

THE HIGH COURT

[2015/6744 P/2015]

BETWEEN

CHARLES KELLY LIMITED

PLAINTIFF

AND

ULSTER BANK IRELAND LIMITED

DEFENDANT

**JUDGMENT of Ms. Justice Reynolds delivered on the 9th day of August, 2019**

**Introduction**

1. The applicant, William Kelly, a litigant in person, seeks to be joined as a notice party to the within proceedings. Before engaging with the merits or otherwise of his application, it is necessary to set out some of the history to the protracted litigation in this matter.

**Background**

2. These proceedings succeed s.205 proceedings commenced in 2008 between the then directors and shareholders of the plaintiff company and entitled Edward Gerard Kelly, petitioner and William Kelly and Charles Kelly Limited, respondents 2008 No. 402 COS. Those proceedings were substantially determined by the High Court (Laffoy J.) in four separate reserved judgments delivered between February 2010 and July 2012.
3. In the course of those judgments the court held, *inter alia*, as follows: -
  - “(a) that William Kelly had exercised his powers as a director of the company in a manner oppressive to the petitioner within the meaning of s.205(1) of the Companies Act 1963, and
  - (b) that there had been a total breakdown in the relationship of the petitioner, Edward Gerard Kelly and the respondent, William Kelly, that they were deadlocked to the extent that they were incapable of running the company properly together and that the situation was irretrievable.”
4. Arising from ancillary orders made by the court, William Kelly is no longer a director or shareholder of the company. Gerard Kelly (otherwise known as Edward Gerard Kelly) is now the sole shareholder and remains a director of the company.
5. The decisions of the High Court remain under appeal and the company maintains that William Kelly has been guilty of extraordinary delay in prosecuting his appeal.
6. In the within proceedings, the company seeks damages for negligence, breach of duty, breach of statutory duty and/or breach of fiduciary duty arising from various complaints made against the defendant (“the Bank”), which can be summarised as follows: -
  - (a) an allegation that the Bank honoured payments drawn on the accounts of the plaintiff which were not validly submitted.

- (b) an allegation that the Bank wrongly permitted the company to exceed its overdraft limit of €1.6m.
  - (c) an allegation that the Bank wrongfully refused to transfer the liabilities of the company from its overdraft facility to one or more term loan facilities.
7. This Court has already dealt with an application by the Bank in the within proceedings for security for costs which was acceded to by Order dated 13th February, 2019.

**Application to be joined as a Notice Party**

8. At the outset, it is notable that the Bank is adopting a neutral stance in relation to this application.
9. As stated above, the crux of the plaintiff's claim is that the Bank facilitated alleged misappropriation of company funds and further facilitated reckless lending/borrowing by the company.
10. The Bank has filed a full defence and has further raised two preliminary issues as follows:  
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- (a) that the proceedings are statute barred, and/or
  - (b) that the company's claim of negligent and/or reckless lending is not a cause of action known to the law in this jurisdiction.
11. Mr. William Kelly was granted leave by Ms. Justice Pilkington to bring the within application to be joined as a notice party in circumstances where he contended that he had a material and vital interest in the outcome of them. He further contends that it will save time and costs and define the issues between the parties. He maintains that the proceedings are without foundation and indeed are statute barred.
12. In his grounding affidavit, he summarises the factual background between the parties and clearly seeks to reopen and relitigate matters that have already been determined by Ms. Justice Laffoy and are the subject matter of a pending appeal.

**The company's position**

13. In his replying affidavit on behalf of the company, Mr. Gerard Kelly vehemently objects to the within application. He posits that it is entirely misconceived, would undoubtedly lead to increased costs and delay and further is an abuse of process. In circumstances where Mr. William Kelly is neither a director nor a shareholder of the company, Mr. Gerard Kelly maintains that he has no basis to interfere in the current proceedings.
14. Further, he contends that it has not been possible to comply with all of the previous orders of the High Court in circumstances where Mr. William Kelly has failed to repay the sum of €165,000 to the company as directed by the court (the sum used by Mr. William Kelly to discharge legal fees in the earlier proceedings and the subject matter of an allegation in the within proceedings that the Bank wrongfully honoured this payment out of company accounts). In addition, a number of properties were directed to be

distributed *in specie* to Mr. William Kelly. It has not been possible to complete the transfers due to Mr. Kelly's failure to pay the sum of €165,000 and due to his unwillingness to cooperate in the transfer.

15. In summary, Mr. Gerard Kelly contends that the within application is being maintained with a view to launching a collateral attack on the findings of Ms. Justice Laffoy and to intermeddle in the within proceedings for Mr. William Kelly's own self-interest.

#### **The applicant's reply**

16. Mr. William Kelly by way of reply maintains that it is in fact Mr. Gerard Kelly who is seeking to relitigate the s.205 proceedings. Further, he contends that he can be of material assistance to the Bank in its defence of these proceedings and asserts that his joinder to the proceedings would minimise costs, not increase them.

