

THE HIGH COURT

[2015 No. 355SP]

BETWEEN:

ANTHONY J. FITZPATRICK

PLAINTIFF

-AND-

DANIEL J. BYRNE, TARA BYRNE, PRACTISING UNDER THE STYLE AND TITLE OF DANIEL J. BYRNE SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Twomey delivered on the 30th May, 2016.

Introduction

1. This case involves an application against a solicitor by a client by way of summary summons. The client, Mr. Fitzpatrick seeks possession of his files pursuant to *Order 3, rule 19* of the Rules of the Superior Courts. At its heart, the case concerns the interpretation of *Order 3, rule 19* and in particular whether an application by way of summary summons by a client for his files from his own solicitor should be granted, where there are other proceedings (in this case a negligence action) between that client and his solicitor, pursuant to which the application for possession of the files could be made by that client.

2. This is an issue for this Court's consideration because the express terms of *Order 3, rule 19* permit an application by way of summary summons for "*the delivery by any solicitor of deeds, documents and papers where there is no pending proceeding in which the application may be made*" (emphasis added). This case involves a consideration of the meaning of this rule in the particular circumstances of this case.

Background

3. The plaintiff is an accountant and the first defendant is a solicitor who acted for the plaintiff. The second defendant is a solicitor, who does not hold a practising certificate and the plaintiff alleges that he provided legal services in conjunction with the first defendant, even though he did not hold a practising certificate at the relevant time. The proceedings have not been served on the second named defendant. The first defendant denies that the second defendant provided any legal services to the plaintiff.

4. At the hearing of this matter, the plaintiff clarified that he was not seeking an order for discovery, notwithstanding that this is set out in his Special Endorsement of Claim. Rather, he is seeking an Order compelling the first defendant to deliver certain files relating to the following three cases conducted on his behalf by the first defendant and, he alleges, by the second defendant:

- *Mount Kenneth*, High Court record number 2005/1657P, Supreme Court Appeal, record number 242/251
- *Fitzpatrick v. Tobin*, Record No. 2010 8636P
- *O'Meara v. Fitzpatrick* Record No. 2010 8525P

Further or in the alternative the plaintiff is seeking an order compelling the first defendant to permit the plaintiff's solicitor to photocopy the files referred to above, at the plaintiff's expense.

5. In the Special Endorsement of Claim in this case, the plaintiff refers to a Plenary Summons which he has issued against the defendants, Record No. 2015 4918 in which he claims, *inter alia*, negligence. This allegation of negligence relates to the legal services provided in connection with the foregoing cases, by the first defendant and, he alleges, by the second defendant, even though he did not have a practising certificate at the relevant time. These plenary proceedings have not been served on either of the two defendants.

6. There are costs in excess of €680,000 which are allegedly due from the plaintiff to the first named defendant arising from the work done on these files. These alleged costs are subject to a Special Summons Record No. 2012/2323S issued by the first named defendant against the plaintiff, which Special Summons was rejected by the Master of the High Court but this rejection is subject to an appeal to the High Court which has not yet been heard.

7. These alleged costs are also subject to the taxation process, which was commenced by the plaintiff signing a requisition to tax and the taxation of costs hearing has not yet been commenced by the Taxing Master.

8. Against this background, the affidavit dated 3rd December, 2015, in these proceedings sworn on behalf of the plaintiff by Mr. McGonagle, solicitor for the plaintiff states that:-

"...my client requires his files urgently to brief an expert witness whose opinion will form the basis of negligence proceedings my client is bringing against the Defendants."

9. The first defendant agreed by letter dated 15th September, 2015, to the plaintiff to permit a legal costs accountant on behalf of the plaintiff to '*solely inspect your files for the purposes of preparing for taxation*' since she asserted that she was exercising her common law lien over the said files subject to the discharge by the plaintiff of all fees, outlay and taxes due thereon.

10. The Special Summons before this Court is being brought by the plaintiff pursuant to *Order 3, rule 19*, which states:-

"Procedure by special summons may be adopted in the following classes of claims-

19 . Applications for the taxation and delivery of bills of cost and for the delivery by any solicitor of deeds, documents and papers where there is no pending proceeding in which the application may be made."

11. During the course of the hearing, the first defendant undertook to provide access to the third listed file, the O'Meara file, to a legal expert employed by the plaintiff for the purposes of the plaintiff's negligence action against the defendants. Accordingly, the Court is only concerned with the Mount Kenneth and Tobin files.

12. The issue in this case therefore is whether under *Order 3, rule 19*, the plaintiff is entitled to have access to these two files in order to brief an expert witness for the purposes of his negligence action against the defendants, since it is under this rule that he has brought this special summons.

Analysis

13. To this Court, the language of *Order 3, rule 19* could not be clearer; an application cannot be made under the special summons procedure for a solicitor's files if there are pending proceedings in which the application may be made.

