

THE HIGH COURT

Record Number: 2010 No. 8282P

Between:**Irene Judkins and Marlo McCoy****Plaintiffs****And****James McCoy and Varko Limited****Defendants****Judgment of Mr Justice Michael Peart delivered on the 5th day of February 2013:**

1. The present plaintiffs are daughters of, and the executors of the estate of, the late Charlotte McCoy who was the plaintiff in these proceedings prior to her death. The first named defendant is her son, and therefore the brother of the present plaintiffs.
2. In 2010 the late plaintiff issued a Plenary Summons in which she claimed, inter alia, judgment against her son, the first named defendant, in the sum of €371,000, being monies claimed to be due and owing on foot of an Agreement dated 23rd July 2010. In addition, the plaintiff sought an injunction to restrain the first named defendant from reducing his assets below the sum claimed, together with a declaration that any assets acquired by the defendants with the plaintiff's assets are held on a constructive trust.
3. I should draw attention at this stage to the fact that Clause 13 of the aforesaid Agreement provided that in the event that the first named defendant failed to make the payments to the plaintiff as provided for in the Agreement the first named defendant "*shall consent to judgment against him in the entire sum provided for in this Agreement*". Nevertheless when the matter came before the Master of the High Court he did not consent to judgment, and will seek to defend these proceedings on the basis, inter alia, that he was under undue influence and threats if he did not sign this agreement.
4. The present application by the defendants is in fact by way of appeal against an Order of the Master of the High Court made first on the 9th December 2010, and perfected on the 14th December 2010, wherein he gave liberty to enter final judgment for the amounts set forth in that order. The terms of that order were later discovered by the plaintiff's solicitors to be incorrect. This appears to have been because the said Notice of Motion did not set forth the correct amounts which the plaintiff was seeking against each defendant.
5. Nothing was done to correct the error in that order until 2nd December 2011 when the plaintiff applied to the Master on notice to the defendants to amend the order so that it gave liberty to enter final judgment as against the first named defendant in the sum of €114,931.38, and as against the first and second defendant jointly and severally in the sum of €200,000. That order was granted.
6. The first named defendant raised no objection to the amendment but in a replying affidavit filed on that application he made the point that since the proceedings had been commenced by way of Plenary Summons, the Summary Summons procedure adopted by the plaintiff was erroneous, and that accordingly the Master of the High Court had no jurisdiction to deal with the plaintiff's motion let alone grant liberty to enter final judgment on foot of it.
7. However, the fact is that neither defendant sought to appeal the order made by the Master on the 9th December 2010 until after the further order was made on the 2nd December 2011 amending the sum for which liberty to enter judgment had been granted. By that time the first named defendant had instructed a different firm of solicitors to act for him.
8. Before this Court is a Notice of Motion dated 21st December 2011 by way of appeal from the Order of the Master of the High Court dated 9th December 2010, varied or corrected by the later order dated 2nd December 2011. If the time for appeal commenced to run 6 days from the date of perfection of Master's Order dated the 9th December 2010 then the defendants are clearly well out of time, and in that event they seek an extension of time in the very unusual circumstances of this case. If on the other hand, this Court concludes that time commenced to run only 6 days after the perfection of the order made on the 2nd December 2011, then no extension of time is required since on the date the said Notice of Motion was issued that order had not been perfected, and was not perfected until 4th January 2012.
9. It is somewhat unusual, though permitted under the Rules, for a liquidated sum of money to be claimed on foot of a Plenary Summons, but that has been explained on the basis that in addition to seeking judgment for the sum claimed to be due and owing, the plaintiff was seeking injunctive relief, a declaration and an order for an account to be taken. There is no doubt that a claim for a liquidated sum may be brought by way of Plenary Summons, even where no other type of relief is claimed in addition to judgment for a liquidated sum. Nevertheless, where a plaintiff opts to proceed by way of Plenary Summons, the procedures provided by the Superior Courts must be adopted also, and the plaintiff cannot simply proceed as if the proceedings had been commenced by way of Summary Summons. One very practical reason why that is so is presumably that a General Indorsement of Claim on a Plenary Summons will not contain any detailed particulars of the claim. It will simply set forth a list of the reliefs being claimed, as in this case. It will not be until the delivery of a Statement of Claim that the defendant will become aware of any details in relation to the claim being made. By contrast, the Special Indorsement of Claim on a Summary Summons must set forth detailed particulars of the sum being claimed, and how the sum claimed has become due and owing.

