THE HIGH COURT

[2010 No. 39 HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991 AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND IN THE MATTER OF COUNCIL REGULATION (EC) 220112003 AND IN THE MATTER OF S M AND C M (CHILDREN)

BETWEEN

MM

APPLICANT

AND

RR

RESPONDENT

AND

THE HEALTH SERVICE EXECUTIVE

NOTICE PARTY

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 25th day of April 2012

1. This judgment is given on an application made by notice of motion seeking "an Order pursuant to the inherent jurisdiction of this Honourable Court setting aside the order of this Honourable Court of the 17th November, 2011."

2. The order made on 17th November, 2011 (Irvine J.) was an order that the above entitled proceedings then between the applicant and the respondent be reentered and certain ancillary orders were made including the joining of the Health Service Executive (HSE) as a notice party. That order was made following an *ex parte* application on behalf of the applicant grounded on the affidavit of Ms. Anke Hartas, a solicitor with the Law Centre on record for the applicant in the proceedings sworn on 16 November 2011. In that affidavit, Ms. Hartas, at para. 8, stated:

> "8. I say that the within proceedings were issued on the 2 December 2010. I say that considerable efforts had been made to locate the Respondent and serve her with the proceedings. Regrettably, these efforts proved unsuccessful and on the 4 May 2011, the proceedings were struck out with liberty to re enter. I say that the efforts made to effect service on the Respondent are set out in various Affidavits which I beg to refer to when produced."

3. The order of the High Court made by me on 4th May, 2011, as drawn, records, *inter alia*, "whereupon and on reading the said Summons and said Counsel informing the Court that the Solicitor for the Applicant has been unable to serve the within proceedings" . It then records that the order made was "that these proceedings be struck out with liberty tore enter".

4. The proceedings in the sense of the summons had in fact been served on the respondent on 19th January, 2011. The respondent, however, had never appeared in Court. It was an order made by me on 26th January, 2011, directing the respondent to appear before the High Court on 2nd February, 2011, of which the solicitor for the applicant had been unable to effect service on the respondent. When I made the order of 4th May, 2011, I was aware that the summons had been served on the respondent. The error in the recital in the order as drawn was not noticed until recently.

5. Counsel for the respondent submits that the solicitor for the respondent, in making the application to re-enter, was under an obligation to disclose all material facts to the Court and that the fact that the summons had been served on the respondent was a material fact which was not disclosed to the Court. Whilst it is accepted that the failure to disclose that the summons had been served on the respondent was not intentional and was inadvertent, it is submitted that, as it objectively constitutes a material fact, this Court should now exercise its discretion to set aside the order made *ex parte*. The submission is that a court which was aware that the summons had been served on the respondent would, as a matter of probability, have required the application to re-enter to be served on the respondent so as to give the respondent an opportunity to be heard prior to making its determination.

6. Both parties accept the principle, which has been termed "the golden rule", that a person applying for *ex parte* relief must disclose to the Court all matters relevant to the exercise of the Court's discretion whether or not to grant relief before giving the opposing party an opportunity to be heard. The principle was termed "the golden rule" by Sir Nicholas Brown-Wilkinson V-C in *Tate Access Floors Inc. v. Boswell* [1990] 3 A11 ER 303. In that judgment, he stated:

> "No rule is better established, and few more important, than the rule (the golden rule) that a plaintiff applying for *ex parte* relief must disclose to the court all matters relevant to the exercise of the court's discretion whether or not to grant relief before giving the defendant an opportunity to be heard. If that duty is not observed by the plaintiff, the court will discharge the *ex parte* order and may, to mark its displeasure, refuse the plaintiff further *inter partes* relief even though the circumstances would otherwise justify the grant of such relief".

7. The above passage was cited with approval by Clarke J. in *Bambrick v. Cobley* [2005] IEHC 43. In that case, there had been a failure of disclosure on the application for an interim injunction and the defendant sought to have the interim order discharged and also invited the Court to decline to make an interlocutory order by reason of the non-disclosure.

