought not to be removed from the proceedings.

7. I will deal with each of the objections in turn but before I do so I will briefly set out the nature of the proceedings and the motion.

The proceedings

8. IBRC seeks summary judgment for the recovery of monies in the sum of more than €5.7 million arising from a number of loan agreements. A motion seeking liberty to enter final judgment issued on the 20th May, 2014 returnable for the 30th June, 2014, and was listed for mention and has travelled with the application for substitution.

9. The application for substitution was brought by Stapleford by notice of motion dated the 23rd July, 2014 and has been adjourned from time to time for the purposes of completing the affidavit evidence. In all, six affidavits have been sworn in the motion, including an affidavit of Peter Lavelle, the defendant, sworn on the 27th November, 2014. While it is the case that applications for substitution may be brought ex parte the application was brought on notice in the light of correspondence from the solicitors for the defendant requesting that they be given notice of the application, and identifying the fact that the defendant asserts a counterclaim against IBRC.

10. The motion seeks relief pursuant to O.17 r.4 and/or O.15 r.14 and ancillary orders dispensing with the need for further service. Having regard to the objections raised by Mr Lavelle, I turn now to deal with the applicable provisions of the Rules on which he relies, but will first deal with the assignment of the debt and how this is said to have been done.

Section 28 of the Supreme Court Judicature Act (Ireland) 1877

11. Section 28(6) of the Supreme Court Judicature Act (Ireland) 1877 provides the means by which a legal assignment of a debt may be effected:-

> *"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed,) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, lie shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."*

12. An assignment of a debt or chose in action, thus, is made in writing under the hand of the assignor, and express notice in writing is to be given to the debtor. The effective date of assignment is the date of such notice. It was contended that Stapleford has not taken an assignment in writing of the relevant part of the IBRC loan book. Further affidavit evidence was adduced to add exhibits previously redacted, and in the course of argument counsel accepted that the affidavit evidence of the applicant now establishes that an assurance has been effected which *prima facie* transfers the loan book.

13. In *IBRC v. Comer & Anor*, Kelly J. identified the test applicable to an application for substitution, namely that there be *prima facie* evidence of an assignment of the relevant debt. His judgment has been approved in a number of later cases, specifically by Finlay Geoghegan J. in *IBRC (In Special Liquidation) v. Morrissey* and Costello J. in *IBRC (In Special Liquidation) v. McCaughey* and more recently by Peart J. in *IBRC (In Special Liquidation) v. O'Driscoll*. The rationale for this approach is found in the old case of *Long v. Crossley* [1877] CH 388, referred to by Costello J. in her judgment, that the object of the Rules was that a case be framed so that it can be adjudicated upon by the court. Peart J. in *IBRC (In Special Liquidation) v. O'Driscoll* commented that the matter was "procedural and simple", and was so characterised notwithstanding that applications for substitution are brought on notice. This approach is consistent with the general approach of the courts that the function of pleadings is to ensure that all issues are before the court.

14. The evidence before me that Stapleford has taken an assignment is as follows: By loan sale agreement dated the 28th March, 2014 IBRC, acting through its special liquidators, agreed to "sell, assign, transfer, convey and deliver the Assets to the purchaser subject to the existing right of redemption of the obligors". The purchaser thereby agreed to "purchase the Assets and assume the Obligations with effect from the Completion Date."

15. As can be seen from that extract various terms, identified in upper case letters, were defined in the agreement. The "Obligor" was Mr. Lavelle, the borrower, and no challenge is now made to this fact.

16. The agreement was completed by deed of transfer made on the 23rd May, 2014 which relied on some of the definitions in the agreement, called therein the "Loan Sale Deed". By the operative part of the deed, IBRC, through its special liquidators,:-

> "Unconditionally, irrevocably, and absolutely transfers, conveys and assigns to the Assignee all, rights, title interests, benefits liabilities, duties and obligations as the Assignor may have in and to be the Assets, subject to and with the benefit in each case of the related Finance Agreement, with effect from the completion date, but excluding the specified assets."

17. It is not argued that any specified excluded assets are relevant to the argument before me, and the completion date, not appearing to be a term of art, can be assumed to be the date of the deed. No issue has been raised as to the execution of the deed by the parties.

18. The deed as first exhibited was redacted, and the redaction of loan sale agreements and/or deeds, in the context of substitution applications has been the subject matter of comment in a number of cases, including by Kelly J. in *IBRC v. Comer & Anor*. The defendant makes one argument with regard to redaction, namely that he, and his loans, are not specifically identified. I reject this argument, without coming to any conclusion as to the proprietary of the redaction, and noting that my function at this stage is to determine whether a *prima facie* argument has been made that the loan book, and the rights and obligations arising thereunder, have been assigned to Stapleford, and I do so noting the inclusion of the defendant's loans in the schedules, and also noting that by the deed there was assured the assets, including all loan facilities and all "ancillary rights and claims" in respect of these. This phrase, incorporated into the deed from the loan sale agreement, is *prima facie* sufficient to establish that Stapleford has taken an assignment of the defendant's loan facilities and the rights arising thereunder, which prima facie includes the right to sue for recovery of the loan. I note the schedule identifying the borrower was exhibited in a supplemental affidavit and not in the initial affidavit, but any argument with regard to this can be dealt with at trial.

