



**Peart J.  
Hogan J.  
Whelan J.**

**BETWEEN**

**FRANK O'MAHONY, FRANK O'MAHONY AND MARTIN O'MAHONY**

**APPELLANTS**

**AND**

**DWYER PROPERTIES LIMITED (IN RECEIVERSHIP)**

**RESPONDENT**

**JUDGMENT of Ms. Justice Máire Whelan delivered on the 31st day of July 2018**

1. This is an appeal against the judgment and orders of Baker J. delivered in the High Court on 1st February 2016 refusing the appellants' application to join Frank Ryan, statutory receiver, as a defendant in the within proceedings pursuant to O. 15, r. 13 of the Rules of the Superior Courts.

**Background**

2. On 2nd August 2011 the proposed defendant, Mr. Frank Ryan, was appointed as statutory receiver over certain assets of the respondent company including property at Kilmoney, Carrigaline, Co. Cork, comprising part of the lands in folio 123221F of the Register Co. Cork. It appears that Mr. Ryan retained two different auctioneers, Mr. Michael McKenna and Mr. Michael Pickett, to act as joint selling agents and source best bids in connection with the proposed sale of the mortgaged property. In early 2014 the property was offered for sale by way of tender subject to conditions.

3. The lands the subject of the tender process were an "acquired bank asset" of the National Asset Management Agency (NAMA) pursuant to the NAMA Act 2009. It appears that the sales process was conducted on its behalf by Frank Ryan as statutory receiver of the defendant company. As such, therefore the proposed defendant was as a matter of law subject to the directions of NAMA pursuant to the operation of the National Asset Management Agency Act 2009.

**Michael McKenna**

4. Mr. McKenna is an auctioneer based in Cork. It appears that on 23rd January 2013 he communicated directly with the appellants who were prospective purchasers by email regarding the tender process which was scheduled to conclude on 7th February 2014.

5. The document central to the appellants' case is an email sent on 23rd January 2014 to the appellants by Mr. Michael McKenna, one of the auctioneers retained by the statutory receiver to conduct the tender process. It provides:

- (i) Final offers were to be submitted by noon on 7th February 2014.
- (ii) Offers were to be accompanied by proof of funds.
- (iii) Offers were to include confirmation that the tendering party's solicitor was happy with the draft contract.
- (iv) Contract to be executed on or before 14th February 2014, closing on or before 7th March 2014.

**7th February 2014**

6. It is claimed that at about 11.50 a.m. on 7th February 2014 Michael McKenna in the presence of the appellants phoned the other joint selling agent, Michael Pickett, who had a another prospective purchaser Mr. Collier/Future Limited in his office. Various bids were made by both interested parties and at the conclusion of that phone call before noon the appellants had advanced the highest bid.

7. Shortly thereafter and subsequent to midday, Mr. Pickett called Mr. McKenna back to say that Mr. Collier/Future Limited was still present in his offices and wished to make a further bid. The appellants, after the 12 noon deadline, in the presence of Michael McKenna, actively engaged over the phone in a resumed bidding process with Mr. Collier/Future Limited. It would appear that the appellants or Mr. McKenna may have only objected to this resumed bidding process at a point when Mr. Collier/Future Limited, who became the ultimate purchaser of the lands, made a further bid of €875,000 for the lands. This became the final bid. At that point Michael McKenna raised for the first time a concern that the bidding had continued beyond "the 12 noon deadline".

8. The proposed defendant Frank Ryan had no direct involvement with regard to the manner in which the joint selling agents conducted the bidding process. There is no suggestion on the part of the appellants that Mr. Ryan had any contemporaneous knowledge that a bidding process took place after midday. It is unclear where the midday deadline emanated from in the first place. At the hearing of this appeal counsel for the respondent suggested that Mr. Ryan had never stipulated a noon deadline. This was not contradicted by the appellants. These are issues to be determined at the trial.

9. Apart from issues regarding the deadline, the appellants further contend that the successful bid did not comply with a requirement that there be proof of funds for an offer to be a valid tender. It is alleged that the second auctioneer, Mr. Pickett, had accepted a solicitor's undertaking in respect of Mr. Collier/Future Limited's funding position. It appears that Mr. Pickett had required "the solicitor to undertake that they were cash purchasers". A solicitor's undertaking by letter had been provided on 7th February 2014 to Mr.

Pickett on behalf of Mr. Collier/Future Limited. It confirmed that Mr. Collier/Future Limited did not need loan approval or bank funding to complete the purchase.