8. Clarke J. identified two questions for consideration by the Court, namely, whether the plaintiff failed to make appropriate disclosure and if he did, what consequences would flow. On the facts, he found there had been a material failure to disclose matters which ought to have been disclosed on the interim application and moved to the second question. On that, he determined that the consequences of nondisclosure are not automatic and referred to the decision of the Court of Appeal in *Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings Ltd*. [1988] 3 All ER 178. He formed the view, with which I respectfully agree, that the Court has a discretion as to the order it will make in cases where a material failure to disclose has been established. That this Court so retains discretion was not in dispute before me. Clarke J. at p. 11 of his judgment, in relation to the criteria which the Court should apply in the exercise of such discretion, suggested that the following factors are those most likely to weigh heavily with the Court:-

> "1. The materiality of the facts not disclosed.
>
> 2. The extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. A deliberate misleading of the court is likely to weigh more heavily in favour of the discretion being exercised against the continuance of an injunction than an innocent omission. There are obviously intermediate cases where the court may not be satisfied that there was a deliberate attempt to mislead but that the plaintiff was, nonetheless, significantly culpable in failing to disclose.
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> 3. The overall circumstances of the case which lead to the application in the first place."

9. In order to determine whether there was a material failure to disclose in the application to Irvine J and if so how the Court should now exercise its discretion in accordance with the above it is necessary to consider the facts in relation to the case which led to the application to re-enter in November 2011.

10. The applicant is the father and the respondent is the mother of the two boys named in the title to the proceedings. The applicant and respondent were married to each other in England in 2003, and a divorce made absolute in England in 2007. In the intervening period, the boys were born in 2003 and 2004, respectively. They lived in England until approximately July 2009, initially with the applicant and respondent (until they separated) and subsequently with the respondent.

11. In July 2009, the respondent, with her then partner, Mr S. and the boys, moved to Spain.

12. The respondent arrived in Ireland with Mr S and the boys in January 2010. The applicant states he was unaware at this time of the whereabouts of the boys. Applications were made to the English courts seeking disclosure from third parties as to their whereabouts. On 2nd December, 2010, the present proceedings were instituted by the issue of the summons in the Irish High Court. The summons was returnable for 15th December, 2010, but efforts to serve the respondents prior to that date failed. On that date, a new return date of 21st December, 2010, was fixed and subsequently, on that date, a further return date of 12th January, 2011, and thereafter, 26th January, 2011. In the meantime, on 19th January, 2011, the respondent was served. However, she failed to appear in Court on 26th January, 2011 as required by the service of the summons.

13. On 26th January, 2011, I made an order directing the respondent to appear in the High Court on Wednesday 2nd February, 2011, as recorded therein for the purposes of:

> (i) Informing the Court as to the whereabouts of ... the minors named in the title hereof;
>
> (ii) The Court making arrangements, if appropriate, for the said minors to be given an opportunity to be heard in the within proceedings;
>
> (iii) Ascertaining whether the respondent intends to oppose the proceedings.

I directed service of the order on the respondent on or before Saturday 29th January, 2011.

14. Despite very considerable efforts by the solicitors for the applicant, they were subsequently unable to ascertain the whereabouts of the respondent and serve her with the order of 26th February, 2011. She had left the address, at which she had been living when served with the summons on 19th January, 2011. The efforts made included an order sought and made on 4th February, 2011, pursuant to s. 36 of the Child Abduction and Enforcement of Custody Orders Act 1991, directing that the principals of seven named primary schools in the area in which the respondent and the boys had been living furnish information to the Court. One principal furnished information that the boys had been enrolled in the school from 20th January, 2010, until 21st January, 2011, but were no longer attending. That principal also furnished the addresses held for the boys. Further enquiries were made thereafter, but the respondent and boys' whereabouts were not discovered. An affidavit setting out the efforts was sworn by Dearbhla Deery of the Law Centre on 15th February, 2011. The respondent, in the affidavit sworn by her on 9th March, 2012, at para. 29, admits that when served with the High Court proceedings, she panicked. She states, "I did not read the Summons fully but was scared that the Applicant was coming to get me and the children. I feared for our safety. I moved with the children to .... I was pregnant with my son D. at the time who was born on the 14th April, 2011. Mr. S. is the father of D. D. is not the subject matter of these proceedings. I decided to home school the children and received advice from ... National School .. in relation to this". She also avers that she did not receive Social Welfare in Ireland and subsequently lived in a mobile home until the HSE removed the children in October 2011.

15. Ms. Hartas, in the affidavit sworn by her in response to this application on 22nd March, 2012, explains that whilst the Law Centre has been representing the applicant since the start of the proceedings, she only commenced dealing with the file in November 2011, and that, for the purposes of this affidavit, she has reviewed the file, all applications made, all correspondence between the applicant's legal representatives here and in England and all court attendances and notes. She states that the matter was before the Court since January on 2nd, 4th and 16th February, 2011; 2nd and 9th March 2011, and 4th May, 2011.

