[2019] IEHC 216

**THE HIGH COURT**

**2013 No. 353 SP**

**BETWEEN**

**START MORTGAGES DESIGNATED ACTIVITY COMPANY**

**PLAINTIFF**

**AND**

**SIMON KAVANAGH**

**DEIRDRE KAVANAGH**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Garrett Simons delivered on 11 April 2019.**

**INTRODUCTION**

1. This judgment addresses a net point of practice and procedure as follows. What procedural steps, if any, must a company, which has changed its status from a limited liability company to a designated activity company, take to reflect this change in status in legal proceedings. In particular, is it necessary for the company to make a formal application to court to amend the title of the proceedings.

2. On the facts of the present case, the title of the proceedings was amended pursuant to Order 17, rule 4 of the Rules of the Superior Courts to reflect the change in status of the plaintiff company. This order was made pursuant to an *ex parte* application moved on behalf of the plaintiff company. The first named defendant, Mr. Simon Kavanagh, has since applied to discharge this order. The grounds relied upon include (i) an argument that the plaintiff company ceased to exist and that the designated activity company is a *new* company, and (ii) an argument that the title of proceedings cannot be changed in circumstances where a final order, i.e. an order for possession, had already been made in the proceedings.

3. For the reasons set out hereinafter, I am satisfied that the objections made by Mr. Kavanagh are untenable. On the facts of the present case, the order amending the title of the proceedings was properly made. The court has an inherent jurisdiction to amend the title of proceedings to reflect the fact that the status of a company has changed. This amendment can be made at any time. The making of such an amendment causes no prejudice to any of the other parties to the proceedings. The only variation which I propose to make to the order is to recite that the order is made pursuant to the inherent jurisdiction of the court (rather than pursuant to Order 17, rule 4).

4. More generally, I am of the view that, strictly speaking, it is not necessary for a company to make a formal application to court to reflect its change of status from a limited liability company to a designated activity company. The legal entitlement to continue proceedings following the change in status of a company is expressly provided for under Section 63(12) of the Companies Act 2014, and this provision appears to be self executing. (See, by analogy, *First Active plc v. Cunningham* [2018] IESC 11). Of course, if a company does make a formal application to court—whether out of an abundance of caution or otherwise—then the court has an inherent jurisdiction to amend the title of proceedings.

**PROCEDURAL HISTORY**

5. The within proceedings were instituted by way of Special Summons in 2013. The proceedings ultimately came on for hearing before the High Court (Hedigan J.) on 18 July 2016. The High Court made the following order on that date.

> "IT IS ORDERED that the Defendants do forthwith upon service of this Order upon them deliver up to the Plaintiff or to some person duly authorised by it in writing in that behalf possession of ALL THAT and THOSE the plot of ground part of the lands of Enniscorthy situate in the Barony of Scarawalsh and County of Wexford now Known as Site no. 15 Parklands, Enniscorthy in the County of Wexford, more particularly the subject matter of Deed of Conveyance dated 1st September 1988 – between Lacey Brothers Limited to Simon Kavanagh and Deirdre Kavanagh."

6. A nine-month stay on execution was placed on the order. The costs of the proceedings were awarded to the Plaintiff.

7. Start Mortgages Ltd. subsequently converted to a designated activity company on 21 October 2016. The Certificate of Incorporation on Conversion to a Designated Activity Company has been exhibited in the affidavit of Ms. Eva McCarthy sworn herein on 28 March 2018.

8. On 26 February 2018, an *ex parte* application was made on behalf of the plaintiff company seeking, in effect, to amend the title of the proceedings. The application was put forward on alternative bases, namely (i) Order 17, rule 4; (ii) the court's inherent jurisdiction, or (iii) pursuant to Section 63 of the Companies Act 2014.