14. This Court has to assume that this pre-condition, to the Special Summons procedure being available for access to a solicitor's files, was inserted for a good reason by our law makers. In this regard, it is relevant to note that under *Order 1, rule 6* of the Rules of the Superior Courts, apart from proceedings to take a minor into wardship, in all proceedings commenced by originating summons, then procedure by plenary summons is mandatory, except where procedure by summary or special summons is required or authorised by the Rules.

15. It is clear therefore that a plenary summons is the default form of summons for litigation in these Courts. Thus, when *Order 3, rule 19* refers to '*where there is no pending proceeding in which the application may be made*', the default position is that those proceedings will be plenary proceedings. Plenary proceedings involve a hearing based on oral evidence, which is particularly suited to actions where disputes over issues of fact may be tried, unlike a Special Summons where all evidence is provided by affidavit.

16. Accordingly, it is this Court's view that the rationale for the pre-condition in *Order 3, rule 19* regarding access to a solicitor's files by his client, is that where there are other proceedings in being, which are likely to be plenary proceedings, then since such plenary proceedings are better suited to resolving issues of fact than special summons proceedings, it is preferable that such a dispute should be dealt with in those other proceedings, rather than using the special summons procedure.

17. Viewed from this perspective, the pre-condition in *Order 3, rule 19* makes imminent sense in this Court's view. Another possible rationale for the rule is that it seeks to avoid a situation where a defendant is subject to several and unnecessary sets of proceedings in relation to the same dispute (if they could be dealt with in the extant proceedings between the parties). This rationale should also have the advantage of leading to a saving of scarce court resources by avoiding a multiplicity of proceedings.

18. For these reasons, the pre-condition in *Order 3, rule 19* is not one that can simply be ignored by this Court. It is also relevant that the wording of the order itself does not envisage any exceptions. Since it is not this Court's job to re-write the law, this Court cannot see how it can depart from the strict wording of *Order 3, rule 19* to grant the plaintiff the application he has sought under that rule, since he is a plaintiff who has pending proceedings in which the application can be made.

19. Reference was however made on behalf of the plaintiff at the hearing to *Order 3, Rule 22* which provides that:-

"Procedure by special summons may be adopted in the following classes of claims-

22. Such other matters as the court may think fit to dispose of by special summons."

20. It is this Court's view that the intention behind *Order 3, rule 22* is not to permit the Court to ignore the express terms of earlier rules and grant relief where it is prohibited under earlier rules. Rather, it is this Court's view that the rationale for *Order 3, rule 22* is to provide for exceptional cases which are not covered by the earlier rules e.g. as in the case of *McKenna v. J.G.* [2006] IEHC 8, in which Finnegan P. dealt with an application under s. 4 of the Proceeds of Crime Act, 1996, by special summons, even though applications under the Proceeds of Crime Act, 1996, are not listed in *Order 3*.

21. This is not such a case since the plaintiff's case falls four square within the express terms of *Order 3, rule 19* and there is no need to look outside this rule. Furthermore, the Court does not see any injustice in requiring the defendant to comply with the strict terms of the Rules of the Superior Courts and seek access to the files pursuant to the plenary proceedings he has instituted against the defendants. Accordingly, this Court sees no basis for dealing with this matter under *Order 3, rule 22*.

22. Reference was also made on behalf of the plaintiff to *Order 3, rule 21* which states:-

"Procedure by special summons may be adopted in the following classes of claims-

21. Any other proceeding which is required or authorised by law and for which no other procedure is prescribed by these Rules."

23. As is clear from its face, a pre-condition to this rule applying is that there be no other procedure prescribed by the Rules available to the plaintiff. So for example in *Bank of Ireland v. Coleman* [2006] IEHC 337, Laffoy J. permitted an application by way of special summons to enforce a solicitor's undertaking on the grounds that there were no existing proceedings in which the application could be brought.

24. However, it cannot be said that the plaintiff in this case does not have any other procedure under the Rules pursuant to which he can seek to access his files. If he had not instituted plenary proceedings against the defendants, he could seek his files under *Order 3, rule 19*. Because he has instituted plenary proceedings, *Order 3, rule 19* obliges him to seek those files pursuant to those proceedings, which is likely to mean pursuant to the discovery rules set out *Order 31*. Therefore he has a procedure prescribed by the Rules enabling him to seek access to his files. On this basis *Order 3, rule 21* has no application to his case.

Conclusion

25. For the foregoing reasons and primarily the express wording of *Order 3, rule 19*, which provides that it is a pre-condition to such an application being made, that there be no other proceedings in which the application could be made (which is not the case here), this Court finds that the plaintiff is not entitled to bring the special summons to seek access to the two named files in the possession of his solicitor. Accordingly the relief is refused.