16. Ms. Hartas, at paras. 6 to 13 of her affidavit, sets out what she believes occurred before the Court on the various dates and the steps taken on behalf of the applicant in the intervening periods. The hearings were before me and whilst I do not now recall precisely what I may have stated on any individual date, her averments as to what I said are consistent with my approach to the management of applications brought for the return of children under the Hague Convention and Council Regulation 2201/2003 and I accept same as accurate.

17. On 2nd February, 2011, she deposes that counsel for the applicant sought an order in the terms of the special summons *i.e.* an order for the return of the boys to England and Wales. Further, that counsel addressed me on the relevant matters but that I was concerned that, if an order for return was served on the respondent, she might again flee and therefore indicated that it might be more appropriate to direct the gardaí to bring the respondent before the Court pursuant to s. 37 of the Child Abduction and Enforcement of Custody Orders Act, 1991.

18. Subsequently, on 4th February, 2011, she states that I indicated a willingness to make an order for the return of the boys but that I was reluctant to do so as it was unclear whether they remained within this jurisdiction. Accordingly, I made orders pursuant to s. 36 of the Act of 1991, requiring seven principals of national schools in the area to provide information. As already indicated, this produced information that the boys had been at one of the schools but had not been in school since 21st January, 2011.

19. Ms. Hartas also deposes that, in March, 2011, I indicated that I would not make an order for the return of the boys when it could not be ascertained that they remained in this jurisdiction. Further, that it was suggested (I think by implication by counsel on behalf of the applicant) that the proceedings be adjourned generally with liberty to re-enter but that I was also unwilling to do this and indicated that I would strike out the proceedings with liberty to re-enter.

20. Ms. Hartas also avers that in March, 2011, I was informed of attempts being made before the English courts to ascertain the whereabouts of the respondent and the boys through requiring a bank to provide all relevant information in relation to financial records of the respondent.

21. Ultimately, on 4th May, 2011, as the applicant's solicitors had been unable to find the respondent and the boys or to ascertain whether, as a matter of probability, they remained in this jurisdiction, I made an order striking out the proceedings with liberty to re-enter. The reason for which I refused to make an order to adjourn generally, with liberty to re-enter and, rather, made an order striking out the proceedings with liberty to re-enter, is that by reason of the obligations on the Court to deal with applications under the Hague Convention and Regulation 2201/2003 in an expeditious manner, it does not appear to me appropriate that proceedings be adjourned generally, and thus remain in being but not under management by the Court. Rather, it appears to me that in such circumstances, the appropriate order is to strike out the proceedings but with liberty to re-enter. The purpose of giving liberty to re-enter is that, if the respondent and children are found to be continuing to reside in Ireland, the proceedings could be re-entered and continued against the respondent.

22. As previously noted, the order as drawn on 4th May, 2011, unfortunately, records that I was informed that the proceedings had not been served on the respondent. I do not believe I was so informed on that day. In any event, at all material times, in these proceedings between January 20th and May 2011, I was aware that the proceedings had been served on the respondent but that, in response to the service, had failed to appear in Court, had disappeared and had not been served with an order expressly requiring her to appear in the High Court+

23. The possible error made in the order of 4th May as drawn does not appear to have been noticed when the order was taken up or when Ms. Hartas, the deponent, swore the affidavit grounding the *ex parte* application of 17th November, 2011. Ms. Hartas explains her mistaken averment in her affidavit of 16th November, 2011, and what was before Irvine J. on that date at para. 15 of her affidavit, sworn on 22nd March, 2012, in the following terms:

> "15. I say that in the Affidavit sworn by this deponent on the 16 November 2011, I set out the history of the matter and exhibited all pleadings and proceedings including the Affidavit of Service of the proceedings, including the Order dated the 26th January 2011 which records the Special Summons as having been served. Judge Irvine was furnished with a full set of papers in advance of the application. When swearing the Affidavit I referred to the efforts to locate and serve the proceedings as not having been successful. By this averment I meant to state that, as set out above, efforts to locate and serve on the Respondent the Order dated the 26th January 2011 directing the Respondent to attend at the High Court were unsuccessful. I say that I made this averment in reliance on the wording of the order made on the 4th May 2011. I say that the reference to "proceedings" in that order is a reference to the Order of the 26th January 2011. I apologise for any mistake in the Affidavit. However, I truly believe that the full facts were before Judge Irvine and that the full set of pleadings which I exhibit make it clear that the Special Summons was served and that, after service of the Special Summons, the Respondent and children went missing. These facts were the basis for the many Affidavits filed in the proceedings and this was the basis for the Orders made on the 26th January 2011, 4th February 2011 and the 4th May 2011."

