

THE HIGH COURT

[2011 4548 S]

BETWEEN

QUARRYVALE TWO LIMITED AND QUARRY VALE THREE LIMITED

PLAINTIFFS

AND

STEPHEN BEERE AND GRAEME BEERE

DEFENDANTS

JUDGMENT of O'Neill J. delivered on the 14th day of December 2012

1. In these proceedings, the plaintiffs, by way of summary summons issued on 4th November 2011, claimed the sum of €43,858.31 for rent and other charges, namely, a food service charge, and a service charge and also interest on the foregoing for the period of 1st October 2011, to 31st December 2011, particulars of which were set out in the special endorsement of claim on the summary summons. The plaintiffs' claim was to the effect that these sums were due on foot of a lease dated 30th April 2004, in respect of which the plaintiffs held the landlord's interest and the defendants, the lessee's interest. The lease was in respect of premises known as Food Court Kiosk, 4 Liffey Valley Shopping Centre, Fonthill Road, Clondalkin, Dublin 22. The lease in question was for a term of twenty years from 1st April 2004.

2. By way of a notice of motion, the plaintiffs sought liberty to enter final judgment for the sum of €44,274.87. This notice of motion was returnable before the Master of the High Court on 31st January 2012. The increase in the sum claimed in the notice of motion, above that claimed in the summary summons, was in respect of interest that had accrued over the interval pursuant to clause 4.5 of the aforesaid lease.

3. Paragraph two of this notice of motion also claimed the following relief:

"2. Such further or other arrears of rent, insurance or service charge which may become due and owing prior to the determination of these proceedings."

4. This latter relief claimed, reflects paragraph three of the special endorsement of claim on the summary summons which makes a claim in similar terms.

5. The application before the Master of the High Court was grounded on the affidavit of Mr. Roy Deller. That affidavit was sworn on 9th December 2011, and it deposes to the lease and the breaches of it and the arrears in respect of which claims were made in the summary summons and the notice of motion, together with interest pursuant to the lease on those arrears. The total claim in this affidavit is as set out in the notice of motion, namely, the sum of €44,274.87.

6. By way of a supplemental affidavit of Mr. Roy Deller sworn on 17th January 2012, additional claims are made in respect of arrears of rent and food service charge and service charges in respect of the period from 1st January 2012, to 31st March 2012, which Mr. Deller averred were unpaid as required by the terms of the lease. In addition, a further small sum of €1,103.20 was claimed in respect of arrears of insurance averred to have accrued for the period from 14th October 2011, to 13th October 2012, which said sum, it was averred, became due on 9th December 2011. These additional claims, when added to the sum already claimed of €44,274.87, brought the total claim to €89,312.92, which was the claim which was advanced before the Master of the High Court when the matter came on for hearing before him on 31st January 2012.

7. This claim was resisted by the defendants, to the extent of so much of it as was not included in the particulars set out in the special endorsement of claim on the summary summons. In opposing the claim, the defendants submitted that the Master of the High Court had no jurisdiction to grant liberty to enter final judgment for any sums in respect of which the claim was not made or set up in the special endorsement of claim on the summary summons; in particular, the defendants relied upon O. 37, r. 1 which is in the following terms:

"1. Every summary summons indorsed with a claim (other than for an account) 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 judgement for the amount claimed, together with interest (if any), or for recovery of land, with or without rent or mesne profits (as the case may be) and costs, and, in the case of an action for the recovery of land for non-payment of rent, to ascertain the amount of rent due. Such motion shall be for the first available day, as the Master may fix, not being less than four clear days from the service thereof upon the defendant, and shall be supported by an affidavit sworn by the plaintiff or by any other person who can swear positively to the facts showing that the plaintiff is entitled to the relief claimed and stating that in the belief of the deponent there is no defence to the action. A copy of any such affidavit shall be served with the notice of motion."

