THE COURT OF APPEAL

[2015 No. 339]

[Article 64 Transfer]

Irvine J.
Sheehan J.
Costello J.

BETWEEN

STAPLEFORD FINANCE LIMITED

(AS SUBTITUTED)

PLAINTIFF/RESPONDENT

AND

PETER LAVELLE

DEFENDANT/APPELLANT

AND

IRISH BANK RESOLUTION CORPORATION LIMITED

(IN SPECIAL LIQUIDATION)

NOTICE PARTY

JUDGMENT of Ms. Justice Costello delivered on 11th day of April, 2016.
1. The issue for decision in this appeal is whether the High Court had a jurisdiction under the Rules of the Superior Courts to substitute the respondent as plaintiff in the proceedings and whether the High Court erred in law in ordering that the proceedings be amended to substitute Stapleford Finance Ltd. as plaintiff in place of the notice party, the original plaintiff, pursuant to O. 17, r. 4 of the Rules of Superior Courts.

Background
2. The notice party instituted summary proceedings against the appellant in 2013. By deed of transfer made on 23rd May, 2014, the notice party, through its Special Liquidators:-

> *"unconditionally, irrevocably, and absolutely transferr[ed], convey[ed] and assign[ed] to the Assignee all such rights, title, interests, benefits, liabilities, duties and obligations as the Assignor may have in and to 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."*

3. The Assignee was the respondent. It was accepted that the Deed operated to transfer the loans the subject matters of these proceedings from the notice party to the respondent.

4. The respondent brought a motion to be substituted as sole plaintiff in the proceedings in place of the notice party. The notice party supported the application of the respondent and the appellant opposed the application for substitution.

5. In her judgment of 21st May, 2015, Baker J. granted the order of substitution. In so doing, she held that the Court had jurisdiction pursuant to O. 17, r. 4 of the Rules to substitute the respondent as plaintiff in the proceedings and she made her order accordingly. It is against this order that the appellant appealed.

Order 17, r. 4 of the Rules of the Superior Courts
6. Order 17, r. 4 provides as follows:-

> *"[w]here 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."*

The arguments on appeal turned on whether there was an event causing a change of interest in this case within the meaning of the rule.

Event
7. The first issue for consideration is whether or not an "event" occurred after the commencement of these proceedings. The appellant argued that the transfer of the debt was not an event within the meaning of the rule. It was argued that an event within

the meaning of the rule referred to an extraneous event such as death or bankruptcy. Reliance was placed upon the Rules of 1905 which referred to lunacy or absconsion of an administrator.

8. The respondent argued that, giving the words in the Order their ordinary and literal interpretation, quite clearly the assignment of the loans and chose in action was an event within the meaning of the rule. It referred to two cases. In *Bank of Ireland Finance Ltd. v. Browne & Ors* (Unreported, High Court, Laffoy J., 24th June 1996), Laffoy J. dealt with a motion brought pursuant to O. 17, r. 4 for the substitution of the applicant as plaintiff in the proceedings in lieu of the plaintiff bank. At p. 2 of her judgment, she noted that *"the Defendants did not and could not seriously contend that an Order should not be made under Order 17, Rule 4"* in circumstances where the charge, the subject of the proceedings, had been transferred to the applicant and it was the registered owner of the charge in question.

9. The second case relied on was the decision of Peart J. in *IBRC v. O'Driscoll* (Unreported, High Court, Peart J., 6th February 2015) where the learned High Court judge (as he then was) was dealing with an identical application pursuant to O. 17, r. 4 and he stated at para. 9:-

> *"[t]he event is clearly the purchase by it of the loan book referred to".*

10. The notice party observed 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. There was no valid reason advanced by the appellant why *"event"* in O. 17, r. 4 should be given a restricted meaning. It was merely argued that as a matter of law it could not be done.

11. It would appear from the judgment of Baker J. that she accepted that the assignment which occurred in this case constituted an event within the meaning of O. 17, r. 4. This Court accepts that she was correct in so doing for the reasons advanced by the respondent and the notice party and rejects the appellant's argument that there was no event within the meaning of the rule in this case.

