

**THE HIGH COURT**

**[2011 No. 9478 P.]**

**BETWEEN**

**DAN O'MAHONY**

**PLAINTIFF**

**AND**

**KIERAN BUCKLEY, COLUM MURPHY AND O'MAHONY, WALSH & ASSOCIATES LIMITED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Michael White delivered on the 14th day of October, 2014**

1. This matter comes before the court by way of three separate motions. A motion issued by the first named defendant on 5th July, 2013, originally returnable for 16th September, 2013, seeking an order pursuant to O. 8, r. 2 of the Rules of the Superior Courts setting aside the order of the Master of the High Court made on 18th October, 2012, that the plenary summons issued on 21st October, 2011, be renewed from 18th October, 2012, for a period of six months.

2. The second named defendant issued a motion on 29th January, 2014, returnable for 27th March, 2014, seeking also an order pursuant to O. 8, r. 2 of the Rules of the Superior Courts setting aside the order of the Master of the High Court made on 18th October, 2012 that the plenary summons issued on 21st October, 2011, be renewed as of 18th October, 2012, for a period of six months.

3. There is also a third motion issued by the plaintiff against the second named defendant seeking summary judgment in the sum of €28,233, due to the second named defendant's failure to enter an appearance.

4. The matter came before this Court for hearing on 27th March, 2014 and having heard submissions, the court adjourned the matter and directed further affidavits be filed by the plaintiff.

**The Substantive Proceedings**

5. The plaintiff issued a plenary summons on 21st October, 2011. On 18th October, 2012, the Master of the High Court made an order that the plenary summons issued on 21st October, 2011, be renewed as and from 18th October, 2012, for a period of six months from the date of such renewal inclusive. The plenary summons was served on the first named defendant on 10th April, 2013, and on the second named defendant on 11th April, 2013. The statement of claim was delivered on 22nd November, 2013.

6. The proceedings relate to a property transaction whereby a property known as Keating's Bakery, Tramore Road, Cork, was purchased by a partnership on 1st March, 2005, for €4m and then subsequently resold. The plaintiff and the second named defendant were part of this partnership.

7. The second named defendant's firm, Colm P. Murphy & Company, Consulting Engineers, submitted a planning application 05/29808 for development of this property.

8. The first named defendant was engaged as the solicitor in his professional capacity to carry out the conveyancing work of the purchase and resale of the property.

9. The matters in dispute in the proceedings are payments made by the first named defendant in his professional capacity, from the proceeds of sale of the property. These payments were:-

(a) On 6th July, 2005, €84,700 paid to Colm Murphy, the second named defendant being a professional fee of €70,000 plus VAT for work done by him for the partnership in a separate capacity as a consulting engineer in connection with the planning application for the bakery property.

(b) On or about 6th July, 2005, the sum of €50,000 to O'Mahony Walsh, the third named defendants being a booking deposit for a property at Rathcormac, Co. Cork.

(c) A payment on 9th August, 2005, of €50,000 to Mr. Terence O'Leary, purported to be a refund due to Mr. O'Leary in respect of a personal cheque given by him for the purchase of another site at Ballymacoda, Co. Cork.

(d) A payment on 7th October, 2005, of €315,300 to Babington Clarke and Mooney Solicitors, understood to be part of the purchase monies for a site at Ballymacoda, Co. Cork.

10. The plaintiff has indicated he is not proceeding with the claim at (c) and (d) the sum of €50,000 paid to Mr. Terence O'Leary and the sum of €315,300 paid to Babington Clarke and Mooney Solicitors.

11. The plaintiff also is claiming a quarter of €84,700 from Colm Murphy being his share of the partnership liability, thus, the motion for judgment for €28,233.

12. The plaintiff claims the payments of €84,700 to Colm Murphy and €50,000 to O'Mahony Walsh were made without his knowledge or authority which is disputed by the first and second named defendants. The Court will not make any finding of fact on the substantive dispute, other than that which is required to be established to determine the reasons for the failure to serve the plenary summons within the twelve months from the date of issue. When the application was made to the Master of the High Court to renew the summons the Plaintiff did not swear an affidavit.