9. It should be noted that this application took the form of an "omnibus" application, whereby the plaintiff company relied on an affidavit and *ex parte* docket filed in one set of proceedings (Start *Mortgages Ltd. v. Ryan* Record Number 2008 No. 26 SP) to ground an application to amend a total of twelve sets of High Court proceedings. These proceedings were identified in an exhibit to the grounding affidavit of Gill Cotter sworn on 13 February 2018 filed in the *Ryan* proceedings. As discussed presently, the fact that the application was an "omnibus" application meant that there was no grounding affidavit filed on the court file in the within proceedings.

10. The *ex parte* application was moved before the High Court (Meenan J.) on 26 February 2018. The following order was made.

> "IT IS ORDERED pursuant to Order 17 Rule 4 of the Rules of the Superior Courts that the within proceedings herein be amended so as to disclose the correct title of the Plaintiff to read 'Start Mortgages Designated Activity Company' a change and/or transmission of interest having taken place after the commencement of the said proceedings
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> And IT IS ORDERED that the within proceedings shall be carried on between the continuing party and the said Start Mortgages Designated Activity Company
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> The title hereof to be duly entered in the Central Office of the High Court with the proper officer."

11. The order was perfected on 31 March 2018. There was a clerical error in the original version of the order in that it mistakenly described the second named defendant as Deirdre Murphy rather than Deirdre Kavanagh. This clerical error was subsequently corrected on 9 April 2018, and this is recorded on the amended order as follows.

> "Amended pursuant to O.28 R 11 RSC as amended by S I 271 of 2009
>
> 9th April 2018."

12. Subsequently an order for substituted service was made *ex parte* on 8 October 2018.

13. The first named defendant, Mr. Simon Kavanagh, issued a Notice of Motion dated 13 November 2018, seeking the following principal relief.

> "An Order pursuant to Order 17 Rule 6 discharging or varying the Order of the 26th day of February 2018 perfected 23rd March 2018 and served by covering letter dated the 30th October 2018 and received on the 2nd November 2018."

14. This application was grounded upon an affidavit of Mr. Kavanagh dated 13 November 2018. Thereafter, there was an exchange of affidavits between the parties. The matter came on for hearing before me on Monday, 25 February 2019. The plaintiff company was represented by Mr. Rudi Neuman, B.L., and Mr. Kavanagh appeared as a litigant in person.

**SECTION 63, COMPANIES ACT 2014**

15. The procedure for the re-registration by an existing private company as a designated activity company is prescribed under Section 63 of the Companies Act 2014. Relevantly, subsection 63(12) expressly addresses the legal effect of a change in status on legal proceedings, as follows.

> "(12) The re-registration of an existing private company as a designated activity company pursuant to this Chapter shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it in its former status may be continued or commenced against it in its new status."

16. The provisions of Section 63(12) were relied upon by the High Court (Eagar J.) in *Launceston Property Finance Ltd. v. Burke* [2018] IEHC 552 to justify the court in making an order amending the title of proceedings to reflect the change in status of the plaintiff company in that case.

17. The statutory language under subsection 63(12) indicates that the change in status does not render "defective" any legal proceedings by or against the company. The use of the term "defective" is significant in that the relevant Rules of the Superior Courts which allow for the amendment of proceedings often refer to defects or errors as necessitating the amendment. For example, Order 28, rule 12, which is sometimes used to amend the title of proceedings, allows a court to amend any defect or error in any proceedings. Section 63(12) makes it clear that the change in status does not give rise to a defect in the existing proceedings.

18. Crucially, Section 63(12) provides that the proceedings may be "continued" by or against the company in its new status. This indicates that the provisions of subsection 63(12) are self-executing. There is no requirement to amend any "defect" in the title to the proceedings or to substitute a new party. Rather the proceedings simply continue by or against the company in its new status.

19. Given the clear terms of subsection 63(12), I am of the view that, strictly speaking, it is unnecessary for a company to make a formal application to court to amend the title of proceedings to reflect the change in status of the company.

20. Moreover, I am satisfied that if, out of an abundance of caution, a company wishes to copper fasten the position in this regard, an *ex parte* application can be made to court. The court's inherent jurisdiction allows it to make an order amending the title of proceedings.