10. Thereafter NAMA accepted the higher bid of Mr. Collier/Future Limited. The subject lands were sold to them. Neither specific performance nor damages in lieu of specific performance was ever sought by the appellants. No *lis pendens* was ever registered by the appellants.

11. It was initially contended by the appellants that the email from the auctioneer Michael McKenna of 23rd January 2014 referred to at para. 5 above was an invitation to treat. Later it was asserted that the appellants' first offer of €675,000 made on 7th February 2014 before noon was the only valid offer made.

#### **Collateral contract**

12. The appellants contend that the said email dated 23rd January 2014 amounts to a collateral contract subsidiary or preliminary to the substantive contract for sale of the lands in accordance with the following express and/or implied terms accepted by the defendant company:

- (a) that Dwyer Properties Limited (in receivership) would contract for the sale of the lands with the party submitting the highest qualifying bid
- (b) that it would conduct a process of tender evaluation fairly
- (c) evaluation of tenders would be in accordance with the terms of the invitation to tender
- (d) no change of conditions would take place whereby the highest or only qualifying bid would not be accepted and
- (e) unfair advantage would not be accorded to any tendering party
- (f) a party who has submitted the highest qualifying or any qualifying bid would not be placed at a disadvantage.

13. A central contention on the part of the appellants is that had the terms of the tender process, as they now construe them, been strictly adhered to the appellants would have been the successful bidders.

14. The pleadings are considered in this judgment solely to the extent necessary to address the entitlement of the appellants to an order to join Mr. Frank Ryan as a defendant to the proceedings pursuant to O. 15, r. 13. The reliefs sought in the statement of claim include a declaration that the appellants were the exclusive qualifying bidder in the tender process. A further declaration is sought that they became entitled at the conclusion of the tender process to the benefit of the award of the purchase contract in respect of the land. Damages are sought for, *inter alia*, breach of contract, misrepresentation and breach of duty.

#### **The respondent**

15. The respondent admits that a bid was made by the appellants but denies that it was otherwise than a step in advance of any binding agreement coming into existence. Special Condition 5(b) of the contract for sale is relied on. It stipulated that:

"This contract shall not be binding upon the Statutory Receiver until such time as it has been approved of by NAMA and has been executed by both parties and one part so executed is returned to the Purchaser's Solicitors. There shall be no assignment of this contract by the Purchaser."

16. Thus, the respondent argues, a binding contract required the prior approval of NAMA. It is denied that the appellants ever had a specifically enforceable contract to purchase the lands. Estoppel by conduct is raised against the appellants. The respondent further denies that the appellants' statement of claim discloses any offer to purchase on the part of the appellants on foot of the tender process.

17. The appellants counter that Special Condition 5(b) of the contract for sale is not material to their claim. It is contended that by reason of a prior collateral contract their claim arises from the terms of the email issued on 23rd January 2014 set out above.

#### **Motion pursuant to Order 15**

18. On 20th May 2015 the appellants issued a motion pursuant to O. 15, r. 13 of the Rules of the Superior Courts seeking the addition of Frank Ryan, the statutory receiver, as a defendant in the proceedings. The motion was grounded on the affidavit of Carl O'Mahony, solicitor, sworn on 19th May 2015 which deposed that the appellants "became entitled to the benefit of the award of the purchase contract in respect of the said lands at the conclusion of the aforementioned tender process. The Plaintiffs are also seeking damages for breach of contract, misrepresentation and breach of duty." The said solicitor deposed:

"11. A review of the documents discovered to the Plaintiffs has highlighted serious irregularities and *mala fides* on the part of the Statutory Receiver Frank Ryan in the execution of his role and in particular in relation to the disposal of The Lands which have contributed to the losses incurred by the Plaintiffs and the Plaintiffs now wish to add Frank Ryan as a defendant to the within proceedings."

There is no further elaboration contained in this affidavit as to what precisely was being alleged as constituting "serious irregularities" or "*mala fides*".

19. In an affidavit sworn in October 2015 the first named appellant deposes that:

"... the Statutory Receiver was aware at all material times that a valid bid which complied fully with all of the terms and conditions of the tender process had been made by the Plaintiffs."

He asserts that notwithstanding same Mr. Ryan:

"...misrepresented the outcome of the tender to Allied Irish Bank Plc. The Statutory Receiver wrongly and knowingly advised the bank that there were discrepancies with the original tender process for the lands thereby impugning the valid tender offer made by the Plaintiffs. As a result of the said deliberate misrepresentation that the Plaintiffs' valid offer did not result in their being deemed the makers of the successful bid and they did not have with the attendant consequences of that fact accrued to them."