Procedural history:

10. In the present case, a Plenary Summons was issued on the 3rd September 2010 and served on the defendants shortly thereafter on the 6th and 9th September 2010 respectively. An appearance was entered by solicitors on behalf of both defendants on the 20th September 2010. The next step taken by the plaintiff's solicitors was not, as one might have expected, the delivery of a Statement of Claim but rather the issue of a Notice of Motion returnable before the Master of the High Court in which the plaintiff sought liberty to enter final judgment for the amounts therein stated. Normally such a procedural error would be picked up in the Central Office when the Notice of Motion was being issued there, but for some reason it was not spotted and the motion in due course was issued and

served on the defendants' solicitors. It was supported by a grounding affidavit sworn by the plaintiff, and in which the genesis of the claims was set forth in some detail. Amongst the exhibits was a copy of the Agreement entered into by the plaintiff and the first named defendant on the 23rd July 2010.

11. Shortly before this return date before the Master somebody on the plaintiff's side seems to have tumbled to the fact that no Statement of Claim had yet been delivered, and on the evening of the 8th December 2010, the day before the return date, one was delivered to the defendants' solicitors.

12. Those solicitors instructed Counsel to appear before the Master on the 9th December 2010. When the matter was called, that Counsel pointed out the procedural error that had occurred and submitted that the Master could not deal with the matter. According to the affidavit evidence, the Master indicated that he was going to deal with the matter. It appears that having read the plaintiff's grounding affidavit he was concerned about the age of the plaintiff, and having considered the exhibited Agreement also, indicated that he was going to deal with the matter. Thereupon Counsel for the defendants requested that the Master adjourn the motion to permit the defendants to swear a replying affidavit. That adjournment was refused and the Master proceeded to give the plaintiff liberty to enter final judgment against the defendants for the amounts claimed in the Notice of Motion. On foot of that order the plaintiff entered judgment against the defendants for the amounts claimed in the Notice of Motion.

13. It is strange (to put it at its mildest) that no move appears to have been made by the defendant to immediately mount an appeal against the Master's Order which had been made on the 9th December 2010. Thereafter in fact, nothing appears to have happened on either side of this case for some time. In an affidavit sworn in February 2012 the first named defendant states in paragraph 19 thereof that at all material times he had intended to appeal that order, and goes on to state that in the early months of 2011 his mother's health deteriorated. Unfortunately, she died on the 29th March 2011. The first named defendant states that he then became distracted by the failure of his company, the second named defendant ("Varco"). He refers to difficulties which he says that he was having with his sisters in the months after the making of that Master's Order. He states that his sisters were preventing him from meeting his mother, and goes on to say that he was not even informed that she was dying and learned of her death only after she had died. His company was in difficulties too, and he describes these times as the worst of his life. He concludes that affidavit by stating that he was also aware that he needed to appeal the Master's Order, but he needed to change his legal team as he believed that they did not have confidence in his case, and that as soon as he felt able to he instructed his present solicitors.

14. In November 2011 the plaintiffs issued a Notice of Motion to reconstitute the proceedings so that the present plaintiffs could be substituted as plaintiffs since they are the executors of the estate of the late plaintiff, and also to amend the amounts set forth in the Master's Order dated 9th December 2010.

15. That application came before the Master on the 2nd December 2011. The first named defendant had by this time instructed new solicitors and swore a replying affidavit. In that affidavit, he made a number of points including that he intended to appeal the Master's order dated 9th December 2010 when it was corrected on the return date, and he went on to make the point that the procedure adopted by the plaintiff in bringing an application for liberty to enter judgment before the Master in proceedings commenced by way of Plenary Summons was erroneous and that the Master had no power to make the order he did as the procedure was not provided for in the Rules of the Superior Courts. He also complained that he was not granted an adjournment when the matter came before the Master on the 9th December 2010.