#### **Law**

##### **Rules of the Superior Courts**

17. Order 15 Rule 9 of the RSC states:

"Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the Court to defend, in such cause or matter, on behalf, or for the benefit, of all persons so interested".

18. Order 15, rule 13 provides that:

"...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."

##### **Caselaw**

19. It is clear that there are a number of authorities which oppose allowing a party to be joined as a party against the will of the plaintiff in civil proceedings.

20. *In Barlow v Fanning & Ors* [2002] 2 IR 593, the Supreme Court held that: -

"a person could be joined as a defendant against the wishes of the plaintiff only in exceptional circumstances".

In that case, Professor Fanning was head of the Department within the University in respect of whom allegations were made. It was clear that in the course of the hearing, it was possible that adverse findings could be made which would reflect on him and his reputation. Notwithstanding that, the Supreme Court was not prepared to join Professor Fanning in the proceedings where there were no "exceptional circumstances".

21. In *YAP v. Children's University Hospital Temple Street Limited* [2006] IEHC 308, Clarke J. in refusing an application to join a notice party referred to "the obligation on the courts to keep private proceedings down to the parties whom the plaintiff chooses" and further noted that the facts in the case could not be distinguished in any material way from the facts in the *Barlow* case.

22. This position, however, appears to have been somewhat eroded by latter case law. In *Dowling & Ors v. Minister for Finance & Ors*, [2013] IESC 58, the Supreme Court held as follows: -

"Looking at the matter from the point of view of principle and, without reference to the applicable Rules governing the joinder of parties, it is clear that the position is significantly different depending on whether the proceedings are purely civil and private or whether they concern issues of public law. In civil litigation, generally speaking parties are allowed to choose whom they wish to sue. In matters of public law persons other than the public authority may have a real and substantial interest in the outcome...

Civil and public law proceedings are not, however, in completely watertight compartments. There is an underlying principle that a person is entitled to participate in proceedings which are capable of adversely and directly affecting his or her substantial interests".

23. In *Dowling* the Supreme Court relied on its previous decision in *BUPA Ireland Ltd & BUPA Insurance Ltd v Health Insurance Authority & Ors* [2005] IESC 80. That case began as a Judicial Review, to which V.H.I. were a notice party. The reason why V.H.I. was joined and was able to remain being joined was in part because what BUPA was seeking to do was to set aside the exercise of a statutory regime in respect of risk equalisation which would, in practice, have the effect of significantly affecting the funding of V.H.I. Therefore, V.H.I. was directly affected by any order that might be made by the court.

24. In analysing this decision in *Dowling*, Fennelly J. noted: -

"This Court, in *BUPA*, was primarily of the view that the judicial review rules provided the framework for the decision and that the High Court judge in that case had been mistaken in considering the matter in the light of Order 15, Rule 13 and the decision in *Barlow v Fanning*, cited about. It concluded, nonetheless, that, even if Order 15 were to be treated as applicable, V.H.I. should still be joined because the Court was "strongly of the view that this case does involve exceptional circumstances and that the continued presence of the notice party in the proceedings is 'necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter'." (Page 214 [of *BUPA*] )

25. Thus, it appears that in public law proceedings such as Judicial Review, applications of this nature are to be considered under the provisions of Order 84 of the rules which

provide that any person who has an interest in the proceedings may be joined to them. Otherwise, Order 15 as cited above would seem to apply.

26. In determining the within application, this Court must therefore consider whether Mr. William Kelly has an interest in the outcome of the proceedings and whether his joinder to the proceedings is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter.

### **Conclusions**

27. It is evident that Mr. William Kelly is misguided in his view that the outcome of the within proceedings will have some effect on his pending appeal. This is clearly not the case. He has at all times accepted that he utilised company funds to discharge his legal fees in the earlier proceedings, therefore, this issue is not in dispute either in these proceedings or indeed in his appeal.
28. In relation to the other outstanding issues to be determined in these proceedings, again it is of no interest to Mr. William Kelly whether the company succeeds or not as he is neither a director nor shareholder of same. He has set out his position on affidavit and it is now a matter for the Bank as to whether or not they choose to call him as a witness at the hearing.
29. It is manifestly apparent that the issues that Mr. William Kelly seeks to have addressed in these proceedings are precisely the same issues that have already been determined by Ms. Justice Laffoy in excess of seven years ago and it is now a matter for him to prosecute his appeal without further delay.
30. I am not satisfied that his joinder to the within proceedings is necessary to enable an adequate and proper adjudication upon the matters at issue herein. Whilst it seems somewhat inevitable that his actions and position within the company will be of no little significance in the course of the hearing, nonetheless it seems to me that he has failed to sufficiently demonstrate that his interests are capable of being adversely and/or directly affected by the outcome of these proceedings. These are private civil proceedings as between the company and the Bank and Mr. William Kelly has failed to establish how he has an interest in the outcome of same to the satisfaction of this Court.
31. For all of these reasons I must refuse his application.