

## THE HIGH COURT

2017 No. 575 SP

BETWEEN

PERMANENT TSB PLC

(FORMERLY IRISH LIFE &amp; PERMANENT PLC)

PLAINTIFF

AND

GEOFFREY CARR

DEFENDANT

**JUDGMENT of Mr. Justice Garrett Simons delivered on 28 January 2019****INTRODUCTION**

1. This matter comes before the High Court by way of an application to discharge an order of the Master of the High Court ("*the Master*") purporting to dismiss the within Special Summons. The application to discharge is made pursuant to Order 63, rule 9 of the Rules of the Superior Courts. The impugned order is dated 5 October 2018, and was perfected on 9 October 2018.

2. For the reasons set out below, I have concluded that the plaintiff bank's application to discharge the order of the Master should be allowed.

3. It is well established that the Master has no jurisdiction to strike out a Special Summons. This principle has recently been confirmed in proceedings taken against the Master by way of an application for judicial review, *Allied Irish Bank plc v. Honohan* [2015] IEHC 247. Given the clear statement in that judgment that the Master has no power to strike out a Special Summons, it beggars belief that the Master continues to make orders purporting to strike out Special Summonses.

4. This course of conduct on the part of the Master simply serves to increase legal costs unnecessarily and to cause delay. It has no practical benefit whatsoever: the Master's purported order striking out a Special Summons will invariably be set aside on appeal. Moreover, in some instances the Master's conduct may give defendants a false sense of hope. A defendant may, mistakenly, think that there has been a lawful adjudication on the merits of their case, and that the matter has been resolved in their favour. In truth, the only forum which can adjudicate upon an application for an order for possession by way of Special Summons is the High Court. The Master has no adjudicative function in this regard. To state the obvious, the Master does not hold judicial office.

5. The proper forum for the adjudication upon an application for an order for possession is the High Court. The High Court will carefully consider whether the proofs for the application are in order, and will do so even in circumstances where a defendant has chosen not to appear before the court. Of course, if the defendant does appear, then they are entitled to be heard, either through solicitor and/or counsel or as litigants in person. If a defendant appears as a litigant in person, then the High Court will extend them every opportunity to advance whatever grounds of defence they wish to rely upon. The court will adjourn the matter if necessary to allow a defendant reasonable time to prepare for the hearing. Any ground of defence advanced in answer to the application for possession will be carefully considered by the High Court before reaching a decision—one way or the other—on the application. In those cases where an order for possession is granted, the High Court will often place a stay on the order for a short period of time to allow the affected party to arrange their affairs. If either party is dissatisfied with the decision of the High Court, then there is a right of appeal to the Court of Appeal.

6. The foregoing represents a very concise description of the procedure before the High Court. As appears, the procedure before the High Court is more than ample to ensure fair procedures to both parties, and to protect the rights of a defendant in particular. This procedure does not require—nor permit—the Master to make any substantive adjudication. The rights of both parties are instead protected by the High Court.

7. The role of the High Court can be illustrated by reference to the facts of this case. As explained in more detail presently, the Master raised a concern as to the absence of a map purporting to identify the property the subject of the mortgage. The deed of mortgage, which has been exhibited in the proceedings, expressly refers to a map. The plaintiff bank, seemingly, maintains the position that the absence of the map does not prevent it from seeking an order for possession. This is a matter which will have to be adjudicated upon by the High Court at the full hearing of the application for an order for possession. Without in any way wishing to prejudice the outcome of such application, it might be the case that, following a full hearing, the High Court concludes that the mortgage is deficient and that an order for possession should not be made. For present purposes, what is relevant is that the function of carrying out this adjudication resides solely with the High Court. It is not a matter within the jurisdiction of the Master. The defendant's rights will be fully protected by the High Court.

8. Finally, for the avoidance of any possible doubt, I reiterate that I have formed no view as to the merits of the application for an order for possession in this case. This judgment is confined solely to the issues arising from the purported order of the Master.

**PROCEDURAL HISTORY**

9. These proceedings seek an order for possession of lands and premises in Nenagh, County Tipperary. The title to the lands is unregistered. The application for the order for possession is grounded on a deed entitled "Mortgage and Charge" said to have been entered into between the plaintiff bank and the defendant. The deed is dated 20 April 2005. The deed appears to have been registered at the Registry of Deeds (Dublin) on 4 August 2005.

10. Given the events which occurred before the Master in October 2018, it is necessary to refer to the description of the lands as per the deed, as follows.