13. In his replying affidavit to the first named defendant's motion sworn on 12th September, 2013, the plaintiff in respect of service of the plenary summons stated at para. 24 of his affidavit:-

"I did not serve the plenary summons within the twelve months as I was in discussions with the first named defendant in an attempt to resolve matters personally with him, a fact he acknowledges within para. 14 where he states:-

'through 2010, 2011 and 2012, I received further telephone calls and correspondence from the plaintiff.'

I did not serve the pleadings as I hoped matters would be resolved between the parties and only served the within proceedings as a last resort. I confirm I applied *ex parte* to the Master of the High Court on 18th October, 2012, without a grounding affidavit and I am advised I was entitled to pursue matters in this manner as it was within the Rules of the Superior Courts. I personally appeared before him and explained why I wanted an extension to serve the proceedings contained herein. I explained to the Master that I had made copious efforts to get this matter resolved including what is set out above in this paragraph and I explained to the Master that I had been in touch with the garda authorities and I showed some correspondence which I had in relation to this. I now regrettably felt that the only way I could go forward was to proceed with the current litigation. Following this explanation, the Master acknowledged my request to an extension and granted the order which the court is now being asked to set aside."

14. When this matter came before this Court on 27th March, 2014, the court sought further clarification from the plaintiff in respect of the discussions referred to in his originally replying affidavit and also the copious efforts to get the matter resolved.

15. In his supplemental affidavit of 15th April, 2014, the plaintiff advanced another reason for the delay in serving the plenary summons within the twelve months. He stated that he had made an error in reading the note on the original plenary summons as to service and that it was only when receiving advice from a former solicitor did he realise he needed the permission of the Master of the High Court to renew the summons. He stated that in December 2011, he set about getting legal advice but was unsuccessful and alleges that one solicitor he retained was forced to come off record due to the receipt of threats.

16. The plaintiff accepted that he did tell the first named defendant he proposed to take various steps to ventilate the issue with a number of agencies as he hoped they would be of assistance in respect of a genuine grievance which he held because of his allegation that the first named defendant had failed to have explained at the appropriate time the reasoning behind the payments in dispute.

17. The first and second named defendants deny the plaintiff made any attempt to resolve the issues. Both the first and second named defendants on affidavit maintain that the plaintiff never entered into any form of negotiations to settle the matter. The first named defendant categorises the communication between him and the plaintiff as being accompanied by substantial threats including a threat to picket his office.

18. The first named defendant in his affidavit of 2nd July, 2013, and second affidavit of 7th May, 2014, states that through 2010, 2011 and 2012, he had given full explanations to the plaintiff of the payments made on behalf of the partnership but that he received further telephone calls and correspondence from the plaintiff in which he accused the first named defendant of dishonesty and corrupt practices and advised him that he proposed to complain to the Law Society, the Fraud Squad of An Garda Síochána, the Criminal Assets Bureau and the Revenue Commissioners and also to ventilate his grievances on local radio and to picket his offices.

19. The first named defendant referred to correspondence received from the plaintiff. The first named defendant particularly referred to a letter of 24th April, 2011, from the plaintiff to the first named defendant received by the first named defendant on 26th April, 2011, wherein the plaintiff stated:-

"I am appalled of the dubious way you operate your business. I am warning you that the Fraud Squad will be interviewing you in the next few weeks. I am also writing to the Law Society to stop you practicing or holding a practicing certificate. This is a very corrupt practice by you and your pal, Colm Murphy. I am demanding the Fraud Squad to send this file to Director of Public Prosecutions. Myself and my family hope to see you and your comen 'illegible' for this abuse."

20. The first named defendant at para. 15 of his affidavit of 2nd July, 2013, stated:-

"On 29th March, 2012, I visited the plaintiff at his office on the Kinsale Road, once more to see if I could address his concerns and dissuade him from picketing my offices. At that meeting, he showed me a series of printed posters apparently intended for use in picketing various offices including my own. At that meeting, the plaintiff agreed not to picket my office on a condition that I wrote to O'Mahony Walsh and to Colm Murphy making an inquiry on his behalf in relation to the relevant payments. The plaintiff undertook to me that he would cease further activity directed against me if I took those steps even if they proved fruitless for him. I took those steps and advised the plaintiff of the outcome but he has not complied with his undertaking to cease activity directed against me."