23. It is against that background that I must consider the materiality of the alleged failure to disclose to Irvine J. on the *ex parte* application the fact that the summons had been served on the respondent and that it was a subsequent order requiring her to appear in the High Court which had not been served on her and if necessary the exercise of the Court's discretion.

Conclusion

24. For the purposes of this decision, I am assuming that by reason of the incorrect averment in the affidavit of Ms Hartas of 16th November 2011, Irvine J. may have mistakenly understood that the summons had not been served on the respondent. It is unclear whether this was, in fact, the position as para. 15 of Ms. Hartas' affidavit sworn on 22nd March, 2012, makes clear that a full set of papers had been furnished to Irvine J. in advance of the application which included references to the fact that the summons had been served.

25. Upon that assumption I find that there was a failure to disclose a material fact namely that the summons had been served and that it was rather the Order of 26th January 2011, requiring the respondent's attendance in the High Court which the applicant's solicitor had been unable to serve.

26. I next require to consider the exercise of the Court's discretion in accordance with the suggested criteria identified by Clarke J. in *Bambrick v. Cobley*. Counsel for the respondent submits that the alleged failure to disclose that the summons had been served is material as, if the judge had been aware of that fact, she may well have taken the view that the respondent should have been put on notice of the application to reenter prior to her determination of same. The underlying submission is that the order of 4th May, 2011, may be considered reflective of the fact that the applicant decided to withdraw and not pursue the proceedings in Ireland.

27. Whilst I have concluded the fact that the summons had been served and that it was, rather, the subsequent order of the Court of 26th January, 2011, which the applicant's solicitors had been unable to serve, is a material fact which should have been disclosed, in my judgment it is of limited materiality to the application to reenter the proceedings. If the full facts in relation to the earlier proceedings, as now set out in Ms. Hartas' affidavit sworn on 22nd March, 2012, at paras. 6 to 13 had been disclosed to Irvine J it would have been clear that the proceedings were struck out with liberty to re-enter in May, 2011, as the respondent and the boys had disappeared after service of the summons and had not been located between January and May, 2011, despite considerable efforts. Further, that it was then unclear whether the boys remained in the State and in those circumstances the Court was unwilling to make an order for return or adjourn generally the proceedings. The objective intent of the order of 4th May 2011 from a consideration of those facts was to permit re-entry if the boys were found to be within the jurisdiction. In November, 2011, when the application was made, it had become clear that the boys were in the State and in the care of the HSE. Whether, the respondent and the boys disappeared before or after the service of the summons is of limited materiality to the overall situation in November 2011.

28. The second matter identified by Clarke J. in *Bambrick v. Cobley* is the extent to which it may be said that the plaintiff is culpable in respect of a failure to disclose. The applicant in these proceedings is not culpable in respect of the failure to disclose the service of the summons on the respondent. It was due to an unfortunate error made by a solicitor who had not been dealing with the matter at the relevant time and contributed to by the form of the court order. The solicitor has apologised to the Court for the error made.

29. Even if I am in incorrect in the view which I have formed that the fact not disclosed was of limited materiality to the application before Irvine J. in the exercise of the Court's discretion in the overall circumstances of this case as fully disclosed in this application in my judgment I should refuse the application. The primary cause of order made on 4th May, 2011, was the respondent's disappearance with the boys in response to the service on her of the summons herein. It was always the intention that, if the boys were ascertained to be in Ireland, the applicant would have liberty to re-enter the proceedings. That is the order made by Irvine J. Objectively, there is no basis for putting the respondent on notice of that application. The applicant is entitled to have the proceedings re-entered and the respondent is entitled to fully defend the proceedings. In the interests of the boys who are the subject matter of the proceedings, they must be now brought forward and heard and determined as soon as is consistent with fait procedures. It would not be in the interests of the proper administration of justice or fair procedures between the parties and having regard to the interests of the boys for the order made on 17th November, 2011, to be set aside.

30. Accordingly, I refuse the application.