"ALL THAT AND THOSE THE DWELLINGHOUSE AND PREMISES SITUATE AT CARNEY COMMONS, CARNEY, NENAGH, IN THE COUNTY OF TIPPERARY FORMING PART OF THE LANDS OF COMMONS OF CARNEY WITH ALL BUILDINGS THEREON CONTAINING 0.27 HECTARES OR THEREABOUTS STATUTE MEASURE ADJOINING THE COUNTY ROAD IN THE TOWNLAND OF GLENAVEIGH IN THE PARISH OF KILBARON IN THE ELECTORAL DIVISION OF FINNOE AND COUNTY OF TIPPERARY WHICH

SAID PLOT OR PIECE OF LAND IS MORE PARTICULARLY SHOWN ON A MAP ATTACHED HERETO AND THEREON OUTLINED IN RED."

11. The Special Summons was first issued on 27 November 2017. The plaintiff bank subsequently sought to amend the schedule to the Special Summons in order to correct an error in relation to the description of the lands. More specifically, the original version of the schedule to the Special Summons had referred to the lands being "more particularly shown on a map attached hereto", i.e. a map attached to the Special Summons. The plaintiff bank sought to omit the word "hereto", and to replace it with a reference to the deed of conveyance under which the defendant is said to have acquired his interest in the lands from the vendor.

12. The explanation for the amendment was stated as follows in the Affidavit of Austin Gill sworn herein on 1 June 2018.

"5. I say and believe that the reason why the amendment is sought is because there is, in fact, no map identifying the property attached to the Special Summons while the amendment will clarify and identify in greater detail the property the subject matter of these proceedings. In this regard, I beg to refer to the Indenture of Conveyance dated the 20th April 2005 which is exhibited with the letters "JOB7" in the Verifying Affidavit of Jacqueline O'Brien sworn on the 11th December 2017."

13. The High Court (McDermott J.) made an order as follows on 25 June 2018.

"IT IS ORDERED that

1). pursuant to Order 28 of the Rules of the Superior Courts the Plaintiff be at liberty to amend the Original Special Summons by substituting the words '*to the Indenture of Conveyance made on the 20th day April 2005 between Margaret Marie Schlag of the one part and Geoffrey Carr of the other part and referred to in the Second Schedule therein*' for '*hereto*'

2) pursuant to Order 10 Rule 1 of the Rules of the Superior Courts the Plaintiff is granted liberty to serve on the Defendant the Special Summons any further pleadings and documents by posting a copy of the door at Carney Commons Carney Nenagh County Tipperary."

14. As appears from the foregoing, the plaintiff bank seems to be relying upon a map attached to the deed of conveyance by which the defendant acquired the property from the vendor. This latter deed has been exhibited in the proceedings, and does appear to have a map annexed thereto. However, the plaintiff bank has yet to explain on affidavit the absence of a map from the deed of mortgage and charge as exhibited in the proceedings.

15. It seems that when the Special Summons next appeared in the Master's List (5 October 2018), the Master raised a concern that there is no map attached to the version of mortgage and charge which has been exhibited in the proceedings. According to the affidavit filed on behalf of the plaintiff bank in support of its application to discharge the order, the Master suggested that it would be necessary for the plaintiff bank to apply for an order for rectification in respect of the mortgage deed. At all events, the Master purported to strike out the Special Summons.

#### **POSITION OF THE DEFENDANT**

16. There has been no attendance by the defendant, nor has he sought to file an affidavit in the proceedings. It seems from the affidavit sworn by the summons server, Brendan Keane, dated 30 May 2018 that Mr Keane has been informed that the property is vacant and has been so for a number of years.

"6. On Thursday, 15th March 2018 at 10.20 am, I called to the aforesaid address and found the said property to be vacant. I then made local enquiries and was informed that the security property has not been lived in for seven years. I beg to refer to photographs I took at the time upon which exhibit sheet, pinned together and marked with the inscription "DN1", I have endorsed my name prior to the swearing hereof.

7. Accordingly, I say to the best of my knowledge, information and belief that the security property at Carney Commons, Carney, Nenagh, Co Tipperary is vacant and abandoned."

#### **APPLICATION TO DISCHARGE MASTER'S ORDER**

17. The application pursuant to Order 63, rule 9 came on for hearing before me on Monday 14 January 2019. Counsel on behalf of the plaintiff bank, Mr Gavin Miller, BL, relied on the case law discussed under the next heading.