21. In this regard, a loose analogy might be drawn with the approach taken by the Supreme Court in *First Active plc v. Cunningham* [2018] IESC 11. On the facts of *Cunningham*, there had been a transfer of the banking business of First Active plc to Ulster Bank Ireland Ltd. This transfer had been made pursuant to the special statutory mechanism for the transfer of the business and assets of a licensed bank or other financial institution provided for under Part III of the Central Bank Act 1971. The legal effect of such a transfer on existing legal proceedings is regulated by Section 41 of the Central Bank Act 1971 as follows.

> "41. Where, immediately before the transfer date, any legal proceedings are pending to which the transferor is a party and the proceedings have reference to the business agreed to be transferred, the name of the transferee shall on the transfer date be substituted for that of the transferor and the proceedings shall not abate by reason of such substitution."

22. On the facts of *Cunningham*, this transfer had taken place *prior* to the hearing in the High Court which had resulted in the judgment under appeal, but the High Court had not been notified of the transfer. The appellant sought to argue that the consequence of a failure to apply to substitute Ulster Bank Ireland Ltd. as plaintiff was that the proceedings were, and remained, improperly constituted. In particular, it was alleged, first, that the hearing was irregular; secondly, that the case had been prosecuted by a party with no interest in the outcome; thirdly, that a decree was obtained by a party with no entitlement to same; and fourthly, that a stay had been refused on the basis of undertakings given by First Active plc, thereby rendering the undertakings meaningless as First Active plc was not in fact a party.

23. The Supreme Court rejected these arguments by reference to Section 41 of the Central Bank Act 1971 (set out above). See paragraphs [25] to [28] of the judgment as follows.

> "25. It is apparent, therefore, that much will turn on the proper interpretation of the statutory provision in question. Section 41 of the 1971 Act, said in the marginal note to concern the continuance of pending legal proceedings, provides as follows:
>
> > '41.– Where, immediately before the transfer date, any legal proceedings are pending to which the transferor is a party and the proceedings have reference to the business agreed to be transferred, *the name of the transferee shall on the transfer date be substitute*d for that of the transferor and the proceedings shall not abate by reason of such substitution.' (Emphasis added)'

> 26. The different constructions, it seems to be me, centre on the proper interpretation of the emphasised portion of the text. Undoubtedly there are different meanings that may be attributed to the word 'shall'. For the respondent, the use of this word means that the process is mandatory and automatic. It leaves no uncertainty as to what is to occur or when it is to occur: no application under the Rules is necessary because the substitution has already occurred automatically as a result of the operation of the section. However, the appellant disputes that this is so, maintaining that an application for substitution under the Rules is required. Under this reading, 'shall' is to be construed as a command to the parties to take action to effect the substitution, rather than indicating an unavoidable and inevitable substitution that operates independent of the taking of any procedural step by the parties.
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> 27. This section must be viewed as being ancillary to the substantive provisions of section 33 of the 1971 Act, and in this case S.I. 481/2009, by which the business transfer was effected. Section 41 does not disturb or affect the underlying rights and/or obligations of the parties to the relevant proceedings. Its single aim is to regularise the title of extant legal proceedings for administrative purposes. In my view, effect is given to the intended purpose of the section by permitting such change to be brought about in as procedurally straightforward and simple a manner as the provision itself permits. Accordingly, despite the appellant's arguments to the contrary, I am of the view that the proper construction of the section is that the substitution of the title of the proceedings occurs automatically. Thus without more, i.e. by automatic process, at least for the purpose of the business transaction, the substitution in respect of legal proceedings is concluded. Indeed it is not clear that the appellant disputes this interpretation, but rather maintains that an application to the Court is nonetheless required to regularise the proceedings. I cannot agree. As the substitution occurs pursuant to statute, it obviates the need for a formal application under the Rules of the Superior Courts, for of course the 1971 Act cannot be subordinated to the Rules (see, for example, *Luby v. McMahon* [2003] 4 I.R. 133). Thus, as a matter of substantive law the name of Ulster Bank was substituted for that of First Active as of the date of the transfer, and accordingly the subsequent judgments and orders stand to be read in favour of Ulster Bank. This is plain meaning of the section and the natural consequence of the statutory process therein described.
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> 28. However, even if as a matter of substantive law the transfer was effected automatically by operation of section 41, it is undoubtedly the case that a situation such as occurred in this case could give rise to potential difficulties such as those outlined in paras. 16 and 18, supra, if the same is not brought to the attention of the trial judge and the record altered to reflect the new circumstances. The step which I have in mind would not require a formal application under the Rules; I am entirely satisfied that had the respondent simply notified the trial judge of the transfer, the requisite name change to the title of the proceedings could, and would have had to, have been made there and then. This ought to have been done and of itself would have been sufficient to bring the identity of the party seeking to recover on foot of the guarantee to the attention of the judge, the court registry, the appellant and those members of the public with an interest. However, this course was not followed, with the respondent attributing its failure to do so to inadvertence. Whilst acknowledging that this fact is 'unfortunate', it maintains that such failure has no consequences for the judgment so obtained."

