

**THE HIGH COURT**  
**COMMERCIAL**

[2012 No. 5845 P]

**BETWEEN**

**ABBEEY INTERNATIONAL FINANCE LIMITED**

**PLAINTIFF**

**AND**

**POINT IRELAND HELICOPTERS LIMITED**

**AND ELITALIANA S.p.A.**

**DEFENDANTS**

**NOTE OF A JUDGMENT delivered by Mr. Justice Kelly on the 27<sup>th</sup> day of July, 2012**

**Foreword**

1. This is a note of a judgment which I delivered ex tempore. As the judgment dealt with a number of important procedural issues, I indicated to the parties that I would reproduce that part of it in the form of a written judgment. This I now do.

**Background**

2. The plaintiff is a limited company registered in Ireland. It is engaged in the leasing of aircraft. The profits derived from that activity are used by it to support various charities.

3. The first defendant is an Irish company and is described as a special purpose vehicle which was established in order to effect the leasing transactions the subject of this litigation. The second defendant is an Italian company and is a member of the Point Aircraft group of companies.

4. This litigation concerns three aircraft and a medical kit. All three aircraft are helicopters. Lease agreements were entered into in respect of them between the plaintiff and the first defendant on 25<sup>th</sup> August, 2008, 25<sup>th</sup> March, 2009 and 29<sup>th</sup> September, 2009. The medical kit lease is dated 21<sup>st</sup> October, 2008. There were then subleases entered into as between the defendants in respect of the helicopters and the medical equipment. Two of the helicopters are, at present, in Kosovo and the other is in Italy.

**Plaintiff's Case**

5. It is the plaintiff's case that there has been default in respect of rental obligations under the leases and subleases. That much was conceded by counsel on behalf of the defendants who accepted that arrears of €3,195,000 are owing. That is a remarkable situation, given the importance which the lease attributes to the payment of rent. For example, clause 4.5 says:-

*"The lessee's obligation to pay rent and other amounts due hereunder shall be absolute and unconditional."*

6. The lease goes on to say:-

*"The lessee acknowledges and agrees that its obligation to pay all amounts to rent due and owing under the terms hereof for so long as this lease is continuing shall be absolute and unconditional and shall not be affected by any circumstance whatsoever, including without limitation, any set off or counterclaim or defence or other right which the lessee may have, any lack or invalidity or defect in title, condition, design or operation of the aircraft, any charge or lien on the aircraft, any invalidity or unenforceability or lack of power of the lessee to enter into this lease, or any insolvency event against the lessor, the lessee or any other person."*

7. Clause 4.6 of the lease contains an express proviso that:-

*"The lessee shall pay the rent and other amounts without set off or counterclaim and free of any deductions or withholdings other than those required by law."*

8. The lease also contains a "hell and high water" clause at para. 4.13 which is in the following terms:-

*"The lessee's obligation to pay rent and make other payments in accordance with this agreement shall be absolute and unconditional irrespective of any contingency whatsoever, including, but not limited to:*

*(a) any right of set off, counterclaim, recoupment, defence or other right.*

*(b) any unavailability of the aircraft for any reason.*

*(c) any failure or delay on the part of either party hereto, whether with or without fault on its part in performing or complying with any of the terms or conditions of this agreement.*

*(d) any insolvency, bankruptcy, administration, reorganisation, arrangement, readjustment of debt, dissolution, liquidation or similar proceedings by or against the lessor or lender.*

(e) any lack of due authorisation of, or other defect in this agreement.”

9. It is difficult to conceive more watertight obligations to pay rent in accordance with the terms of the lease. Yet it is a fact that almost from the very beginning there has been default on the part of the first defendant in respect of the discharge of those obligations.

10. Given that situation, it is hardly surprising that on 11<sup>th</sup> June of this year, the plaintiff served notice of termination of the leases and subleases and went about exercising its rights under the security assignments. Shortly thereafter, on 14<sup>th</sup> June, 2012, it commenced these proceedings.

11. In this action, the plaintiff seeks both liquidated amounts and substantive relief in respect of the aircraft. In particular, it seeks an order for specific delivery up of the aircraft and the medical kit to the plaintiff. Given that mix of reliefs, the plaintiff opted to proceed by way of plenary summons.

12. The plaintiff contends that there is no defence to any aspect of this claim and it has brought the present motion seeking judgment for the entire of its claim. It thus seeks summary judgment for the monies due and delivery up of the aircraft. Alternatively, it seeks injunctive relief.