Interest – submissions by the parties

12. The learned High Court judge went on to consider whether there had been a *"change… of interest"*. She interpreted the meaning of the words in the light of four factors set out in para. 39 of her judgment:-

> *"(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."*

13. The appellant submitted that the term *"interest"* is utilised in O. 17, r. 4 in contrast to s. 28(6) of the Supreme Court of Judicature Act (Ireland) 1877. The section referred to the assignment of debts or other choses in action as the *"transfer[of] the legal right",* as opposed to the transfer of an "interest". The appellant argued that the language of r. 4 and the *ex parte* procedure it prescribes was specifically **and exclusively** directed to transmissions of interest on death, or changes by devolution, creation, or the transfer or assignment of interests in real property. This interpretation of r. 4 was reinforced by the fact that these were all matters that were set out in O. 17, rr. 1-3. Counsel submitted that the specific language *"change or transmission of interest"* in O. 17, r. 4 was used in the relevant sections of the Chancery Amendment Act 1852 (15 & 16 Vict. c. 86) and s.157 of the Chancery (Ireland) Act 1867 (30 & 31 Vict. c. 44) which predated the Supreme Court of Judicature Act (Ireland) 1877. He referred to the cases cited in *Daniell's Chancery Practice*, 8th ed. (London; Stevens and Son Ltd., 1914) and *Wylie on the Judicature Acts (Ireland) Rules and Forms*. Under the equivalent of O. 17, r. 4 of the 1905 Rules, apart from cases arising on death or bankruptcy, the authorities cited were exclusively concerned with cases involving the transmission or change of interest in real property.

14. He therefore concluded as the Rules had not been materially changed after the enactment of the Supreme Court of Judicature Act (Ireland) 1877 that O. 17, r. 4 had the same limited application post the Judicature Act as it had prior to its enactment. It followed that the word *"interest"* in the rule should be confined to an interest in land. In failing so to confine the meaning of the word *"interest"* he submitted that the learned High Court judge had erred in law.

15. In reply, the respondent said that the word *"interest"* was not confined to cases of interest in real property. Indeed, some of the cases cited by Daniell and Wylie involving death or bankruptcy did not relate to interests in real property. Thus there was no reason why O. 17, r. 4 should be confined to interests in land and that a wider meaning could not be giving to word *"interest"* in the rule. The respondent submitted that the assignment affected a change of interest. A different person now had the interest in the loans. Certainly, the notice party no longer had an interest in the loans. There was thus a change of interest within the meaning of the rule and the learned High Court judge was correct when she concluded that the Court could substitute the respondent for the notice party as plaintiff in the proceedings pursuant to O. 17, r. 4 of the Rules.

Discussion

16. This Court is of the opinion that the learned High Court judge was correct in her conclusion that the assignment amounted to a change in interest within the meaning of the rule. Firstly, no compelling reason was advanced as to why the Rules should be given a narrow construction as contended by the appellant. The Rules are intended to be facilitative. As was stated by Peart J. in *BUPA Ireland Ltd. v. Health Insurance Authority & Ors* [2005] IEHC 291 at p. 10 of the judgment:-

> *"[i]n matters of court procedure and rules applicable, I would be of the school of thought that the rules exist so that things can be done rather than so that things can be prevented from being done. That school of thought has been encapsulated very well in my view almost one hundred years ago, when in Coles v. Ravenshear [1907] 1 KB 1, it was put in this way, that:*
>
> > *'the relation of rules of procedure to the work of justice is that of handmaid rather than mistress and the court*

should not feel bound by rules to do what would cause injustice in a particular case.'

…the principle can be equally valid today that no rule of procedure should, for the sake of strict adherence to it in a slavish way, permit an injustice to be rendered !"