24. Whereas the statutory language employed under Section 41 of the Central Bank Act 1971 is, obviously, very different from that employed under Section 63(12) of the Companies Act 2014, the approach of the Supreme Court nevertheless has some resonance with the present case. In each instance, the effect on legal proceedings of a change in the status or identity of a litigant is regulated by primary legislation. This primary legislation must prevail over any rule of court. The judgment in *Cunningham* emphasises that regard should be had to the legislative intent underlying such provisions, i.e. to regularise the title of extant legal proceedings for administrative purposes, and that a purposive interpretation requires that such change be brought about in as procedurally straightforward and simple a manner as the provision itself permits.

25. It should also be noted that the *change* in the present case is less significant than the change at issue in *Cunningham*. More specifically, on the facts of *Cunningham* the identity of the plaintiff had changed from First Active plc to Ulster Bank Ireland Ltd. By contrast, the identity of the plaintiff has remained the same in the present proceedings. The only change is in the status of the plaintiff company.

**ORDER 17**

26. The *ex parte* order of 26 February 2018 recites that the order was made pursuant to Order 17, rule 4. The relevant parts of Order 17 read as follows.

> "1. A cause or matter shall not become abated by reason of the death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title pendente lite; and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgement; but judgement may in such case be entered, notwithstanding the death.
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> […]
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> 4. Where by reason of death or bankruptcy, *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.
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> 5. An order obtained as in rule 4 mentioned shall, unless the Court shall otherwise direct, be served upon the continuing party or parties, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to rules 6 and 7, be binding on the persons served therewith, and every person served therewith who is not already a party to the cause or matter shall be bound to enter an appearance thereto within the same time and in the same manner as if he had been served with a summons.
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> 6. Where any person who is under no disability, or, being under any disability, has a guardian ad litem in the cause or matter, shall be served with such order as in rule 4 mentioned, such person may apply to the Court to discharge or vary such order at any time within twelve days from the service thereof.

*Emphasis (italics) added.

27. As appears, whereas Order 17 is principally concerned with a change or transmission of interest or liability arising as a result of death or bankruptcy, rule 4 does also refer to "any other event". The learned authors of *Delany and McGrath on Civil Procedure* (Round Hall, Dublin, 4th ed., 2018) suggest that an application pursuant to Order 17, rule 4 is the appropriate procedure to adopt following the assignment of a loan or chose of action. See page 351/52 as follows (footnotes omitted).