13. The first issue which arises is whether or not it is open to the plaintiff to bring a claim for summary judgment in respect of non-liquidated sums.

#### **Jurisdiction**

14. This court is all too familiar with the situation where a liquidated sum of money is the subject of an action commenced by summary summons. The rules of court specifically provide for judgment being marked in the Central Office of this court in default of appearance in such a case. An application can be made to the Master or the Court for summary judgment in respect of that type of claim when an appearance is entered. It is equally clear that if one brings a claim for a liquidated sum on a plenary summons, judgment for that sum can be obtained in the Central Office in the absence of any appearance being entered. In the event of there being an appearance, an application can be made to the Court for summary judgment in respect of the liquidated part of the claim.

15. But is it open to a plaintiff to seek summary judgment in respect of the un-liquidated claims?

16. I am satisfied that the answer to that question is in the affirmative. I come to that conclusion by reference to both the inherent jurisdiction of the court and the specific rules which apply to cases transferred to the Commercial List.

17. I can see no reason in either law or logic why a defendant who has no defence to a liquidated claim may be subject to an application for summary judgment, but, not be so in the case of an action seeking unliquidated damages or other substantive reliefs.

18. In proceedings seeking liquidated sums, a defendant has to put his defence on affidavit within a short period of time and have it judicially tested by reference to the – admittedly low – standard of proof which has to be achieved in order to avoid summary judgment. In the absence of an ability to seek summary judgment in a non-liquidated claim an unmeritorious defendant can procrastinate for months or perhaps years. That would be an obvious injustice to a plaintiff in such a case.

19. I believe there to be an inherent jurisdiction in the court to enable a plaintiff to seek summary judgment in such circumstances. It is true that there is no specific provision in the Rules of the Superior Courts to enable such an application to be brought, save in respect of cases in the Commercial List to which I will turn in due course. But the absence of a specific rule should not deny a meritorious plaintiff from speedy relief against an unmeritorious defendant in an appropriate case.

#### **Inherent Jurisdiction**

20. In *Barry v. Buckley* [1981] I.R. 306, Costello J. held that the court has an inherent jurisdiction to strike out or stay proceedings which are frivolous or vexatious or have no reasonable prospect of success. He said:-

*"But, apart from order 19, the Court has an inherent jurisdiction to stay proceedings and, on applications made to exercise it, the Court is not limited to the pleadings of the parties but is free to hear evidence on affidavit relating to the issues in the case: see Wylie's Judicature Acts (1906) at pp. 34-37 and The Supreme Court Practice (1979) at para. 18/19/10. The principles on which the Court exercises this jurisdiction are well established. Basically its jurisdiction exists to ensure that an abuse of the process of the Courts does not take place. So, if the proceedings are frivolous or vexatious they will be stayed. They will also be stayed if it is clear that the plaintiff's claim must fail."*

21. In this case, it is argued that a similar jurisdiction exists so that a plaintiff can obtain summary judgment without having to proceed to plenary hearing if a defendant does not have a statable defence. This proposition was alluded to by McCarthy J. in *Sun Fat Chan v. Osseous Limited* [1992] I.R. 425. At p. 428 he referred to the decision of Costello J. in *Barry v. Buckley* and commented as follows:-

*"In Barry v. Buckley Costello J. referred to the notes on that sub-section as set out in Wylie on the Judicature Acts. Since the matter has not been debated, I express no view upon the decision in Barry v. Buckley save to comment that applying the underlying logic, a defendant may be denied the right to defend an action in a plenary hearing if the facts are clear and it is shown that the defence is unsustainable. This appears to have been the net effect of the decision in the High Court (Dixon J.) in Dolan v. Neligan (1959) reported in its second phase in [1967] I.R. 247."*

22. That obiter statement of McCarthy J. accepts the logic and the justice in providing a mechanism for a plaintiff to obtain relief in all proceedings if the facts are clear and it can be demonstrated that there is no sustainable defence. Indeed, that position appears to have been accepted since at least 1959 having regard to the decision to which he refers in *Dolan v. Neligan*.

