

THE HIGH COURT

[2011 No. 2085 S]

BETWEEN

ACC BANK PLC

PLAINTIFF

AND

THOMAS HEFFERNAN AND MARY HEFFERNAN

DEFENDANTS

JUDGMENT of Mr. Justice Hogan delivered on 4th November, 2013

1. Where a plaintiff commences proceedings by summary summons seeking a liquidated debt and thereafter applies to the Master of the High Court for summary judgment and it is concluded that the proceedings ought instead to have been commenced by plenary summons, is the Master nonetheless entitled to strike out the summary summons proceedings and require the plaintiff to recommence by way of plenary action? This, in essence is the issue which is presented in this appeal pursuant to O. 63, r. 9 from a decision of the Master to this effect.

2. The present proceedings were commenced by summary summons on 18th May, 2011. The plaintiff, ACC Bank, contends that it advanced the sum of €3,360,000 to the defendants, Mr. and Ms. Heffernan, in September 2007 following the acceptance of a loan offer by them. In February 2011 the plaintiff demanded repayment of the principal and interest in the sum of €4,152,755 which it contended was due under the loan agreement. Appearances were entered by the two defendants a few weeks thereafter and on 28th June, 2011, the plaintiff issued a motion for liberty to enter final judgment in the sum of €4,244,749 (including further interest). The defendants filed three replying affidavit by way of defence.

3. This matter was then listed before the Master of the High Court on 12th July, 2012. On that occasion counsel for the plaintiff submitted that as this was a contested matter, the case should be transferred into the High Court in accordance with O. 37, r. 6. The defendants' solicitor submitted that as the plaintiff was aware at the proceedings had been commenced that the defendants had a substantive defence to the proceedings, the proceedings ought to be struck out. In a reserved decision delivered on 18th October 2012 the Master acceded to this latter application and struck out the proceedings on this ground, adding that the plaintiff could always start again by way of plenary summons. The plaintiff bank now appeals to this Court against that decision.

The provisions of Order 37, rr. 4 and 6

4. The procedure governing the hearing of proceedings commenced by summary summons is set out in O. 37 of the Rules of the Superior Courts 1986. Order 37, r. 1 provides that every summary summons endorsed with a claim for a liquidated sum "shall be set down before the Master by the plaintiff on motion for liberty to enter final judgment for the amount claimed". Order 37, r. 2 provides that, generally speaking, any motion for liberty to enter final judgment shall be heard on affidavit. Order 37, r. 3 provides that the defendant "may show cause against such motion by affidavit."

5. Order 37 next distinguishes between the powers of the Master in uncontested cases on the one hand and those which obtain in contested cases on the other. Order 37, r. 4 deals with the power of the Master in uncontested cases:

"Upon the hearing of any such motion, the Master, in all uncontested cases, may deal with the matter summarily, and may give liberty to enter judgement for the relief to which the plaintiff may appear to be entitled and, for that purpose, in the case of an action for the recovery of land for non-payment of rent, may ascertain the amount of rent due, or he may dismiss the action and generally may make such order for the determination of the action as may seem just."

6. It is thus plain that in uncontested cases the Master may deal with the matter summarily and give liberty to enter final judgment.

7. Order 37, r. 6 deals, however, with contested cases and this rule provides:

"In contested cases, the Master shall transfer the case, when in order for hearing by the Court, to the Court list for hearing on the first opportunity; and, for this purpose, the Master may extend the time for filing affidavits and give such directions and adjourn the case before himself as he shall think fit. The Master may also, on consent, adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings, discovery, settlement of issues or otherwise as may be appropriate."

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. 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.

9. While it may seem curious that the provisions of O. 37, r. 4 and O. 37, r. 6 (and their pre-1986 predecessors) have heretofore received comparatively little judicial scrutiny, there can nonetheless be little enough doubt regarding the meaning and effect of these provisions. In *Grace v. Molloy* [1927] IR 405 the plaintiff issued a summary summons claiming a fixed sum by way of arrears of rent. The defendant filed a replying affidavit claiming that he had an arrangement with the plaintiff to the effect that the plaintiff was to continue to pay rent to the head landlord under the lease and to remain as tenant under that lease and that it was only on the plaintiff making such payments that the defendant was obliged to recoup him in respect of the same amount. The defendant stated

that the plaintiff had not paid the rent due to the head landlord and claimed that until such payments were made in the first instance he was not liable. The Master made an order for final judgment on the ground that the defendant's affidavit did not disclose the fact entitling him to defend.

10. The defendant's appeal against that decision of the Master succeeded before this Court. As O'Byrne J. observed ([1927] IR 405, 405) Order XIII, r. 5 of the Rules of the High Court and Supreme Court 1926 gave the Master power to make certain orders, including an order for final judgment in uncontested cases. It was, however, otherwise in the case of a contested case. On this point O'Byrne J. stated:

"The present is admittedly a contested case, and therefore the Master had no power under that Rule to make the order for judgment, nor has he such jurisdiction under any order of the Rules of the High Court and Supreme Court."

11. It is clear, therefore, that the Master has no jurisdiction to determine contested cases. In the case at hand everything turns on the meaning of the words "contested case" and "uncontested case." For my part I would interpret the reference to "an uncontested case" in its ordinary sense as meaning one where the defendant offers no opposition to the application over and above the entry of an appearance. The mere entry of an appearance is not *in itself* sufficient to bring a case into the category of a contested case, since this is simply the administrative mechanism which (subject to some exceptions not here relevant) acknowledges due service of the proceedings and fulfils the function of either permitting a solicitor to come on record or, where the litigant is acting in person, allowing for address for service to be thereby given.

12. But where - as here - the defendants oppose the application for liberty to enter final judgment under O. 37, r. 1 by the filing of affidavits disputing the plaintiffs claim, then the case falls into the category of a contested case. In those circumstances, as the comments of O'Byrne J. in *Grace* make clear, the Master's task is simply either to transfer the case into the High Court for adjudication once satisfied that the papers are in order and the matter is ready for determination or, should the parties so consent, adjourn the case for plenary hearing. Specifically, the Master has no function to resolve a conflict of fact or to make an assessment of the likely strength of the case made by either the plaintiff or the defendant or to determine that the case ought to have been commenced by Plenary summons.

Conclusions

13. For the reasons just stated, the plaintiff's appeal must be allowed. The case was plainly a contested case in that the defendants have elected to defend the proceedings by filing affidavits setting out that defence. In these circumstances the Master had no jurisdiction but to transfer the case to the judge's list of the High Court in accordance with O. 37, r. 6 once the case was administratively ready for this purpose.

14. The case can now accordingly proceed to a consideration of the separate question Of whether the plaintiff is entitled to summary judgment.