19. My finding that a *prima facie* case has been made out does not prevent the defendant seeking to challenge the assignment at the hearing. In that regard Finlay Geoghegan J. has identified the effect of an order in a decision in the Court of Appeal in *IBRC v. Halpin* [2014] IECA 3:

> *"The procedural substitution application did not determine the issue of the validity of the assignment from IBRC to the assignee/applicant (or the entitlement to rely upon the Deed of Assignment as redacted before the Court). These matters were left over for the trial judge."*

20. I consider that I have sufficient evidence at this stage in the process to adjudicate upon that question, and I am satisfied that the combined effects of the agreement to assign and the deed, satisfy the test set out in s. 28 of the Judicature Act, namely there is sufficient evidence of an assignment in writing of the *chose in action* to Stapleford, and notice has been given to the defendant.

21. I turn now to consider the jurisdiction to make an order substituting Stapleford as plaintiff. The application is brought in the alternative under O.15 r.14, and/or O.17 r. 4 of the Rules. I consider each in turn.

Order 15 rule 14

22. The rule provides:

> *"Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by motion or at the trial of the action in a summary manner."*

Order 15 deals with the substitution, joinder and misjoinder of parties, and is a more general provision dealing with parties to an action than O.17. Order.15 rule 2 has no application as this deals with the case where an action has been commenced in the name of the wrong person as a plaintiff and gives the court a power to substitute or add a plaintiff if it is satisfied that the proceedings have been so commenced due to a *bona fide* mistake.

23. Order 15 rule 13 provides for the striking out of parties improperly joined as plaintiffs or defendants, and the addition of parties, whether as plaintiffs or defendants

> *"who ought to have been joined, or whose presence before the Court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter".*

24. Equivalent, or broadly equivalent, provisions were found in O.16 r.13 of the Rules of Court 1875, those considered by Fry J. in Long v. Crossley, the judgment relied upon in *IBRC v. Comer & Anor.* by Kelly J. and by Costello J. in *IBRC (In Special Liquidation) v. McCaughey*. In that case Fry J. added as an additional co-plaintiff the persons entitled in remainder to property of which the original plaintiff was tenant for life. It was not a case of substitution, but rather of joinder of an additional co-plaintiff.

25. In none of the cases relied on by the applicant was the issue of the appropriateness of making a substitution order under O.15 r.13 canvassed.

26. I accept the argument by counsel for the defendant that the purpose and effect of O.15 r.14 is to fix the time at which an application to add, strike out or substitute a plaintiff or defendant may be made, and it is not an empowering provision. I also accept her argument that O.15 r.13 does not provide for the substitution of parties, save in place of parties improperly joined when the proceedings were commenced. She makes the argument however that O.15 r.13, which she implicitly accepts does give a jurisdiction to the court to add Stapleford as co-plaintiff, permits an application to be made by an existing party or on the court's own motion, and not by the proposed new party. I accept that she is correct in this. *IBRC (In Special Liquidation) v. Morrissey* was a joint application by a non-party and the existing plaintiff in the proceedings, and is not authority for the proposition that the order may be availed of by a non-party.

27. It is clear however that O.15 r.13 does give the court a discretion of its own motion to add a co-plaintiff, and that may be done in any case where it is necessary to enable the court to effectually and completely adjudicate upon the case. This brings me back to *Long v. Crossley* and the admirably short judgment of Fry J. where he made an order adding a party. That action was for specific performance and Fry J. asked whether the presence of the remainder persons was necessary to enable the court to *"effectually and completely"* adjudicate upon and settle the question. He went on to deal with the standard of proof required at that stage of the process and having answered that question, made the following comment:-

> *"It is said by Mr North that, if they are added as co-plaintiffs the action must still fail. I think that at present I have nothing to do with that. The object of the provision of the Rules was not, that a party's case should be so framed as to succeed, but that it should be so framed that it can be adjudicated upon by the court, whether in his favour of against him."*

Thus, adopting this approach, and in the light of the evidence as to the assignment of the debt, I accept that I may of my own motion add Stapleford as co plaintiff. I may not under O.15 r.13 make an order for substitution.

