

BETWEEN

IRISH BANK CORPORATION LIMITED (IN SPECIAL LIQUIDATION)

PLAINTIFF

AND

PETER GAW

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 7th day of May, 2019.

1. This is the second judgment of the court in these proceedings. The facts and circumstances of the case are set out in the judgment delivered by the court on the 26th March, 2019 and this judgment should be read in conjunction with the court's previous decision. By notice of motion dated 23rd October, 2018 the plaintiff sought, *inter alia*, an order pursuant to O. 63, r. 1(15) of the Rules of the Superior Courts, or in the alternative an order pursuant to O. 28, r. 12 of the Rules of the Superior Courts correcting an alleged clerical error in the name of the plaintiff in these proceedings, wherein the word "Resolution" was omitted. The application was grounded on the affidavit of Ms. Mairead McShea sworn on 23rd October, 2018. Application was made to the court on 11th January, 2019 to adduce additional evidence, namely an affidavit sworn by Mr. Brian Quigley, solicitor. He was the solicitor who had carriage of the case since its inception and he further outlined how the clerical error arose. That application was strongly contested by counsel for the defendant.

2. On the 26th March, 2019, the court permitted the affidavit of Mr. Quigley sworn the 11th January, 2019, and the exhibits contained therein, to be admitted on a *prima facie* basis, subject to the right of the defendant to reply however he so wished.

3. Mr. Sherry, solicitor, swore an affidavit on 5th April, 2019. He avers that despite the additional information outlined in Mr. Quigley's affidavit as to how the clerical error arose, the plaintiff is not entitled to the order sought as it has failed to adduce sufficient evidence to prove that a clerical error arose. He reproduces aspects of Mr. Quigley's affidavit, which he submits highlights an intention to issue proceedings under the title "*Irish Bank Corporation Limited (In Special Liquidation)*". Further, he avers that it is incumbent upon the plaintiff to show by way of evidence, the point at which the error is said to have arisen and that such evidence is not before the court. He disputes Mr. Quigley's contention that the omission was "*a mistake occurring in the physical process of putting down the name of the plaintiff on the summons*" and avers that there were a number of interactions between counsel and solicitor before the issue of the summons. A number of additions, deletions and/or amendments were made. He states that it is clear that several individuals played a part in drafting the summons and the error, which was repeated on more than one occasion, amounts to substantially more than a minor slip or inconsequential error.

4. Mr. Sherry also refers to the letter dated 1st March, 2013 written to the plaintiff's solicitors which stated:-

"We have taken our client's instructions in relation to same, and confirm that he has no knowledge of the Plaintiff in those proceedings."

He states that this is clear evidence of doubt on the part of the defendant as to the correct plaintiff in these proceedings and that this doubt was communicated to the plaintiff. He further disputes the averment of Mr. Quigley that:-

"I spoke with the defendant's solicitors who agreed to take instructions from the defendant in relation to this claim, indicating knowledge of the plaintiff to the within proceedings"

Mr. Sherry states that this is highly speculative and denies that an agreement to take instructions from his client was an admission of any particular fact. Further, he disputes that the cover sheet of the fax enclosing proceedings, which stated "*IBRC (In Special Liquidation) v Peter Gaw*", is evidence which supports the position taken by the plaintiff as this application seeks to correct the title of proceedings to "*Irish Bank Resolution Corporation Limited (In Special Liquidation)*" and not the name as stated on the cover sheet.

Submissions

5. At the resumed hearing of this application on the 11th April, 2019, Ms. Conneely B.L., on behalf of the defendant, sought to rely on *O'Brien v. Reilly and the Motor Insurers' Bureau of Ireland* [2014] IEHC 514. That case concerned an application under O. 28, r. 12. There the error in the title regarding the name of the defendant which read 'John Reilly' when his real name was in fact "*John O'Reilly*". Counsel submitted that the court there had evidence before, it including a birth certificate, identifying the defendant as Mr. O'Reilly, proof of address for Mr. O'Reilly which corresponded to that on the summons and further evidence that no person called Mr. Reilly resided at that address. Evidence was before the court that the summons was served on a Mr. O'Reilly and there was also other documentation which proved his identity. It is submitted that there is a stark difference between the evidence before the court in that case and the case at hand. She submits that the evidence before this court does not show that there was an intention on the part of the plaintiff to issue proceedings in the name of Irish Bank Resolution Corporation Limited (In Special Liquidation). Also irrelevant, in her submission, is the evidence that certain documents contained the word resolution as the majority of the evidence refers to the plaintiff herein, Irish Bank Corporation Limited.

6. Counsel also relies on *Sandy Lane Hotel Limited v. Times Newspapers & ors* [2011] 3 I.R. 334. The Supreme Court held that:-

"a clerical error was an error which arose from the mechanical process of writing, transcribing or copying and was entirely distinct from an error which arose from lack of knowledge, mistaken belief or wrong information."