He also deposes:

"as a direct result of the statutory receiver's deliberate wrongdoing and misrepresentation the appellants have suffered loss and damage and the statutory receiver has a potential liability to the appellants."

20. In essence, what the appellants contend is that the proposed defendant deliberately and wrongfully procured the exclusion of the appellants from the right to enter into a contract to purchase the property by reason of, *inter alia*, certain misrepresentations alleged made by him. They also alleged that the provisions of s. 438 of the Companies Act 2014 are engaged and certain breaches have occurred of the said statutory provisions by the statutory receiver and the obligations thereunder. It is further alleged that there were acts of deception and deceit perpetrated by the proposed defendant which caused injury, damage and loss to the appellants

### High Court judgment

21. The motion came on for hearing in the High Court. Baker J. in her ex tempore decision noted that it was sought to join Mr. Ryan on the basis, *inter alia*, of a collateral contract. The trial judge was satisfied that it was properly correct in law that certain implied terms enter a tender process.

22. She characterised para. 9 of the statement of claim as "...equivalent to a plea that there exists either implied terms or a collateral contract as between vendor and tenderers" and this in effect is "an obligation of good faith..."

23. She continued: "The difficulty I have with Mr McEntagart's argument is that he has pleaded that such implied terms under a collateral contract exist between the plaintiff and the defendant, and he now seeks to join another defendant in order to make the same claim against that defendant but it seems to me that the claim he seeks to make is not one that arises in these proceedings."

24. She noted:

"The provisions of the rule allow the Court to add a party... that is necessary in order to enable the Court effectually and to completely adjudicate on the issues. The issues are clearly and concisely set out in the statement of claim. None of those issues require the joinder of the receiver so for that reason I have some difficulty with the application, but I have another difficulty with the application and it is this. The expression "collateral contract" must mean a contract that arises in what I might call generally the umbrella of the main contract, so a collateral contract can exist between the vendor of lands and a tenderer but to say that a contract exists between the tenderer and the person employed, and whether that be a receiver or other person, employed to act on behalf of the owner is an entirely different thing."

She concludes:

"I consider that if there is a claim against the receiver, and I can't judge from this vantage point whether there is or not, it is a completely separate claim. It cannot be one that arises in the course of these proceedings. The determination of that issue is not necessary in order that the Court can fully determine or effectually and completely adjudicate on the issues between the parties in the existing proceedings, and those issues probably will require Mr Ryan to be a witness but I am not convinced of the requirement to be a party. So for all those reasons I consider that I will refuse the application to join Mr. Ryan as co-defendant but I take no view as to whether he is a proper defendant in other proceedings whether for negligence or breach of another contract, although it seems as a matter of first principle that the answer to that would have to depend on whether the plaintiff wins or loses the main action..."

25. The appellants appeal that refusal.

26. In addition to the issues relied upon in the High Court application, the appellants in this appeal relied on Schedule 1, clause 15 of the NAMA Act 2009 for the proposition that the proposed defendant as a statutory receiver has power to defend proceedings. This proposition was not disputed by the respondent.

27. Section 438 of the Companies Act 2014 was relied on for the proposition that, at the level of principle, liability could attach to a receiver in connection with the generating of a contract for the sale of property and that there was no exclusion of liability operative in relation to Mr. Ryan concerning the contract the subject matter of the litigation and the subject of the proposed claim against him.

28. The appellants also relied on the principle laid down in *Henderson v. Henderson* [1843] 3 Hare 100 and asserted that they were bound to ventilate these issues against the statutory receiver within these proceedings at this point in time and that the within proceedings were the appropriate mechanism for a determination of the liability of the statutory receiver.

### Determination

29. O. 15, r. 13 of the Rules of the Superior Courts provides:

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether 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, be added."

30. At issue accordingly is whether as a matter of law Mr. Frank Ryan, the statutory receiver, is an individual who ought to be 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 case or matter.

31. It is also appropriate to consider whether the joinder of Mr. Frank Ryan is "necessary" in the context of the jurisprudence pertaining to O. 15, r. 13.

32. O. 15, r. 1 makes clear that joinder of parties is permissible subject to the court being satisfied that the right to relief is in respect of or arises out of the same transaction or series of transactions as the subsisting litigation and there must be some common question of law or fact.

33. The existing proceedings are founded on contract and the wrongs alleged and reliefs sought derive from that asserted contractual

legal basis. In the instant case a fundamental distinction between the existing defendant and the proposed defendant lies in the fact that a Mr. Frank Ryan was not a party to the contract pleaded. No privity of contract has been demonstrated to have existed between the appellants and the proposed defendant in relation to that contract.