23. The mere fact that the Rules of the Superior Courts do not expressly provide for an application of this type is no bar to it being made successfully. The rules of court are the servants of justice, not its master. Support for this view can be obtained from the judgment of Geoghegan J. in *Dome Telecom Limited v. Eircom Limited* [2008] 2 I.R. 726. There, a question arose as to whether the defendant could be compelled by an order for discovery in respect of electronic data to create documents for the purpose of complying with the order. In the course of his judgment, Geoghegan J. said:-

*"My starting point would be that I would reject any idea that the right to discovery of documents should be exclusively based on an interpretation (literal or otherwise) of the relevant rule of court...."*

*In modern times, courts are not necessarily hidebound by interpretation of a particular rule of court. More general concepts of ensuring fair procedures and efficient case management are frequently overriding considerations. The 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."*

24. This quotation lends support to the plaintiff's contention. If there is an inherent jurisdiction to strike out proceedings which have no reasonable prospect of success then, in the interests of justice, why should there not, in an appropriate case, be a jurisdiction to adjudicate summarily upon a purported defence? If the defence offered is alleged to be lacking any reasonable prospect of success then the plaintiff should have the ability to seek to recover judgment regardless of the type of proceedings. I believe that there is no good reason why such an application cannot be brought and considered by the court.

### **Commercial List**

25. Quite apart from the inherent jurisdiction, it has to be borne in mind that this litigation is in the Commercial List. The purpose of setting up that list was, as I indicated in *IBB Internet Services Limited v. Motorola Limited* [2011] 2 ILRM 326, to achieve the objective of "speedy, efficient and just determination of commercial disputes".

26. Order 63A, rule 5, gives a wide discretion to make directions and orders as part of the case management of proceedings. It provides that:-

*"A Judge may, at any time and from time to time, of his own motion and having heard the parties, give such directions and make such orders, including the fixing of time limits, for the conduct of proceedings entered in the Commercial List, as appears convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings".*

27. That rule is supplemented by rule 6(1) which provides that, in order to facilitate the determination of proceedings in a manner which is just, expeditious and likely to minimise costs, a judge either of his own motion or on the application of a party can give directions in relation to a wide range of matters. These include whether proceedings shall continue to be heard without formal pleadings or to be heard on affidavit without oral evidence. The judge is also entitled to fix any issues of fact or law which fall to be determined in the proceedings.

28. These rules have been utilised in many cases to grant directions and make orders which facilitate the expeditious and cost effective management and disposition of commercial proceedings. Such directions have included the identification of issues so that evidence can be confined to the matters actually in dispute between the parties (*P.J. Carroll & Company Limited v. Minister for Health and Children* [2005] 1 I.R. 294); the directing of a modular trial (*McCann v. Desmond* [2010] 4 I.R. 554); the staying of proceedings where the court considers it just to do so as part of the case management of related proceedings, (*Kalax Fund Limited v. HSBC International Trust Services (Ireland) Limited* [2009] IEHC 457); the "telescoping" of the leave and substantive hearing in judicial review applications, (*Sweetman v. An Bord Pleanála* [2009] IEHC 174).

29. Given these wide powers, I am of opinion that it is open to a plaintiff in plenary proceedings being heard in the Commercial List to seek a summary disposal of them in circumstances where a defendant is alleged to be unable to demonstrate a real or *bona fide* defence. The ability to bring such an application promotes the objectives for which the Commercial List was established.

### **The Test**

30. The test which the court has to apply on applications for summary judgment in relation to liquidated claims has been the subject of many decisions in this Court and the Supreme Court. The number of these decisions has increased substantially in recent years given the collapse of the Irish economy.

31. The leading case on the principles to be applied is the decision of the Supreme Court in *Aer Rianta cpt v. Ryanair Limited* [2001] 4 I.R. 607. In her judgment, McGuinness J. endorsed the test laid down in *First National Commercial Bank v. Anglin* [1996] 1 I.R. 75 and summarised it as follows:-

*"Thus it is for this court to decide whether in the instant case the defence set out in the affidavits of Mr. O'Leary, together with the documents exhibited therewith, is credible, or in other words, whether there is a fair or reasonable probability of the defendant having a real or bona fide defence.... The court does not ask whether Mr. O'Leary's account of events is probable, or likely to be true; nor does it ask whether Mr. Byrne's account of events is more likely. The question is rather whether the proposed defence is so far fetched or so self contradictory as not to be credible."*

32. Hardiman J. in a concurring judgment formulated the test to be applied in the following terms:-

*"In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

33. I am of opinion that a similar test falls to be applied on an application for summary judgment in respect of a non-liquidated debt claim. Thus, a defendant has to surmount the same low threshold of proof in order to avoid summary judgment.

### **Afterword**

34. As this note has been prepared only in respect of the general procedural question, it is not necessary to deal with what occurred in this case in any detail. It is sufficient to record that summary judgment was given in respect of the liquidated claim for arrears of rent and conditional leave to defend was granted in respect of the other aspects of the claim.