8. In reliance upon this, it was submitted for the defendants that liberty to enter final judgment could only be given "for the amount claimed, together with interest (if any)". Thus, it was submitted that the Master of the High Court could not give liberty to enter final judgment for the arrears claimed in respect of rent and other charges for the period from 1st January 2012, to 31st March 2012, nor for the arrears of insurance claimed to have become due on 9th December 2011, because none of these items were claimed in the special endorsement of claim on the summary summons. No objection was raised to the claim for continuing interest, as this was expressly mentioned in O. 37, rule 1.

9. The defendants countered the plaintiffs' argument by relying upon the judgment of Clarke J. delivered on 1st June 2010, in the case of *Dublin Docklands Development Authority v. Jermyn Street Ltd. and Blacktie Ltd.* (Unreported), wherein at p. 12, the learned judge said the following at para. 3.4:

"3.4 A second point raised on behalf of Jermyn Street concerns the claim in respect of continuing arrears of rent and other charges. As of the time of the initiation of these proceedings the total sum said to be due was €88,085.31. However, as pointed out earlier, no rent has been paid. The amount due has, it is said, therefore increased significantly as further items of rent and charges have fallen due in the ordinary way. It is said on behalf of the defendants that it is not permissible to maintain a claim in respect of ongoing rent or charges in summary proceedings. The basis for that contention is that it is said that each failure to pay rent (or indeed other charges) as they fall due, gives rise to a separate cause of action. Thus, it is argued, sums due in respect of rent which have not arisen as of the time of the issuing of proceedings relate to causes of action not then extant such that the same cannot be maintained in the same proceedings. It was accepted on behalf of Jermyn Street that, by reference to *Stokes v. Kerwick* [1921] 56 I.L.T.R. 24 and *Gold Ores Reduction Company Limited v. Parr* [1892] 2 Q.B. 14, continuing interest can be claimed in summary summons proceedings where the interest is provided for and ascertainable under the terms of the relevant contract or instrument or is fixed by statute. It is clear, therefore, that continuing interest can be claimed even though that interest accrues after the date when a summary summons is issued. It seems to me that there is no reason in principle why continuing rent cannot be claimed on the same basis. A failure to pay ongoing interest due under a contract is a fresh breach of the relevant contractual provision each time an obligation to pay interest newly accruing is not met. I am not, therefore, satisfied that there is any barrier to the DDDA maintaining a claim in respect of all rents and other charges due up to the date of the hearing before me . . ."

10. Reliance was also placed by the plaintiffs on another case where these plaintiffs sued a different tenant, in which the same point had arisen before the Master of the High Court, who had refused to allow liberty to enter final judgment for the additional sums claimed beyond that claimed in the summary summons, which decision was appealed to the High Court and heard by MacMenamin J. who, following the judgment of Clarke J, in the *Dublin Docklands Development Authority* case, and in an *ex tempore* judgment, set aside the order of the Master of the High Court and gave liberty to the plaintiff in that case to enter final judgment for the additional sums claimed.

11. In this case, the Master of the High Court rejected the submissions made on behalf of the plaintiff, and by his order of 31st January 2012, gave liberty to the plaintiffs to enter final judgment for the sum of €44,274 only.

12. By way of a notice of motion dated 3rd February 2012, and returnable before this Court on 16th April 2012, the plaintiffs seek an order pursuant to O. 63, r.8 of the Rules of the Superior Courts setting aside the decision of the Master of the High Court made on 31st January 2012, and also seeking liberty to enter final judgment in the amount of €88,479.80, together with interest thereon.

13. This matter came on for hearing before me and it would appear that the same submissions that were made to the Master of the High Court by both sides were repeated before me.

14. It is apparent that O. 37, r. 1 only makes express provision in an application before the Master of the High Court in respect of *"the amount claimed together with interest (if any)"*.

15. Where O. 37, r. 1 refers to *"the amount claimed"*, it is, of course, axiomatic that what is involved here is a liquidated amount and it is well settled that a liquidated amount is a sum which has been ascertained or is capable of being ascertained simply by calculation. Thus, there could be no doubt but that additional sums claimed in these proceedings are liquidated sums capable of being claimed in summary summons proceedings.

16. In plenary proceedings, the pleadings can be amended to include additional claims. Order 37 contains no provision for amendment in this respect. This, of course, is understandable given the nature of the procedure provided in O. 37 i.e. notice of motion grounded on affidavit.