16. The Master made an order on the 2nd December 2011 reconstituting the proceedings and also one amending the figures for which he had granted liberty to enter final judgment on the 9th December 2010. That order was perfected on the 4th January 2011. Even before the perfection of that order the present a Notice of Motion was issued.

17. In his grounding affidavit the first named defendant refers to the procedural anomaly in these proceedings. He states that his former solicitors had advised him that following the service of the Plenary Summons, a Statement of Claim would be delivered and that he in due course would deliver a Defence. He refers to the fact that the Entry of Appearance on his behalf called upon the plaintiff to deliver such a Statement of Claim. He exhibits a copy of a letter dated the 9th November 2010 written by his former solicitor in which he called upon the plaintiff's solicitor to deliver a Statement of Claim. That letter received no response and a reminder letter was written on the 23rd November 2010. By these dates the plaintiff's Notice of Motion bringing an application before the Master for final judgment had already been served, it having been issued on the 27th October 2010, and it is surprising in such circumstances that no issue was taken with the summary summons procedure which was being embarked upon by the plaintiff in plenary summons proceedings. The plaintiff's solicitor wrote in reply eventually on the 2nd December 2010 stating:

"Our Counsel states that a Statement of Claim in this instance is not relevant. Our Counsel states that we are seeking a liquidated amount".

Noting also in that letter that the first named defendant had already consented to judgment in the Agreement already referred to, the plaintiff's solicitors sought confirmation that the defendant did not intend to file any replying affidavit, and went on to state that any application for an adjournment would be resisted.

18. The defendants' solicitors replied by letter dated 6th December 2010 that as the plaintiff had commenced the proceedings by way of Plenary Summons a Statement of Claim should be served. A further letter dated 8th December 2010 from the defendants' solicitor stated that the defendants had not filed any replying affidavit because the plaintiff had followed the incorrect procedure, and that had the plaintiff wished to proceed by way of Notice of Motion, she ought to have commenced the proceedings by way of Summary Summons. They requested that the Notice of Motion returnable for the following day be withdrawn. That did not happen.

19. By letter dated 8th December 2010 the plaintiff's solicitor responded by letter. They repeated their view that a Statement of Claim was not relevant. They requested confirmation as to whether the defendants intend to defend these proceedings, given the contents of Clause 13 of the Agreement. They also informed the defendant's solicitor that the defendants had had sufficient time to file any replying affidavit if they considered that it was necessary to do so.

20. Prior to the 9th December 2010 the defendants' solicitors themselves had attempted to issue a motion in the Central Office seeking to have the plaintiff's proceedings dismissed for failure to deliver a Statement of Claim. However, that motion was not accepted by the Central Office as they considered that the letter dated 9th November 2010 which the solicitors had written to the plaintiff's solicitors did not constitute a 21 day warning letter. It had simply requested a Statement of Claim. Nothing turns on that particular matter.

Issues arising:

21. It seems to me that three main issues arise:

1. Whether the first named defendant requires an extension of time to appeal the Master's Order dated 9th December 2010 as varied/corrected.

2. If so, do the facts and all the circumstances justify an extension of time. *[This involves a consideration of arguable grounds of appeal and a consideration of all the circumstances of the case including possibly that a breach of constitutional rights may arise – natural justice audi alteram partem].*

3. If an extension of time is required and granted, then should the order of the Master dated 9th December 2010 be set aside, and the proceedings allowed to continue as Plenary proceedings following the delivery of the plaintiff's Statement of Claim.

22. In relation to 1 above, I consider the matter to be straightforward. The order being appealed is that by which the Master granted liberty to enter final judgment. The fact that it was later amended as to the amounts for which judgment was to be entered does not in my view mean that time had not started to run from the date of perfection of the order dated 9th December 2010. The errors as to amount did not alter the fact that the order had been perfected. There was nothing to prevent the defendant seeking to appeal that order within the time permitted. I do not understand why that was not done given the obvious grounds which existed for doing so, namely the incorrect figures, the failure by the Master to grant an adjournment on the 9th December 2010, the incorrect procedure adopted by the plaintiff and the lack of jurisdiction for the Master to deal with the application for liberty to enter final judgment. I do not consider that the fact that in December 2011 that order was amended meant that time for appealing the first order recommenced to run. In my view an extension of time to appeal is required before the first named defendant can appeal the order in question.