> "6–111 However, it would seem that the assignment of a loan or chose in action is an "event" within the meaning of Order 17, rule 4. This was the view of Peart J in *Irish Bank Resolution Corporation v O'Driscoll*, who commented that "[t]he event is clearly the purchase by it of the loan book referred to". In *Irish Bank Resolution Corporation v Lavelle*, Baker J accepted the submission that the purpose and effect of Order 15, rule 14, is to fix the time at which an application to add, strike out or substitute a party may be made and said that it is not an empowering provision. She further held that Order 17, rule 4 permits an application to be made to add or substitute a party who has taken a legal assignment of a loan book from the original plaintiff. On the basis that there had been a change or transmission of the interests of the plaintiff in loan facilities, she made an order in that case pursuant to Order 17, rule 4, instead of Order 15, rule 14.
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> 6–112 This conclusion was confirmed on appeal by the Court of Appeal in *Stapleford Finance Ltd v Lavelle,* which accepted the view put forward by the notice party that there was "no reason in principle why an 'event' within the meaning of the rule should mean an extraneous event, such as death, but not a private event, such as a contract for the sale of the loans". The Court of Appeal also upheld the conclusion reached by Baker J in *Lavelle* that the assignment of the loan amounted to a change in interest within the meaning of Order 17, rule 4. Irvine J expressed the view that the legislative intent of s.12 of the Irish Bank Resolution Corporation Act 2013 would be defeated if the Rules did not permit the purchaser of the "cause of action or proceedings" to be substituted as plaintiff. She concluded that there was no valid reason why Order 17, rule 4 should be given the narrow construction put forward by the appellant and she held that Baker J had been correct in holding that she had power pursuant to that rule to substitute the respondents as the sole plaintiff in the proceedings before the court."

28. These passages appear to me to represent an accurate statement of the law in this regard. Of course, the factual position in the present case is somewhat different. Here, there has been no change in the *identity* of the plaintiff, and hence no transfer of a loan or chose in action. There is no *new party* being joined to the proceedings. The only change is to the corporate status of the existing plaintiff, and the legal effect of this change has been addressed under the previous heading above by reference to Section 63(12) of the Companies Act 2014. As explained, I am of the view that, strictly speaking, it is unnecessary for a company to make a formal application to court to amend the title of proceedings to reflect the change in status of the company. If such an application is to be made, then I think that it should be made pursuant to the court's inherent jurisdiction rather than pursuant to Order 17, rule 4. Having had the benefit of full argument, I do not think that such an application fits within the parameters of Order 17, rule 4 in circumstances where there is no change or transmission of interest, and no new party joined to the proceedings.

29. The order of 26 February 2018, was made on an *ex parte* basis. I think that this procedure was correctly adopted, and that it was open to the Plaintiff to proceed in this manner. Of course, an order which has been made on an *ex parte* basis is always subject to the right of an affected party to apply on notice to have the order varied or discharged. This represents an important procedural safeguard for the affected party.

**OBJECTIONS TO THE *EX PARTE* ORDER**

30. Mr. Kavanagh, in his various affidavits and at the hearing before me, has raised a series of objections to the order amending the title of the plaintiff company in the proceedings. I propose to address these in turn.

31. The first objection is that the plaintiff company had ceased to exist by virtue of the enactment of the Companies Act 2014, and that Start Mortgages DAC is a "new company". This objection is untenable, and runs contrary to the express provisions of Section 63 of the Companies Act 2014. These provisions have already been discussed in detail at paragraph 15 *et seq*. above. The re-registration of an existing private company as a designated activity company does not affect any rights or obligations of the company, and the company continues in being albeit with a new status.

32. A similar argument has been rejected by the High Court in the context of the re-registration of a limited company as an unlimited company pursuant to the Companies (Amendment) Act 1983. See *Kearney v. Allsop Ireland* [2016] IEHC 166.

> "9. Further, section 52 of the Companies (Amendment) Act, 1983, governs the re-registration of a limited company as unlimited and section 52(7) provides that 'the re-registration of a limited company as an unlimited company pursuant to this Act shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings which might have been continued or commenced against it in its former status may be continued or commenced against it in its new status.' This statutory provision reflects the intention of the Oireachtas that a valid re-registration does not create a new corporate entity and has no effect upon the rights and obligations of the company."

33. The second objection is to the effect that the plaintiff company does not hold any charge or title in the name of Start Mortgages DAC on "any conveyance register". See Mr. Kavanagh's affidavit of 3 December 2018. With respect, this objection misses the point. On the facts of the present case, there has been no change in ownership. This is not a situation whereby the ownership of a loan or the underlying security has been transferred from one entity to another, such as might occur, for example, on the sale of a loan book of a financial institution.