34. Based on the submissions and arguments of the appellants' counsel, the written submissions and the transcript of the hearing in the High Court, the key issues that would apparently be agitated as against the proposed defendant Frank Ryan, were he joined in the proceedings, include:

- (a) Alleged irregularities in the conduct and discharge of his powers and functions as a statutory receiver.
- (b) Alleged *mala fides* in the execution of his powers and duties as a statutory receiver.
- (c) Alleged default of his obligations as a statutory receiver.
- (d) Claims pursuant to s. 438 of the Companies Act 2014 giving rise to personal liability against the statutory receiver.
- (e) It appears clear from the submissions and arguments advanced by counsel on behalf of the appellants that any substantive hearing will involve a consideration of s. 149 of the NAMA Act 2009 together with schedule 1 of the said statute insofar as it pertains to powers of statutory receivers.

35. Laffoy J. in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* [1998] 2 I.R. 519 construed O. 15, r. 13 to the effect that the provision requires the plaintiff to demonstrate that he has a stateable case against the defendant proposed to be joined and the proper approach is to determine whether it is a stateable case on the basis of the plaintiff's version of the disputed events.

36. Subsequently Clarke J. (as he then was) in *Cunningham v. Springside Properties (in receivership) & Ors.* [2009] IEHC 454 considered that the joinder of a party should ordinarily be granted except where prejudice may occur to either the existing parties or the proposed new defendant.

### **Prejudice**

37. In the instant case the existing defendant strenuously opposes the application seeking joinder of Mr. Frank Ryan on grounds which include prejudice.

38. Of concern is the fact that in substance the causes of action against the existing defendant company and the proposed defendant are substantially different though both spring from events surrounding the tender process and occurrences in the months of January and February 2014. The addition of Frank Ryan as defendant will have the effect of adding several new different causes of action to the proceedings.

39. It will be recalled that in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.*, in the Supreme Court, Murphy J. noted at pp. 532-533 that:

"...the words "cause or matter" in O. 15, r. 13 mean the action as it stands between the existing parties (*Amon v. Raphael Tuck & Sons Ltd.* [1956] 1 Q.B. 357 at p. 369). Certainly the court has jurisdiction to refuse to add parties for the purpose of introducing a new cause of action. In *Raleigh v. Goschen* [1898] 1 Ch. 73, Romer J., explained why, in that case at any rate, such a course should not be adopted, although he was careful to indicate that the plaintiff would have whatever rights were available to it in other proceedings against the parties whom it had sought to add."

40. It was clearly acknowledged at the hearing and in this appeal that the appellants have a continuing entitlement to institute such proceedings as they see fit against Mr. Frank Ryan. The outcome of this application has no bearing on that fact.

41. No argument has been advanced on behalf of the appellants that the cause or matter now subsisting in the within proceedings is liable to be defeated or adversely impacted by the non-joinder of Mr. Frank Ryan. Neither do they advance any argument that the proposed defendant is a person who ought to have been sued in the first instance or that the presence of the proposed defendant as a party rather than as a witness is necessary to enable the court to effectually adjudicate on all the questions involved in the subsisting proceedings as against the company in receivership.

42. It is acknowledged in the submissions and by the respondent that Mr. Ryan is likely to be called as a witness at the hearing of the action.

### **Balancing of Rights**

43. An application pursuant to O. 15, r. 13 necessarily involves the balancing of rights and it is appropriate that the court has due regard to the rights and interests of an existing defendant in that regard. As the trial judge correctly identified, a substantial aspect of the claim being articulated against the statutory receiver sounds in negligence and there are assertions of impropriety and "*mala fides*". These are wholly separate and distinct claims which fall entirely outside the existing action. It would operate unfairly and unreasonably upon the respondent were the within litigation to be overlaid with that corpus of claims by way of amended pleadings which, from the respondent's perspective, would undoubtedly have a significant adverse impact on the conduct of the proceedings with additional costs likely to be incurred. The duration of any likely hearing would be likely to be significantly extended.

44. The issue whether as a matter of law personal liability can attach to a statutory receiver in the discharge of functions pursuant to a collateral contract in the manner as is contended for by the appellants, is not sufficient in and of itself on the facts disclosed in the instant case to interfere with the exercise of discretion by the learned High Court judge.

45. As regards liability pursuant to s. 438 of the Companies Act 2014 such a claim does not readily align with the matters alleged against the existing defendant in the statement of claim delivered in these proceedings.