23. That brings me to the question whether in this case an extension of time is justified. The *locus classicus* in relation to the granting of an extension of time to appeal is of course *Eire Continental Trading v. Clonmel Foods* [1955] 1 IR 170. In his judgment in the Supreme Court identified three conditions which are proper matters for consideration in determining whether time for appeal should be extended:

(i) The applicant must show that he had a bona fide intention to appeal formed within the permitted time.

(ii) He must show the existence of something like mistake and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient.

(iii) He must establish an arguable ground of appeal.

However, Lavery J. went on to state firstly that "*they must be considered in relation to all the circumstances of the particular case*", and secondly, quoting the words of Sir Wilfred Greene MR in *Gatti v. Shoosmith* [1939] 1 Ch. 841 "*The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised*".

24. These matters received further consideration in the Supreme Court in *Brewer v. The Commissioners for Public Works* [2003] 3 I.R. 539. In his judgment Geoghegan J., having referred to these well known conditions, stated:

"I would interpret those words of Lavery J. as indicating that while these three conditions were proper matters to be considered, it did not necessarily follow in all circumstances that a court would either grant the extension if all these conditions were fulfilled or refuse the extension if they were not. The court still had to consider all the surrounding circumstances in deciding how to exercise its discretion."(emphasis added)

In *Brewer*, Geoghegan J. was satisfied that the defendant/appellant had demonstrated a bona fide intention to appeal within the time permitted, and also that there were arguable grounds for appeal. But he was less sure about second condition, namely whether there existed the sort of mistake referred to by Lavery J. in *Eire Continental*. He was satisfied that if in fact it was an absolute requirement that all three conditions had to be satisfied, then an extension of time would have to be refused. On the facts of that case, time was extended.

25. It seems clear that while being guided by a consideration of the three conditions, the Court retains discretion whether or not to grant an extension where one or more of these conditions are not fulfilled, and that all the circumstances of the case may be taken into consideration. A prejudice to the other party would also be another matter to weigh in the balance in deciding where the balance of justice lies.

26. By reference to the three conditions, I would have some doubt as to whether to accept at face value the first named defendant's averment that at all material times he had intended to appeal the Master's Order. While I cannot think why he would not have so intended, given the manner in which the matter had proceeded before the Master as if the proceedings had been commenced by way of Summary Summons, there is no objective evidence that he had formed that intention. There is no letter for example from his solicitor to the plaintiff's solicitor stating that they were intending to file an appeal. In fact, what evidence there is would tend to go the other way. I refer to the fact that four days after the Master's Order was made, the defendant's solicitor wrote a letter dated 14th December 2010 to the plaintiff's solicitor. It was not marked 'without prejudice'. That letter stated:

"Our client has instructed us to write to you on his behalf to ascertain whether or not your client would be interested in a mediation being arranged in respect of this particular case.

The prime purpose of such a meeting would be to agree a revised repayment schedule in respect of the amount due to your client in light of our client's current business difficulties.

Your client may already be aware that Varco Limited has gone into liquidation and as far as we are aware the Liquidator is Mr Ken Fennell of Kavanagh Fennell, Insolvency.

If this proposal is acceptable to your client, it seems to us that such a mediation can be arranged at short notice."

That letter certainly contains no hint, not to mention a threat, that the first named defendant intended to appeal the Master's Order. However, Counsel on this application has submitted that an effort to mediate a solution should not be considered to rule out an appeal should the proposal to mediate be rejected. It is submitted that in the circumstances it was a reasonable stance to adopt, and should not militate against an extension of time to appeal. In fact by letter dated 17th December 2010 the offer to mediate was

refused on the basis that there was no trust on which to base a mediation, and that it would in those circumstances be futile.