34. The case law relied upon by Mr. Kavanagh in this regard is not relevant. In particular, the judgment of Laffoy J. in *Kavanagh & Bank of Scotland plc v. McLaughlin* [2015] IESC 27; [2015] 3 I.R. 555, and that of Baker J. in *Harrington v. Gulland Property Finance Ltd. (No 2)* [2018] IEHC 445 deal with an entirely different matter, namely the transfer of the ownership of a registered charge under the Registration of Title Act 1964 (as amended), and the requirement that the transferee must become registered as the owner of the relevant charge on the relevant folio if it wishes to exercise the statutory powers conferred by the Act.

35. The next number of objections advanced by Mr. Kavanagh raise procedural issues as to the form in which the application was made and subsequently recorded. A complaint is made that, whereas the *ex parte* application is said to be grounded upon an affidavit of Gill Cotter filed in the proceedings, this affidavit is not listed on the case record as posted on the Courts Service's website, nor does the affidavit appear on the file held in the Central Office of the High Court. The explanation for this is provided in a subsequent affidavit filed on behalf of one of the solicitors acting for the plaintiff company, Ms. Barbara Tanzler sworn herein on 16 January 2019. This affidavit explains that the application made to the High Court in February 2018 took the form of an "omnibus" application,

whereby the plaintiff company relied on an affidavit and *ex parte* docket filed in one set of proceedings (*Start Mortgages Ltd. v. Ryan* Record Number 2008 No. 26 SP) to ground an application to amend a total of twelve sets of High Court proceedings. These proceedings were identified in an exhibit to the grounding affidavit of Gill Cotter sworn on 13 February 2018 filed in the *Ryan* proceedings.

36. In short, the plaintiff company, rather than filing twelve affidavits in almost identical form, relied instead on one affidavit to make the application in respect of the twelve different sets of proceedings. Given that the factual ingredients of the application, namely proof of the re-registration of the company, are uncontroversial, there was no need to file twelve different affidavits. The approach adopted by the plaintiff company in February 2018 was appropriate.

37. The legitimacy of employing an omnibus application of this type has been confirmed by the High Court (McDermott J.) in *Irish Bank Resolution Corporation v. Kennedy* [2016] IEHC 395. McDermott J. indicated that this was an appropriate way to proceed in relation to proceedings before the High Court. On the particular facts of the case, however, McDermott J. indicated that it would not be appropriate in the context of Circuit Court proceedings given the division of jurisdiction of that court over different localities. In particular, McDermott J. did not consider that the administrative benefits which arise in the context of the High Court would be available in the context of the Circuit Court.

38. Mr. Kavanagh makes a further objection to the effect that the order was amended pursuant to the slip rule. The explanation for this amendment has been set out in detail in the affidavit of Ms Tanzler sworn herein on 16 January 2019. In brief, it seems that the original version of the order, which had been drawn up on 31 March 2018, incorrectly referred to the second named defendant as Deirdre Murphy. This was amended by the Registrar on 9 April 2018 under the slip rule to reflect the correct name, Deirdre Kavanagh. The fact of this amendment is recorded in the amended order.

39. Order 28, rule 11 (as amended in 2009) reads as follows.

> "11. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected without an appeal—
>
> (a) where the parties consent, and with the approval of the Court, by the registrar to the Court,
> (i) on the application to the registrar in writing of any party, to which a letter of consent to the correction from each other party shall be attached or
>
> (ii) on receipt by the registrar of letters of consent from each party; or
>
> (b) where the parties do not consent, by the Court,
> (i) on application made to the Court by motion on notice to the other party or
>
> (ii) on the listing of the proceeding before the Court by the registrar on notice to each party."