#### **CASE LAW ON THE MASTER'S JURISDICTION**

18. The limited nature of the Master's jurisdiction has been confirmed in a number of recent judgments of the High Court and the Court of Appeal.

19. Before turning to consider these judgments, it may be useful to flag that some of the judgments are concerned with the Master's jurisdiction in respect of Summary Summons proceedings, rather than Special Summons proceedings. These judgments are nevertheless informative as to the limited nature of the functions which have been conferred on the Master generally.

20. As an aside, it should be noted that the President of the High Court has very recently issued a Practice Direction dated 23 January 2019 in respect of Summary Summons proceedings in the following terms.

"HC84 - Motions for judgment in summary summons proceedings

Pursuant to the provisions of Section 10 of the Courts (Supplemental Provisions) Act 1961 I hereby direct that from Monday 4th February, 2019 all motions seeking liberty to enter final judgment pursuant to Order 37, rule 1 of the Rules of the Superior Courts shall, in lieu of being set down for hearing before the Master of the High Court, be set down for hearing before a Judge of the High Court and shall be listed in a common law motion list on an appropriate Monday.

Peter Kelly,

President of the High Court".

### **Allied Irish Bank plc v. Honohan**

21. The judgment of most immediate relevance is that of the High Court (O'Malley J.) in *Allied Irish Bank plc v. Honohan* [2015] IEHC 247 ("*Honohan*"). The proceedings in *Honohan* took the form of an application for judicial review as opposed to an application pursuant to Order 63, rule 9 of the Rules of the Superior Courts.

22. On the facts, the Master had purported to make an order striking out a Special Summons issued by the applicant banks. The Master had earlier indicated that he would be referring the papers in the case to the Director of Public Prosecutions ("*DPP*") because he (the Master) considered there to be an issue of perjury pertaining to one or more of the affidavits sworn by the bank officials in that case.

23. The reliefs sought by the applicants in *Honohan* included declarations to the effect that the Master has no jurisdiction to go beyond the provisions of Order 38, rule 6 of the Rules of the Superior Court, and to inquire into the substantive content of affidavits filed in proceedings. Order 38 provides that every Special Summons is to be returnable before the Master. Rule 6 provides as follows.

"6. In all cases in which he shall not have jurisdiction [...] the Master shall transfer the summons, when in order for hearing, to the Court list for hearing on the first opportunity."

24. The High Court (O'Malley J.) made the following four findings in relation to the jurisdiction of the Master, before making an order of *certiorari* quashing the purported order of the Master striking out the Special Summons.

"162. Having regard to the authorities cited above, certain propositions relevant to this case seem to be beyond dispute. The first is that the respondent only has powers where such are given to him by statute, the Rules, or (in some circumstances) allocation by the President of the High Court. The second, arising from the first, is that he has no power to take a step which amounts to a determination of the rights and liabilities of parties save where he has jurisdiction to do so. The third is that he has no function in assessing the veracity or accuracy of affidavits in cases where he does not have jurisdiction. The fourth is that he has no power to strike out a special summons."

### **ACC Bank PLC v. Tobin**

25. The next judgment of interest is that of the High Court (Laffoy J.) in *ACC Bank PLC v. Tobin* [2012] IEHC 348; [2013] 2 I.L.R.M. 65 ("*Tobin*"). The proceedings had been issued by way of Special Summons, and concerned an alleged breach of a solicitor's undertaking.

26. The Special Summons was returnable before the Master's Court on 16 May 2012. It had been adjourned a number of times before finally being struck out by the Master on 11 July 2012. The Master refused to transfer the proceedings to the Chancery List, and instead struck it out with costs against the plaintiff on the basis that the papers were not in order. The matter came before Laffoy J. seeking an order pursuant to Order 63, rule 9 of the Rules to discharge the order of the Master, and also seeking the reliefs sought in the Special Summons.

27. Laffoy J. ruled that the Master did not have jurisdiction to dismiss the proceedings.

"16. Order 38 of the Rules, which deals with the hearing of proceedings commenced by special summons, provides in rule 5 that, in all cases in which he shall have jurisdiction, the Master may decide the matter himself or put it in the Court list for hearing. In my view, the Master had no jurisdiction to dismiss these proceedings when the matter was before him on 11th July, 2012. Accordingly, the decision of the Master is set aside."

### **Bank of Ireland v. Dunne**

28. The third judgment, *Bank of Ireland v. Dunne* [2013] IEHC 484 ("*Dunne*"), relates to a Summary Summons. The single issue arising in the judgment was whether the Master had jurisdiction to dismiss the proceedings.