Order 17 rule 4

28. Order 17 rule 4 provides as follows:-

> *"Where by reason of death, or any other event occurring after the commencement of a cause or matter and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained ex parte on application to the court upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence."*

29. Stapleford submits that an *"event"* has occurred after the commencement of these proceedings on the 5th July, 2013 by which a "*change or transmission"* of the *"interests"* of IBRC in the loan facilities has occurred. It submits in those circumstances that it is both necessary and desirable that it may be made a party, and that the proceedings be carried on between it and the defendant. IBRC agrees and submits that it has no further interest or claim against Mr Lavelle, and that there is no basis in law in which it may remain as co-plaintiff in the proceedings.

30. Counsel for the defendant argues that O.17 r.4 may not be availed of in the circumstances of this case. She points first to the language of the O.17 r.4 itself and submits, in my view correctly, that the deed of assignment did not effect a *"transmission"* of any rights from IBRC to Stapleford, and the word *"transmission"* imports an assurance by operation of law, which is not what is asserted to have occurred.

31. She secondly argues that as what is asserted to have occurred is a transfer by assignment or assurance in writing of contractual rights or rights *in personam*, as is governed by s. 28 of the Act of 1877, and that no "interest" has "changed". She argues that the word "interest" denotes such classes of rights as interests in real property, the transmission of interest on death or by other devolution and that this precise language is found the Chancery Ireland Act of 1868 (30 & 31) Vict.c 44, and earlier in the Chancery Ireland Act of 1853 (16 & 17) Vict.c.113. She argues that the expression "change or transmission of interest" is a term of art confined in its meaning to the transmission of interest or liability from death or other causes, and is not sufficiently wide to encompass the transfer of a legal right which became possible only after the enactment of the Act of 1877 which for the first time provided a means for a legal assignment of debt, such assignments sounding in equity only up to the date of the Judicature Act. She argues that it cannot have been intended that this wholly new means of legal assignment or assurance can be read as governed by the language of the old equivalents of pre-1877 Order 17, enacted precisely to deal with the legal effect of death or bankruptcy, but not the legal effect of an assignment of a debt or other *chose in action* after 1877.

Discussion

32. These points on the applicability of O. 17 have not been argued in the cases referred to, and on which the applicant relies. Kelly J. in Comer noted that reference had been made by the applicants to O. 17 r. 4 and said *obiter* that *"Arguably, that rule could also be applicable in the current case, although it does not mention substitution"*. His reference to O. 17 r. 4 was to note that an order could be made ex parte and that that fact informed his view as to the form of proof. In *IBRC v. Morrissey*, Finlay Geoghegan J. did not make the order under O. 17 r. 4. Donnelly J. in *Lombard Ireland Limited v. Kevin Devlin Transport and Kevin Devlin* [2014] IEHC 653 did make an order of substitution under O. 17 r. 4 but no argument with regard to the jurisdictional basis was made to her. In *IBRC v. McCaughey* O. 17 r. 4 was not considered at all. In *Lombard* the court noted that the defendant's counsel had not raised any objection to the assertion that a change of interest had taken place.

33. In the Court of Appeal decision in *IBRC v. Halpin* a substitution order was not made and another co-plaintiff was added, but the Court's reasons for doing so found their origins in its role as an appellate court, and in the exercise of the appellate function it would be concerned with the evidence that was before the High Court.

34. However, in *IBRC v. O'Driscoll*, Peart J. did make the order under O. 17 r. 4 and emphasized the expression *"or any event"* in the Rule. At para. 9 he made the following comment:-

> *"The person who……comes conveniently within Order 17 rule 4 above and can be dealt with accordingly. The applicant must satisfy the court 'that an event has occurred which renders it necessary or desirable that it be substituted as plaintiff in these proceedings'. The event is clearly the purchase by it of the loan book referred to, and this is caused to transmission of the defendant's alleged debt to it. The question for the court is simply whether on a prima facie basis the applicant has shown that this has occurred."*

35. It is not clear whether the point with regard to the interpretation of O.17 r.4 was argued before Peart J, but it appears not to have been.

36. The expression "change … in interest" found in O. 17 r. 4 is undoubtedly a somewhat strained use of language and echoes that found in the pre-Judicature Act legislation. But I am not persuaded that the phraseology in O. 17 cannot be distanced from its historical context for the reasons I now consider.

37. The relevant Rules of the Superior Courts were enacted in 1986. The Supreme court in *DMPT V Taxing Master Charles A Moran and ors* 2015 IESC 36, having identified the history of the amendment of certain Rules, in that case relating to the taxation of costs, considered that the interpretation of the 1986 Rules was required to accord with fair procedure in the light of more recent jurisprudence and in particular *Mallak v Minister for Justice* 2102 3 IR 297, decided some thirty years after the Rules were enacted. By analogy the interpretation of the Rules at play in this judgment must take into consideration the contemporary meaning of the provisions, provided of course such an approach does not involve a departure from the language of the enactment itself.