27. In relation to condition 2, namely whether there exists some mistake to account for the absence of an appeal within time, there is nothing urged by way of mistake as such by the first named defendant or by his then solicitors. What is urged is the upset caused by his mother's illness in the months following the order, certain family difficulties which he was experiencing with his sisters around that time, and financial problems he was wrestling with in relation to his business. In my view those grounds are more properly considered in the context of all the circumstances of the case.

28. The strongest basis for extending the time for appeal in this case is the third condition, namely whether there are arguable grounds of appeal. In my view this condition is easily satisfied by the nature of at least one of the grounds of appeal, namely that the Master had no jurisdiction to make any order granting liberty to enter final judgment in a matter commenced by way of Plenary Summons. Another ground under the broad heading of fair procedures would be arguable in circumstances where the Statement of Claim was delivered only the evening before the return date and an adjournment was sought to file a replying affidavit and refused. It is at least arguable that since all that had been served prior to that was a Plenary Summons with a General Indorsement of Claim, it was simply not possible for the defendants to be in a position to answer the claim being made by the plaintiff. In essence, at that point there was no case yet to answer. It is arguable therefore that the defendants were denied fair procedures and that a judgment was entered in breach of constitutional justice i.e. the principle of *audi alteram partem*. The defendants were never heard or given a reasonable opportunity of being heard.

29. If the Master had jurisdiction to enter upon the Notice of Motion, and if the defendants had been permitted to file a replying affidavit, the first named defendant would have wanted to mount a defence of undue influence in relation to his execution of the underlying Agreement between himself and his mother, and no doubt he would also have wanted to include within those arguments the difficulties he was having with his sisters and the pressure he felt under by their alleged behaviour towards him and which he says forced him to enter into the Agreement in question. On the present application, it is unnecessary for me to express any view on the strength of that case and whether it alone would have met the condition that the appellant seeking an extension of time should have an arguable ground of appeal. I express no view in that regard in view of the clear arguability of the grounds to which I have already referred.

30. Such is the force of the two grounds to which I have referred in the preceding paragraph as to the Master's jurisdiction and as to fair procedures, I am persuaded that an extension of time to appeal should be granted even though I have some doubt whether in fact a bona fide intention to appeal was formed within 6 days from the date of perfection of the order made on the 9th December 2010, and even though there is no evidence before me of any mistake on the part of the first named defendant within the meaning to be given to that word per the judgment of Lavery J. in *Eire Continental*. Such is the arguability of the two grounds which I have referred to, that it would in my view be wrong not to accede to the application for an extension of time, given the fact that as made clear by Geoghegan J. in *Brewer*, the three conditions in *Eire Continental* are not absolute requirements but rather matters to be considered together with all the circumstances of the case. I consider the very unusual circumstances of the present case to require that an appeal be permitted. I take account also, as part of those circumstances, the fact that the defendant is entirely blameless for the fact that this matter came before the Master at all. The defendants had been seeking a Statement of Claim from the plaintiff's solicitor and was met with the response that such a document was irrelevant. There was no basis in law for such a response and it was the plaintiff who ran headlong into a procedure appropriate only for a Summary Summons despite promptings to the contrary from the defendants' solicitor. Any prejudice argued for by the plaintiffs at this stage in the event that this extension of time is granted must be viewed in the light of the fact that it is the plaintiff's side which has been responsible for the incorrect procedure adopted in this case. I will extend the time therefore for this appeal.