21. In his supplemental affidavit of 15th April, 2014, the plaintiff stated at para. 13:-

"I refer to para. 15 of the affidavit of Ciaran Buckley and confirm the first named defendant did attend my office on 29th March, 2012. I did state to the first named defendant that I would picket his office but did only so out of frustration at the continued failure of the first named defendant to adequately explain in any way or at all why he paid substantial monies from the client account and as a catalyst to bring this matter to a head. The first named defendant avers that your deponent indicated that I showed him printed posters in my office. It is expressly denied that your deponent had printed posters with the intention of picketing the offices of the first named defendant or any other office. I say that I always have a series of posters in my office which are used in everyday normal course of business or the advertising of the sale of lands and/or car auctions etc. I refer to the first named defendant's assertion wherein he states:-

'The plaintiff agreed not to picket my offices on condition that I wrote to O'Mahony Walsh and Colm Murphy making an inquiry on his behalf in relation to the relevant payments.'

I say that is correct and I was happy at this time that the first named defendant agreed to write to the second and third named defendants on my behalf making inquiries as to the relevant payments and believed I was finally making some progress in this matter and that I was finally going to recover the monies."

22. The relevant letter is a letter of 17th April, 2012, from Ciaran Buckley & Company Solicitors to the plaintiff which states:-

"I refer to our meeting at our offices on Thursday, 29th March last.

As instructed, I wrote to Colm Murphy and to O'Mahony Walsh in relation to the queries raised by you. I confirm that I have now received responses to my correspondence from both Mr. Murphy and Mr. Walsh.

You gave me a commitment at our meeting that provided I obtained responses from the parties involved that you would furnish me with a letter confirming that this ended my involvement in the matter. You also indicated that you would withdraw any further threat of pickets or of proceedings against this office.

I confirm that I will hand over the copy correspondence to you in exchange for the aforementioned letter. I am quite happy to meet you in person to exchange the relevant paperwork at a time that is convenient to you."

23. The first named defendant avers that he never received a response to that letter.

24. In response to the picketing allegation, the first named defendant in his replying affidavit of 7th May, 2014, states at para. 8:-

"Having done so previously by telephone, Mr. O'Mahony repeated the threat of picketing in the course of my meeting with him at his office on 29th March, 2012, when he pointed me to a number of placard type posters turned faced to the wall. He turned two of those placards out from the wall to face me so that I would read them. One of those two placards referred to me and the offer to O'Mahony Walsh. On that occasion I took a photograph of the placard referring to me with my camera phone. I beg to refer to a true copy of that photograph upon which marked 2KB2 I have signed my name prior to the swearing hereof."

25. The exhibit clearly shows a poster stating "please investigate Ciaran Buckley, Solicitor". In respect of the motion of the second named defendant, the plaintiff in his affidavit of 26th March, 2014, has set out the same reasons as against the first named defendant for failing to serve the plenary summons within the twelve month period of time.

26. The second named defendant in his replying affidavit filed on 16th April, 2014, stated at para. 11:-

"As Mr. O'Mahony never had any discussions with me with regard to the outstanding fees, I take serious issue with his averment at para. 38 of his affidavit when he says he explained on the *ex parte* hearing before the Master of the High Court that he made copious efforts to get this matter resolved. This quite simply is not true and he made no effort whatsoever to discuss these matters with me."

27. At para. 21, the second named defendant states:-

"I wish to refute and deny absolutely the averment of Mr. O'Mahony at para. 31 of his affidavit when he says that at all times he tried to negotiate a settlement of this matter. This is completely untrue and disingenuous of Mr. O'Mahony to state this and in particular when he fails to exhibit any correspondence whatsoever to this effect from himself, his previous solicitors, Maguire Desmond or any other solicitors acting for him since that time."

28. At para. 32, the second named defendant states:-

"Mr. O'Mahony states here that 'I explained to the Master that I had made copious efforts to get this matter resolved and I explained I had been in touch with the garda authorities and I showed some correspondence which I had in relation to this'. I deny yet again that Mr. O'Mahony had made any efforts whatsoever to resolve this matter even communicate with me and the reason offered to the Master is quite simply not sustainable given his complete failure to engage with myself or any other defendants in a timely fashion and in particular that he was dealing with professional defendants, whose career and reputation depends on their good name and standing in the community. I must have met Mr. O'Mahony at least a hundred times since 2007."