17. In *Dome Telecom Ltd. v. Eircom Ltd.* [2008] 2 I.R. 726, at para. 12, Geoghegan J. stated:-

"[t]he rules of court are important and adherence to them is important but if an obvious problem of fair procedures or efficient case management arises in proceedings, the court, if there is no rule in existence precisely covering the situation, has an inherent power to fashion its own procedure and even if there was a rule applicable, the court is not necessarily hidebound by it."

18. Finally, in *Abbey International Finance Ltd. v. Point Ireland Helicopters Ltd. & Anor* [2012] IEHC 374 at para. 23, Kelly J. stated:-

"The mere fact that the Rules of the Superior Courts do not expressly provide for an application of this type [an application for summary judgment in respect of an unliquidated claim] is no bar to it being made successfully. The rules of court are the servants of justice, not its master."

19. He took support for this view from the judgment of Geoghegan J. in *Dome Telecom Ltd.*, cited above.

20. Since the Supreme Court of Judicature Act (Ireland) 1877 it has been possible legally to assign a chose in action. The intent of the statute is to do away with the formal necessity of joining the assignor in any proceedings brought by the assignee to enforce the chose in action. The legislative intent is defeated if the rules of court do not provide for of the substitution of the assignee of the chose in action as plaintiff in proceedings commenced by the assignor. This is so in case of a statute dating back to 1877 in respect of application which Kelly J. described as common place.

21. More recently, the Irish Bank Resolution Corporation Act 2013, s. 12 provides:-

"12.— (1) The sale or transfer of any asset or liability by IBRC, acting through a special liquidator, or by a special liquidator where such asset or liability has vested in the special liquidator, to any person or the assumption of any obligation or liability relating to such sale or transfer shall take effect notwithstanding—

(a) any provision of any enactment, rule of law, code of practice, contract, or other agreement—
(i) providing for or requiring—

(I) notice to be given to any person,

(II) the consent, approval or concurrence of any person, or

(III) any other step, consent, notification, authorisation, licence or document to similar effect,

or

(ii) prohibiting that sale or transfer,

or

(b) any other legal or equitable restriction, inability or incapacity relating to the sale or transfer of any asset or liability or the assumption of any obligation or liability relating to such sale or transfer.

(2) 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…

(5) Notwithstanding any enactment or rule of law, IBRC, acting through a special liquidator, or a special liquidator, where such cause of action has vested in the special liquidator, may sell or transfer, on such terms and conditions and to such person as the special liquidator thinks fit, any cause of action, howsoever arising, which has accrued or will accrue to IBRC."

22. The legislative intent of s. 12 will likewise be defeated if the Rules of the Superior Courts do not permit the purchaser of the *"cause of action or proceedings"* to be substituted as plaintiff in those proceedings.

23. In the course of his submissions, counsel for the appellant stated that it is possible to assign *the chose in action* but not an existing *cause of action*. He elaborated that if the chose in action is assigned, any proceedings in being taken to enforce these choses in action, no matter how far they have progressed in the courts must cease and the assignee must start new proceedings.

24. Firstly, this ignores the express words of s. 12 which allows for the sale of causes of action and proceedings by IBRC, as occurred here.

25. Secondly, the construction advanced by the appellant could lead to very considerable wasted time, effort and expense.

26. Thirdly, counsel accepted that the Rules are totally silent as to what is to happen to the costs of these prematurely terminated actions. These costs could be very substantial indeed.

27. Fourthly, if the assignee must start new proceedings, there is the undoubted risk, if not inevitability, that some of these cases would thereby become statute barred. The appellant's argument would apply, for example, to the sale of an insurance company's business with the result that hundreds of cases potentially would have to be recommenced. The problem only needs to be stated for the startling gravity of the implications of the appellant's position to become clear.

28. Fifthly, the Rules provide that the application is to be made ex parte (though in these proceedings it was on notice). This indicates, in the words of Peart J. in *IBRC v. O'Driscoll "the somewhat procedural and simple nature of the application".* The argument ignores the fact that the Rules exist to ensure that things can be done rather than so that things can be prevented from being done.