38. The provisions of s. 6 of the Interpretation Act 2005 may also assist:

> *"In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant matters, which have occurred since the date of the passing of that Act or the making of that statutory instrument, but only in so far as its text, purpose and context permit."*

39. Thus, while I accept that there is little or no textual differences between the pre-1877 Rules of Court, and those enacted in 1986, and that this fact might suggest a degree of universality of meaning is intended, especially as the Rules are made within the same statutory framework, the meaning of the words *"change … in interest"* in O.17 r.4 must be interpreted bearing in mind the following factors:

> (i) The words are, in the absence of a historical context, simple and clear: *per* Peart J in *IBRC v. O'Driscoll*
>
> (ii) The interpretative process may be conducted bearing in mind changes in the law, including those effected by the Act of 1877, and changes in the meaning of words that might flow from legislative change or the common law thereafter.
>
> (iii) There has been a change in the ownership of the relevant loan book, effected by means of the procedure provided by the Act of 1877, and there has been therefore in the plain meaning of the word a "change", a change in the identity of the person or body who now owns the *chose in action*
>
> (iv) The word "interest" is a broad term and connotes "rights, titles advantages, duties, and liabilities connected with a thing, whether present or future, ascertained or potential" *per* "Murdock's, Dictionary of Irish Law" (5th ed. 1988) page 634.

Conclusion

40. Accordingly I consider that O.17 r.4 as properly interpreted in the light of the factors identified in the previous paragraph, and as the language of the rule does not prima facie admit of ambiguity, permits application to be made to add or substitute a party who has taken a legal assignment of the relevant loan book from the original plaintiff. Such an interpretation further, does not offend the legislative intent, nor depart from the first principle that the issues and parties to disputes be before the adjudicating body as explained above.

The alleged counterclaim or set off: section 12 of the IBRC Act, 2013

41. IBRC no longer has any interest on which it can maintain this action and ought no longer remain as a party. However counsel for the defendant asserts that he has a counterclaim or set of against IBRC and that in the circumstances it is not appropriate to remove it from the proceedings. I turn now to consider this point

42. Section 12(2)(a) and (b) of the Irish Bank Resolution Corporation Act 2013 provides:

> *"On the sale or transfer of any cause of action or proceedings by IBRC, acting through a special liquidator, or by a special liquidator where such cause of action has, or proceedings have, vested in the special liquidator, to any person—*
>
> *(a) that person assumes all of the rights and obligations in relation to the cause of action or proceedings which*

IBRC had immediately before that sale or transfer, other than the obligations of IBRC to which paragraph (b) relates, and

(b) IBRC retains obligations in relation to the defence of or liability for any counterclaim or cross-claim which, if successful, would not give rise to a right of set-off and, in respect of such defence or liability, IBRC has full rights in relation to, and is solely liable for, any remedy awarded in relation to any counterclaim or cross-claim which, if successful, would not give rise to a right of set-off."

43. The defendant asserts that a substitution order may be made only if the court is satisfied that IBRC retains no liability to him that might give rise to a counterclaim or right of set off, as such liabilities have not been assigned. The question of a counterclaim was not raised in any of the decisions referred to above, save in *Morrissey* where the court considered that it did not arise for consideration on the facts.

44. The counterclaim is said to arise from an investment vehicle alleged to have been mis-sold by IBRC. The fund is not related to these proceedings. As present the alleged counterclaim or right of set off has not been formulated save in the affidavits adduced in opposition to the motion for substitution. The alleged counterclaim or right of set-off has not been raised in the substantive debt proceedings.

45. As a result of the statutory provisions regulating the institution of proceedings against IBRC, created by section 6 of the Act of 2013, leave of the court to maintain such proceedings is required and has not yet been sought.

46. It may transpire that the defendant will obtain an order entitling him to proceed against IBRC, and if so it may be that those proceedings will be listed to be heard in conjunction with these debt proceedings, or that a stay on the execution of any judgment in the summary proceedings could be sought pending the determination of the counterclaim, and the court hearing such applications will best be placed to determine these questions. I do not consider that at this juncture I may keep IBRC in these proceedings on account of the alleged counterclaim or right of set off, as to do so would ignore the requirement of section 6, and would also leave in the proceedings a party who manifestly has no right to seek judgment in the proceedings as currently constituted as proceedings for summary judgment.

47. Without making any decision on the issue of how the proceeding are to be prosecuted, whether the alleged counterclaim may be maintained or whether, if so, the two sets of proceedings should be linked in some way, either as to the substantive claims or in regard to enforcement, I reject the argument that there exists a counterclaim against IBRC that has the effect that I ought not remove it from the proceedings

48. Accordingly, for the reasons stated, I make an order pursuant to O.17 r.4 substituting Stapleford as plaintiff in the proceedings.