29. In respect of the plaintiff's difficulty with solicitors, there is no dispute that the plaintiff hired the services of Kieran Griffin and Company Solicitors in or around April 2008 and that firm was in correspondence on behalf of the plaintiff with the first named defendant's firm and that the first named defendant's firm had furnished to Kieran Griffin and Company Solicitors a complete copy of the files for the purchase and sale of the bakery property.

30. Separately, there is no dispute that in January 2009, the plaintiff retained solicitors, Maguire Desmond to write to the other members of the partnership in respect of these matters which are now in dispute.

### **Legal Principles**

31. Order 8, rule 2 of the Rules of the Superior Courts states:-

"In any case where a summons has been renewed on an *ex parte* application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order."

32. The principles are comprehensively dealt with in the High Court judgment *Chambers v. Kenefick* [2007] 3 I.R. 526.

33. Finlay Geoghegan J. stated at p. 529 of the judgment at para. 4:-

"The first issue which I have to address is the onus on a defendant who seeks to set aside an order for renewal of a summons made *ex parte*. The application is brought under O. 8, r. 2, which simply provides, 'In any case where a summons has been renewed on an *ex parte* application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order'. Counsel for the plaintiff submitted that the onus on the defendant is exclusively as set out by Morris J. in *Behan v. Bank of Ireland* (Unreported, High Court, 14th December, 1995). In that judgment Morris J. stated at p. 3:-

'In my view in moving an application of this nature the defendant takes upon itself the onus of satisfying the court that there are facts or circumstances in the case which if the court which made the order in the first instance, *ex parte*, had been aware, it would not have made the order. It is clear, in my view beyond dispute, that this

application is not to be dealt with on the basis that it is an appeal from the original order and, accordingly, it is incumbent upon the moving party to demonstrate that facts exist which significantly alter the nature of the plaintiff's application to the extent of satisfying the court that, had these facts been known at the original hearing, the order would not have been made."

34. Later at para. 6, Finlay Geoghegan J. stated as follows:-

"It appears to me that, in addition to the approach set out by Morris J., it is open to a defendant, by submission, to seek to demonstrate to the court that, even on the facts before the judge hearing the *ex parte* application, upon a proper application of the relevant legal principles the order for renewal should not be made."

35. Finlay Geoghegan J. went on to state at para. 8 on p. 530:-

"the submissions made on behalf of the defendant lead me to the conclusion that the proper approach of this court to determining whether or not it should exercise its discretion under O. 8, r. 1, where the application is based upon what is referred to therein as 'other good reason', is the following. Firstly, the court should consider is there a good reason to renew the summons. That good reason need not be referable to the service of the summons. Secondly, if the court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Thirdly, in considering the question of whether it is in the interests of justice as between the parties to renew the summons because of the identified good reason, the court will consider the balance of hardship for each of the parties if the order for renewal is or is not made."

36. In this case, there has been no reason advanced by the plaintiff of any difficulty serving the plenary summons within the twelve month period from 21st October, 2011. Both the first and second named defendants were easily amenable to service and there is no dispute that the plaintiff met the first and second named defendants on occasions during this period, but did not choose to serve the summons.

37. The court is satisfied that the plaintiff on affidavit has sought to mislead the court.

38. The plaintiff printed posters specifically identifying the first named defendant which he has denied on affidavit.

39. The reference made by the plaintiff to making copious efforts to resolve the matter is untrue

40. The method employed by the plaintiff during this period was one of threat. There is no evidence produced that there was any meaningful constructive efforts to settle these proceedings.

41. In respect of difficulty with solicitors, the undisputed evidence is that the plaintiff had retained the services of two firms of solicitors to act for him in these matters.

42. He may well have had difficulties in getting solicitors to act for him to issue this summons, but I do not see that as a good reason for the renewal of the summons.

43. Although there is no affidavit for the court to rely on, if the Master formed the opinion there had been genuine efforts to negotiate a settlement of this case and that was the reason for the renewal of the summons, he was misled.

44. It is entirely inappropriate to hold a High Court plenary summons in reserve and then to use it when the plaintiff deems it necessary to do so. This is precisely the tactic employed by the plaintiff.

45. I am satisfied that the application to have the Master's order set aside is an appropriate one, and I make that order accordingly. It follows that having done so I have to dismiss the plaintiff's motion for summary judgment against the second named defendant.