46. As was held by the Supreme Court in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* whereas the plaintiff may institute proceedings against any defendant without seeking the permission of anyone, the High Court undoubtedly has discretion as to whether or not to order the addition of a defendant such as Mr. Frank Ryan. Further, the existing defendant, Dwyer Properties Limited (in receivership) had locus standi to be heard in relation to whether a new defendant should be joined, as it might well cause prejudice such as delay or unnecessary additional costs if such a measure were taken.

47. The very distinct nature of the issues between the appellants and the proposed defendant appear to have been expressly acknowledged by counsel for the appellants and is also referenced in the outline legal submission filed at paragraph 3.1 where it is stated:

“On the hearing of the application it was submitted to the Court that the contract with regard to the tender process itself was subsidiary to or brought about the creation of a separate relationship other than and distinct from the ultimate contract for the sale of the lands. . . There were two distinct legal relationships: one between the Plaintiffs as potential purchasers and the Defendant owner of the lands, the second between the Plaintiffs and the Receiver in the context of the tender process.”

48. This points inexorably to the separate and distinct issues arising for determination as between the appellants and the existing defendant on the one hand and the appellants and the proposed defendant on the other. The trial judge correctly identified that the claims being articulated vis-à-vis the proposed defendant did not arise in the within proceedings. The mere fact that the allegations being advanced had their genesis in the tender process is not sufficient in and of itself to warrant joinder. None of the issues pleaded in the statement of claim warranted, required or justified the joinder of the statutory receiver as a defendant.

49. The objective underpinning O. 15, r. 13 is to achieve justice between parties so that a wrongdoer should not escape liability for some technical or legal reason where a correct party has not been joined in proceedings. O. 15, r. 13 vests considerable flexibility in the court to join a party either as a plaintiff or a defendant whenever it is considered necessary “effectually and completely” to adjudicate on all issues arising in the case.

#### **Henderson v. Henderson**

50. In addition the appellant contended that having regard to the principle in *Henderson v. Henderson* it is necessary that Mr. Ryan be joined now in these proceedings to forestall any contention later being advanced on behalf of the defendants or on behalf of Mr. Ryan that there was a failure to bring forward all claims expeditiously and simultaneously.

51. However the rule in *Henderson v. Henderson* is but an expression of the doctrine of issue estoppel. It cannot arise in the instant case in circumstances where the defendants have openly acknowledged and indeed the High Court has determined that the application is premature and that the pursuance of any claim against Mr. Ryan could only arise at the determination of the within proceedings and in light of any outcome and ensuing orders as might be made.

52. As regards the rule in *Henderson v. Henderson*, the appellants ought not to have any concern in that regard having regard to the acknowledgment on the part of the respondent that the rule was not engaged and did not arise in the instant case vis-à-vis the issues now being raised concerning Frank Ryan.

#### **Conclusions**

53. There is well-established jurisprudence that the court has jurisdiction for valid reasons to refuse to add parties for the purpose of introducing a new cause of action. The allegations being made in the grounding affidavit against the statutory receiver include, *inter alia*, *mala fides*, failure to comply with fair dealing obligations, failure to comply with statutory obligations pursuant to the Companies Act 2014, serious irregularities in the conduct of a tender process and wilful default in compliance with the discovery order of the High Court.

54. There was no satisfactory evidence which would have warranted the trial judge in concluding that it was “necessary” to join Frank Ryan to ensure that all matters in dispute were effectively dealt with such that he was rendered a proper party to the within proceedings.

55. It was appropriate for the trial judge to have regard to the nature and extent of the prejudice which the respondent has demonstrated it will suffer should the order be made including additional delays, additional witnesses, the addition to the length of the trial and the inevitable ensuing additional costs. It is clear that significant hardship would be visited upon the respondent should the order be made. Further, it is not shown to be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the cause or matter.

56. The issues arising *vis-à-vis* the statutory receiver are wholly distinct from the issues in the existing proceedings. The order is unwarranted and no case has been made out that it be justified having regard to the distinct nature of the respective claims.

57. It is not in the interests of justice in the circumstances that Mr. Ryan be joined as a defendant in the within proceedings since to do so runs the risk of adversely impacting on and prejudicing the respondent. In particular to do so would add substantially to the cost of the litigation and, far from saving time, most likely would result in significant further delays and add to the duration of the trial.

58. Clearly the High Court judge had jurisdiction to refuse to add parties particularly in circumstances where this would result in the introduction of new causes of action.

59. Since the appellants failed at the fundamental hurdle in satisfying the court that the joinder of Frank Ryan would be “necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions in the cause or matter”, before the High Court as envisaged by O. 15, r. 13 for the reasons as outlined above, I am satisfied that the decision of the trial judge ought not to be disturbed.

60. Accordingly I would dismiss this appeal.