7. Ms. Conneely B.L. submits that the plaintiff has consistently been referred to as Irish Bank Corporation Limited rather than Irish Bank Resolution Corporation Limited and this is proof of either incorrect information or a lack of knowledge, rather than clerical error. She submits that Hardiman J. in *Sandy Lane* did not rule that had the plaintiffs got the name of the operating company right that a clerical error would have arisen, rather that it would have made the plaintiffs case stronger. In all the circumstances, she submits that the plaintiffs have failed to prove their case.

8. Mr. Murphy B.L. on behalf of the defendant submits that there is abundant evidence now before the court of a clerical error within

the meaning of the Rules of the Superior Courts. He rejects the assertion that the omission of the word resolution was not noticed, despite the fact that it was looked at "by a number of eyes" and in any event, he states that is not the test. He submits that the court must look at the substance of what happened. The test is clearly met by what is averred to in Mr. Quigley's affidavit and in particular, in para. (e) and para. (f) thereof.

9. Counsel submits that should the court not be satisfied as to the contents of the affidavit evidence alone, there is before the court pre-action letters which contain the correct title. These documents existed prior to the application to adduce additional evidence. Mr. Murphy B.L. submits that the burden of proof is the balance of probabilities and the court has to be satisfied as to what is more likely. It is submitted that it is more likely that this was clerical error and that all the evidence before the court would suggest as much. He also relies on *dicta* in *Sandy Lane* and *O'Brien*. He submits that it is not a matter of counting all of the documents which contain the word *resolution* and those which do not and deciding which is the greater number, as the defendant suggested. It is a simpler process whereby the court must look to see whether there has been a simple clerical error in putting down the name of the plaintiff in these proceedings.

Decision

10. Order 63, r. 1(15) provides:-

"(15) An order for the correction of clerical errors or errors in the names of parties in any proceeding, whether on consent or not, but subject to re-service when not on consent."

11. O. 28, r. 12 provides:-

"12. The Court may at any time, and on such terms as to costs or otherwise as the Court may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

12. In *Sandy Lane*, Hardiman J. stated at p. 338 that:-

"[23] In construing O. 63, r.1 (15) of the Rules of the Superior Courts 1986 it is necessary first to note that the term "clerical error" has been the subject of judicial decisions. In R. v. Commissioner of Patents, ex parte Martin (1953) 89 C.L.R. 381, Fullager J. held at p. 406 that:- "[...] the characteristic of a clerical error is not that it is in itself trivial or unimportant, but that it arises in the mechanical process of writing or transcribing."

[24] In a later case, Re Maere's Application [1962] R.P.C. 182, the term "clerical error" was described as follows in another patent case, in words, at p. 185, which plainly followed the case cited above:- "The words 'clerical error' must, I think, be taken to mean a mistake made in the course of some mechanical process such as writing or copying as distinct from an error arising, e.g. from lack of knowledge, or wrong information, in the intellectual process of drafting language to express intention."

[25] Having regard to the structure of O. 63, r. 1(15), I believe that the phrase "errors in the names of parties" must be construed in the same sense as the proceeding phrase, with which it is eiusdem generis, "clerical errors". Either category of error must be construed in contradistinction from another sort of error arising from "lack of knowledge or "wrong information". It appears to me, from a consideration of Mr. O'Sullivan's affidavit on behalf of the plaintiff, that the mistake made in this case is not one which can be described as a clerical error, or anything like it. He frankly admits that the name "Sandy Lane Hotel Co. Limited" was not originally intended to be used in the proceedings. This was because, although he knew of the history of the companies, it was not present to his mind, or to the mind of the lawyers, that the company actually operating the hotel was the Sandy Lane Hotel Co. Limited. This in turn was because, as he very frankly says "at the time of the change of name in 1997 I thought nothing of the inclusion of the word 'Co.' in the title of the plaintiff."

13. Hardiman J. then goes on to state that the error was not clerical in nature:-

"[26] This is not, in my view, a clerical error. The error here arose due to a mistaken belief and a failure to ascribe any significance to the change of name of 1997. This is a misguided state of mind with which one cannot have much sympathy, given that it was made by or on behalf of "a consortium of businessmen", in the course of a complicated series of arrangements made for tax planning purposes, in which they obviously had the benefit of the best legal and taxation advice..."

[28]... The Plaintiff's case would in my opinion have been a stronger one if it had simply failed to get the name of the operating company right."

14. I have considered the affidavits and the submissions of the parties. I am satisfied that an error was made in this case and that this error did not emanate from incorrect information or a failure to ascribe significance to the names of two different existing entities. The court has been informed, and the evidence indicates, that Irish Bank Corporation Limited (In Special Liquidation) is an unknown entity. This contrasts with the circumstances which pertained in *Sandy Lane*, where there was in fact an entity with the title of the plaintiff in the proceedings as originally instituted. In my view, the error which occurred in this case was not one which arose due to mistaken belief or wrong information. It was an error which arose, in my view, by virtue of the process of writing down the name of the plaintiff, which originated in the instructions which were given to counsel and which was not observed until the proceedings were well underway.

15. In the circumstances, and in the interests of justice, I propose to make the order sought amending the title of the proceedings by substituting the name Irish Bank Resolution Corporation Limited (In Special Liquidation) for that of Irish Bank Corporation Limited (In Special Liquidation).