17. The approach, which appears to have been adopted by the Master of the High Court and which is to the effect that every additional claim, such as arose in this case, because it arose after the issuance of the summary summons, cannot be included by way of notice of motion in an application for liberty to enter final judgment and must be the subject matter of a fresh summary summons, imports into O. 37 a degree of inflexibility which I am quite satisfied is not warranted in the express terms of O. 37 itself, nor is it to be necessarily or reasonably implied from the terms of Order 37.

18. I would like to draw attention to O. 37, r. 4, r. 6 and r. 7 which are in the following terms:

"4. 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. 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."

7. Upon the hearing of any such motion by the Court, the Court may give judgement for the relief to which the plaintiff may appear to be entitled or may dismiss the action or may adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons, with such directions as to pleadings or discovery or settlement of issues or otherwise as may be appropriate, and generally may make such order for determination of the questions in issue in the action as may seem just."

19. I draw attention to these two rules for two reasons. Firstly, as is provided for in r. 6 where a case is contested, the rule directs the Master of the High Court to transfer the case to the courts. This does not appear to have happened in this case, where clearly, a contest arose as to the additional claims made. The order of the Master of the High Court of 31st January 2012, gives liberty to the plaintiffs to enter final judgment for the sum of €44,274.87, and is silent as to the balance of the plaintiffs' claim and does not transfer the balance of the claim to the court as directed by O. 37, rule 6. In my view, therefore, the Master's order can only be construed as a refusal of the plaintiffs' application as made in their notice of motion for liberty to enter final judgment for the additional sums claimed above and beyond €44,274.87.

20. Order 37, r. 7 gives the court jurisdiction to “*give judgment for the relief to which the plaintiff may appear to be entitled*”. This formulation of the jurisdiction to grant judgment is in terms similar to the jurisdiction given to the Master of the High Court under O. 37, r. 4 to grant liberty to enter judgment in uncontested cases.

21. It is apparent that this jurisdiction in O. 37, r. 7 and r. 4 is not expressed in similar language to that used in O. 37, r. 1, namely, “*liberty to enter final judgment for the amount claimed*”. The use of the phrase “*judgment for the relief to which the plaintiff may appear to be entitled*” in O. 37, r. 4 and r.7, necessarily implies, in my view, a jurisdiction that can extend beyond “*the amount claimed*” in the special endorsement of claim on the summary summons.

22. I am satisfied that the jurisdiction to grant liberty to enter final judgment, thus described in O. 37, r. 4 and r. 7, encompasses serial or sequential claims for liquidated sums arising in circumstances similar to and associated with the claim originally made in the endorsement of claim on the summary summons.

23. The additional claims sought to be made in these proceedings are so closely associated with the original claims made in the summary summons that it makes complete sense, both in terms of procedural efficiency and the avoidance of unnecessary cost, to have these claims dealt with in the one set of proceedings. Indeed, the converse, namely, that as each quarter of rent and/or services charges fell due and into arrears, a fresh set of proceedings was required, offends any sensible notion of procedural efficiency and would lead to much greater and unnecessary cost in making these types of claims.

24. I am quite satisfied that within the summary summons procedure, where serial or sequential claims arise out of circumstances similar to and closely associated with the causes of action raised in the endorsement of claim on the summary summons, additional claims can be the subject matter of the application for liberty to enter final judgment if such additional claims are appropriately set out and supported by affidavit evidence. Needless to say, these additional claims could only be for liquidated sums.

25. Thus, I would respectfully agree with the judgment of Clarke J. in the *Dublin Docklands Development Authority* as quoted above.

26. I have come to the conclusion that the additional claims by the plaintiffs in their notice of motion for arrears of rent and service charges, and in respect of an insurance premium arising after the issuance of the original summary summons, can be claimed in these proceedings, and as the only ground upon which the defendants contested these additional claims was the jurisdictional ground which I have rejected, it follows that the plaintiffs are entitled to enter final judgment for the sum of €89,312.92.