29. Finally, there was no reason advanced as to why it should not be done, merely, that as a matter of construction of the Rules it cannot be.

30. In addition to these points, it is of interest to consider the English authorities on their equivalent rule, RSC O. 15, r. 7. The terms of the English Order differ to O. 17, r. 4 so the authorities may be of limited assistance in construing O. 17, r. 4. However, the judgments refer to the origin of the rule and this is relevant to the appellant's arguments as to the proper construction of "change of interest" in the rule.

31. In *Yorkshire Regional Health Authority v. Fairclough Building Ltd. & Anor* [1996] 1 W.L.R. 210 at p. 215, Millet L.J. referred to the substitution of a new party as being necessary in existing proceedings. He carried on:-

> *"[i]t is therefore not surprising that an Order to enable substitution for this purpose to be effected has been in existence ever since the original rules were introduced under the Judicature Act 1875 (38 & 39 Vict. c. 77)* ***and can be traced back even before that to section 52 of the Chancery Procedure Act 1852 (15 & 16 Vict. c. 86)****. No system of law could view with equanimity the absence of some procedure to cater for the transmission or devolution of the cause of action or the liability in respect thereof during the course of subsisting proceedings; and any contention that the court has been deprived of this necessary jurisdiction must be jealously scrutinised."* (Emphasis added)

32. The antecedents of O. 15, r. 7 were acknowledged by Mance J. in *Industrie Chimiche Italia Centrale & Anor v. Alexander G Tsavliris & Sons Maritime & Co & Ors* [1995] C.L.C. 1461 at pp. 1467-1468 where he stated:-

> *"Order 15, r.7 is like O.20, r.5 the descendent of rules in force prior to 1980, but it goes back still further to O.17 of the rules in their pre-1962 form. The history of that order itself goes back to the original rules made under the Judicature Acts 1875 and even prior to that to the Common Law Procedure Act 1852…*
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> *The problem addressed by O.15, r.7 is different: during the course of the proceedings there has been some change affecting the identity of the correct claimant, which could not have been dealt with (or normally even predicted) when proceedings were originally issued. The self-evident nature of the relief which it affords is demonstrated by the provision that application may be made ex parte… The classic instances are however listed in the notes to the Supreme Court Practice and consist of such everyday occurrences as death of one or other party, bankruptcy (leading to assignment to a trustee in bankruptcy), assignment, transmission or devolution of interest. In the distant past there was even a rule that a wife's legal existence was merged with that of her husband, a further former instance which, it appears anachronistically, continued to be expressly catered for in O.17 until the general 1962 revision of the rules. A legal assignment of a debt or even of a cause of action for damages may occur at any stage of proceedings. There is English legislation, for example in the fields of insurance and building societies, providing for transfer of a business, including rights and obligations, to a successor body, and other examples could probably be found in other contexts such as statutory transfers between public undertakings or corporations, nationalisations and privatisation.*
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> *In all such situations, of which, death is only the most striking, it seems self-evident both that any existing proceedings, properly constituted within the limitation period, should be allowed to continue for or against the party to whom the relevant right or obligation has been transferred in law; and this should be permitted whether the transfer occurs before or after the expiry of the limitation period."*

33. These authorities show that the English courts had no difficulty in tracing the power to substitute a plaintiff back before the enactment of Judicature Acts in 1875. If that is correct, the appellant's argument that there was no such power prior to the Judicature Acts and no amendment of the Rules post the Judicature Acts is of no avail. An amendment was not necessary as the power already existed. Furthermore, this Court would concur with the observation of Millet L.J. that any contention that the court has been deprived of the necessary jurisdiction must be jealously scrutinised.

Conclusion

34. There is no valid reason why O. 17, r. 4 should be given the narrow construction advanced by the appellant. For the reason advanced by the learned High Court judge and as set out above, this Court is satisfied that she was correct in holding that she had power pursuant to O. 17, r. 4 to substitute the respondent as the sole plaintiff in these proceedings, she did not err in law and, accordingly, the appeal should be dismissed.