40. As appears from the terms of the order, the correction of clerical mistakes generally requires either (i) the consent of the parties and the approval of the court, or (ii) a formal application or listing before the court. These requirements do not readily translate to the correction of an order which has been made *ex parte*. It would seem anomalous that a party who is not entitled to notice of the substantive application would nevertheless have to be put on notice of an application to correct a clerical mistake in the order made on foot of that substantive application. On the facts of the present case, such an interpretation would have the odd result that whereas the application to amend the title of the proceedings to refer to the plaintiff company as a "designated activity company" could be made *ex parte*, the subsequent correction of the clerical mistake in the description of the second named defendant (Deirdre Murphy as opposed to Deirdre Kavanagh) should have been made on notice to the defendants.

41. Given the potential anomalies which could arise were Order 28, rule 11 to be interpreted as applying to *ex parte* applications, I tend to the view that the rule probably does not apply. However, in circumstances where the objection has been pressed by Mr. Kavanagh, I propose to consider the objection on its merits. The correction consists of the amendment of the original version of the order to refer to Deirdre Kavanagh as opposed to Deirdre Murphy. This correction ensures that the order properly reflects the actual parties to the proceedings, and the inclusion of the incorrect name was clearly a clerical error. The amendment does not affect the substance of the order, and does not prejudice any of the parties to the proceedings. Accordingly, I am satisfied that the amendment is an appropriate amendment to make, and represents no more than the correction of a clerical mistake. I will make an order confirming the amendment made to the original order of 9 April 2018.

42. A separate objection is made by Mr. Kavanagh to the effect that one of the affidavits sworn in opposition to his application to discharge the order of February 2018 is sworn by an employee of Start Mortgages Holding Ltd., not Start Mortgages DAC. Mr. Kavanagh seeks to rely on the judgment of the High Court (O'Malley J.) in *Ulster Bank Ltd. v. Dermody* [2014] IEHC 140. This judgment actually addresses a different issue, namely the circumstances in which reliance can be placed upon the Bankers Books Evidence Act 1879. The purpose of this legislation is to enable evidence to be given of the contents of other parties' bank accounts without the necessity for the attendance of a representative of the bank concerned and the production of the relevant books. The affidavit evidence must be provided by a partner or officer of the bank.

43. In the present case, the only evidence being provided by Ms. Eva McCarthy is in relation to the history of the proceedings. No evidence of the type contemplated by the Bankers Books Evidence Act 1879 is involved.

44. A further objection is made that the application to amend the title of the proceedings has been made *after* the granting of the order of possession. Mr. Kavanagh seeks to draw an analogy with case law in relation to the setting aside or amending of *final* orders. With respect, this analogy is inapt. The judgments relied upon are concerned with a situation where there is an attempt made to change the *substance of a final* order, i.e. an order that has been drawn up by the court and where all possibility of appeal has been exhausted.

45. By contrast, the amendment in the present case is a technical amendment only, which reflects the change in corporate status of the plaintiff company. It does not affect the substance of the order in any way.

46. Finally, an objection has been made to the effect that the application should not have been made pursuant to Order 17, rule 4 of the Rules of the Superior Courts. For the reasons indicated earlier, I have taken the view that an application to amend the title of a plaintiff company—if it is to be made at all—should be made pursuant to the inherent jurisdiction of the court. Accordingly, I propose to vary the order of February 2018 to reflect the fact that it is made pursuant to the inherent jurisdiction of the court. Of course,

this does not affect the outcome of the application. I am satisfied that the amendment of the title of the proceedings was appropriate and should be allowed.

**CONCLUSION**

47. For the reasons detailed herein, the first named defendant's application to discharge the order of 26 February 2018 is dismissed.

48. I will, however, vary the order in the following respects. First, the words "pursuant to Order 17 Rule 4 of the Rules of the Superior Courts" will be replaced with "pursuant to the inherent jurisdiction of the court and having regard to Section 63 of the Companies Act 2014". Secondly, the words "a change and/or transmission of interest having taken place after the commencement of the said proceedings" will be deleted. Thirdly, the words "this amendment was confirmed by the High Court (Mr Justice Simons) on 11 April 2019" are to be added after the reference to the amendment made on 9 April 2018.