29. By way of background, the plaintiff had issued summary summons against the defendants claiming liquidated sums amounting to €4,570,579.49 together with interest. The plaintiff subsequently sought, by way of notice of motion, an order from the Master granting liberty to the plaintiff to enter final judgment as against the defendants. The defendants were fully contesting the plaintiff's case. The issue came before the Master on the 7 November 2012. The Master ordered that the Summary Summons be dismissed. This order was then subject to an application under Order 63, rule 9.

30. The High Court (Kearns P.), having cited provisions of Order 37 of the Rules of the Superior Courts, held as follows.

"These rules are clear and unambiguous. The Master's jurisdiction to dismiss an action arises only in uncontested cases. This is not an uncontested case.

The Master has no discretion in a contested case. Where a case is contested, the Master is obliged by rules of court to transfer the case to the court list for hearing at the first opportunity. The only qualification to that requirement is that he may, on consent, adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons. Further, where a case is contested and there is some inadequacy as to form, the Rules do not confer on the Master a jurisdiction to dismiss the proceedings out of hand – his jurisdiction, clearly spelt out in the Rules (Order 37, Rule 6), permits him only to go so far as to decline to transfer the case to the court list until those deficiencies are rectified and the matter thereby becomes 'in order'. While that point does not arise specifically in this case it is nonetheless worthy of emphasis."

### **ACC Bank PLC v. Heffernan**

31. The final judgment relied upon by counsel for the plaintiff bank is that of the High Court (Hogan J.) in *ACC Bank PLC v. Heffernan* [2013] IEHC 557; [2013] 2 I.R. 790 ("*Heffernan*"). The plaintiff to these proceedings had sought judgment, by way of Summary Summons, on foot of a loan agreement between the parties. The defendants entered an appearance, and the plaintiff sought liberty to enter final judgment. The Master purported to find that the proceedings should have been commenced by Plenary Summons rather than Summary Summons, and struck out the proceedings.

32. The plaintiff applied to have the order discharged pursuant to Order 63, rule 9 of the Rules. In allowing the plaintiff's application, Hogan J. noted that the jurisdiction of the Master depended on the status of the case as contested or uncontested. If uncontested, then the Master has jurisdiction to deal with the matter summarily. The Master does not have jurisdiction to strike out a contested matter.

"[8] It will accordingly be seen that the Master has no jurisdiction to enter final judgment in contested cases. His task in such cases is rather to transfer the matter to the High Court for hearing when the case is 'in order' for hearing by the court. The reference to 'in order for hearing' means nothing more than that the case is administratively ready for hearing so that, for example, all appropriate affidavits have been sworn and filed. This phrase does not give the Master a jurisdiction to strike out contested cases on the ground that the pleadings are in some way irregular or that the proceedings ought to have been commenced by plenary action rather than by way of summary summons: see here by analogy the comments of Laffoy J. to like effect in *ACC Bank plc v. Tobin* [2012] IEHC 348, [2013] 2 I.L.R.M. 65. In that case she held that the Master had no jurisdiction to strike out a special summons on the grounds that the papers were not in order for the purposes of O. 38, r. 5."

33. The judgment in *Heffernan* has since been approved of by the Court of Appeal in *Allied Irish Banks plc v. Pierce* [2015] IECA 87.

#### **CONCLUSION**

34. The Master of the High Court has no jurisdiction to adjudicate on the substance or merits of an application for an order for possession brought by way of Special Summons. On the facts of the present case, where service had been effected in accordance with the order of the High Court of June 2018, and the defendant had neither appeared nor sought to file any affidavit, the proceedings were "in order" when the matter appeared in the Master's List on 5 October 2018. The Special Summons should have been transferred on that date to the Chancery Special Summons List for hearing by a High Court Judge. Instead, the Master exceeded his jurisdiction in (i) purporting to adjudicate on the enforceability of the mortgage (by reference to the absence of an annexed map), and (ii) purporting to strike out the Special Summons.

35. Accordingly, I make an order discharging the order of 5 October 2018, and reinstating the Special Summons. I will make a further order transferring the proceedings into the Chancery Special Summons List. A date for the hearing of the application for possession can then be fixed. I will also direct that the plaintiff bank file written legal submissions in advance of such hearing, setting forth its argument for saying that it can rely on the mortgage notwithstanding the absence of a map. The defendant will be put on notice of the hearing date, and may make such submission, written or oral, as he wishes.