31. Much of what I have said already is relevant also to whether this application to set aside the Master's order of 9th December 2010 as amended, by way of appeal, should be granted. Whatever about the merits of the defence which the first named defendant wishes to mount in his Defence to the plaintiff's Statement of Claim, the fact is that he has been deprived of any opportunity of even articulating and arguing that defence. He was served with a Statement of Claim on the eve of the matter appearing in the Master's list for the first time. Having applied for an adjournment to file a replying affidavit once the Master indicated that he intended to deal with the matter, that application was refused on the basis of the age of the plaintiff herself but also on the basis of what view of the plaintiff's case the Master formed from his reading of the grounding affidavit and exhibits, including it would appear the Agreement. Perhaps he was influenced by the clear statement in Clause 13. Nevertheless, the question of jurisdiction aside, the defendant was deprived of an opportunity of even considering the Statement of Claim and being advised in relation to it. As I have said, this was the first occasion on which the matter had been listed and the defendants' solicitors had been for some weeks calling for a Statement of Claim and this had been refused until the evening before that return date. I do not consider that the age of the plaintiff was itself a ground for refusal of the adjournment taking into account the late delivery of the Statement of Claim. It would have merited an adjournment, and the Master would certainly have been justified in allowing only a short adjournment in the light of the plaintiff's age, but in my view there was not a proper basis for an outright refusal. For this reason alone I would order that the said order be set aside so that the first named defendant may be allowed an opportunity to put forward his defence.

32. In relation to the jurisdiction point, I believe that it is unanswerable. The Rules of the Superior Courts provide in O.1, r. 6 that "*in all proceedings (other than to take a minor into wardship) commenced by originating summons, procedure by plenary summons shall be obligatory except where procedure by summary summons or by special summons is required or authorised by these Rules*". Order 2 RSC provided that procedure by way of summary summons "*may be adopted*" in a number of different types of claim, including where the plaintiff seeks "*only to recover a debt or liquidated demand in money*".

33. In the present case even if the plaintiff was seeking to recover only a liquidated sum and was not seeking in addition some injunctive relief, she could have commenced her proceedings by way of plenary summons, given the use of the phrase "may be adopted" in O. 2, r. 1 RSC. However, given the inclusion of reliefs other than the seeking of judgment for the amount claimed, these proceedings could not have been commenced by way of Summary Summons. It was appropriate to commence by way of Plenary Summons therefore. Having done so, however, the procedures for plenary summons proceedings must be followed and adhered to. Once the defendants entered an appearance in which they called for delivery of a Statement of Claim, the plaintiff before proceeding in any way further was required by Order 20, r.3 RSC to deliver a Statement of Claim within 21 days from the date of receipt of that Appearance. There is nothing in the Rules which makes any provision, even by consent, for the plaintiff to issue and serve a Notice of Motion for liberty to enter final judgment returnable before the Master of the High Court either before delivery of a Statement of Claim or thereafter. It is simply not permissible, and it is surprising indeed that this was not picked up in the central Office when the plaintiff's solicitor was issuing the Notice of Motion. However, the fact is that for whatever reason nobody spotted this error.

34. The Order 37, r. 1 RSC is very clear and precise. It provides clearly that "*every summary summons indorsed with a claim ... under Order 2 to which an appearance has been entered shall be set down before the Master by the plaintiff, on motion for liberty to enter final judgment for the amount claimed...*" (my emphasis). That is the only circumstance provided in the Rules where such a

motion is brought before the Master of the High Court. Order 63 RSC which empowers the Master to make certain other orders does not assist by giving him any additional powers which would enable him to deal with a motion to enter judgment in a proceeding commenced by plenary summons. The Master does not enjoy any inherent jurisdiction.

35. It follows in my view that the Master had no jurisdiction to make the order which he made on the 9th December 2010 no matter how concerned he was about the age of the plaintiff or indeed how doubtful he may have been about the defendants' chances of defending these proceedings. It follows that this order must be regarded as one with no lawful basis. It is and always was a nullity.

36. I will therefore, in addition to having extended time for this appeal, make an order setting aside the Master's Order made on the 9th December 2010, as by now amended, and as a consequence thereof the judgment entered on foot of same on the 6th May 2011.

37. It remains to direct what should now happen. It seems that I should make clear directions now in relation any Notice for Particulars and Replies thereto which may be necessary, as well as extending time for delivery of a Defence. It will be a matter for the plaintiffs to consider in the light of any such Defence which may be filed, whether they wish to bring any application by way of Notice of Motion to strike out the Defence under O.19. r. 28 RSC should they consider that it discloses no reasonable defence or is frivolous or vexatious, and seek judgment once more on that basis. Alternatively, the matter will have to simply proceed to trial in the normal way following the service of Notice of trial.