THE HIGH COURT

[2015 No. 1572 S]

BETWEEN

DANSKE BANK A/S (TRADING AS DANSKE BANK)

PLAINTIFF

AND

RICHARD WALSH

DEFENDANT

EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 20th day of November, 2018

1. There are two motions before the court in this matter. The first is a motion brought by the defendant, Mr. Walsh to set aside a judgment that was obtained by the plaintiffs, Danske Bank, in the Office in default of appearance on the 25th October, 2016 in the amount of approximately €437,000. That application is brought essentially on the ground that the judgment was obtained by irregularity. The second motion that is before the court is a motion brought by the plaintiff bank which seeks to make absolute a conditional order charging shares of the defendant on foot of the default judgment and obviously that motion either stands or falls on the outcome of the first application.

2. I will first refer briefly to the chronology having had the opportunity of reading all the papers and hearing the arguments of counsel and the very helpful written submissions that both sides have provided to me. A summary summons in these proceedings was issued on the 12th August, 2015 and I think it is fair to say, and I'm not sure if it is in dispute, but certainly it is evident from the papers that there was a degree of difficulty arising in relation to the service of those papers and ultimately service was effected on the defendant's wife in accordance with the Rules of the Superior Courts. That service was effected, and this date is important, on the 8th February, 2016.

3. No appearance was entered by the defendant to the summons and the bank subsequently applied on foot of an affidavit of debt for judgment in default of appearance in the office. The affidavit appears to have been sworn on the 13th April, 2016 and there seems to be some issue as to when it was actually filed but I am not concerned with that for the purposes of this application. What I am concerned with is the fact that on the 25th October, 2016 over one year after the summons was issued, approximately fourteen months after the summons was issued, a judgment by default was obtained by the bank in the Office. The defendant argues that this judgment was obtained irregularly on one ground only and I have to compliment everybody involved in this case for the great amount of clarity that was brought to this and the focus on what is the real issue in the case. And that issue is that the defendant claims that the bank failed to comply with the provisions of O.122 r.11 of the Rules of the Superior Courts. That rule provides as follows and I quote:

> "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed. In any cause or matter in which there has been no proceeding for two years from the last proceeding had, the defendant may apply to the Court to dismiss the same for want of prosecution, and on the hearing of such application the Court may order the cause or matter to be dismissed accordingly or may make such order and on such terms as to the Court may seem just. A motion or summons on which no order has been made shall not, but notice of trial although countermanded shall, be deemed a proceeding within this rule."

4. Obviously the issue that arises in these proceedings is whether or not the service of the summons itself can be considered to be a "proceeding" within the meaning of O.122 r.11 because if it is not, it follows automatically that there was no proceeding in this case for one year from the last proceeding and the failure of the bank to serve a Notice of Intention to Proceed would mean that the judgment was obtained by irregularity.

5. Counsel have helpfully referred me to a number of decisions and I should say at the outset that rather surprisingly it seems that this point has never been decided before or at least counsel through their, I'm sure diligent, endeavours have not been able to turn up a case precisely on point here. So the court is somewhat at large it seems to me in determining this issue. I was referred to the judgment of Mr. Justice Gibson in Northern Ireland in a case of *Allen and Redland Tile Company Northern Ireland Ltd* which is reported at 1973 Northern Irish Reports at p. 75 and in the course of his judgment in that case Mr. Justice Gibson said the following and I quote:

> " 'A proceeding is an act which has some degree of formality and significance and which is done in furtherance of an action … something in the nature of a formal step being either an application to the court or at least a step which is required by the Rules.' A motion or summons on which no order has been made is deemed not to be a proceeding but a notice of trial even if countermanded is. It has also been held that neither a Notice of Intention to Proceed nor notice of change of solicitor constitute a proceeding for the purposes of the Rules but the delivery of a pleading would satisfy the requirement."

I should say in fact that the second part of that quotation comes from the Delaney and McGrath Civil Procedure in the Superior Courts and contained within para. 1503 is the quotation by Mr. Justice Gibson to which I have referred.

6. So that gives some guidance on what amounts to a proceeding and reference was also made by counsel in the course of argument to a number of authorities which consider the issue of whether some particular matter could be considered a step for the purposes of the Arbitration Act because where a person takes a step in proceedings that is a critical feature to be considered by any court in an application made to stay those proceedings pending arbitration under the relevant arbitration legislation.

7. In that regard I was referred to the decision of the Supreme Court in a case called *O'Dwyer v. Boyd* which is reported in 2002 IESC at p. 54 where again one of the issues that arose in that case was that a step in the proceedings had been taken such that a stay pending arbitration would or would not be granted by the court. The judgment of the court was delivered by Mr. Justice Geoghegan and just quoting from that where he deals with this issue at p. 5564 Mr. Justice Geoghegan said the following:

> "Moving now to the second substantial ground of appeal that is to say that the court had no jurisdiction to order the stay

because the respondent had taken a step in the proceedings, it is only fair to say that although many relevant and useful cases have been cited none of them are quite on all fours with what happened in this case.

Before reviewing the case law, I think it useful to refer first to textbook passages on which the appellants have particularly relied. The passage most favourable to the appellants' point of view is probably that contained in Halsbury's Laws of England, 4th edition, reissue, Volume 2 at paragraph 627."

And Mr. Justice Geoghegan goes on to cite that passage with apparent approval and it is as follows and I quote:

"The applicant must have taken no step in the proceedings after acknowledgment of service. A step in the proceedings is an act which both invokes the jurisdiction of the court and which demonstrates the applicant's election to allow the action to proceed. An applicant may take what would otherwise be a step if he makes it clear that that act is done without prejudice to his right to apply for a stay. Steps in the proceedings have been held to include: the filing of an affidavit in opposition to a summons for summary judgment, service of a defence, and an application to the court for leave to serve interrogatories, or for a stay pending the giving of security for costs, or for an extension of time for serving a defence, or for an order of discovery, or for an order for further and better particulars. The following have been held not to be steps: acts preliminary to the issue of proceedings, a request in correspondence for an extension of time for serving a defence, the filing of affidavits in answer to an application by the plaintiff for the appointment of a receiver, transferring a summons into counsel's list, applying to strike out a defective statement of claim, resisting an application for an interlocutory injunction by putting in evidence and appearing in court, and applying for a stay on grounds other than that the dispute was subject to an arbitration payment."

And then Mr. Justice Geoghegan goes on to refer to a footnote to the passage which I have just read out and he refers to it and quotes it as follows:

"Any act which does not involve the court does not invoke its jurisdiction: … as a general rule any application to the court, or filing of pleadings or documents, does invoke its jurisdiction and does amount to a step in the proceedings: … under certain circumstances, however, such actions may not amount to steps."

8. It is I think common case, and it could hardly be in dispute, that the jurisdiction of the court is in the normal way invoked by the issuing of the summons and that has certain limited consequences in particular as was pointed out in argument this morning that it effectively stops the clock for the purposes of the Statute of Limitations but a summons only remains valid for a period of six months unless renewed and after a period of twelve months an application to renew must be made to the court. Such applications are indeed regularly and frequently made usually to avoid the consequences of the statute where the case would otherwise be statute barred if fresh proceedings had to issue.

9. But of course beyond merely issuing proceedings that of itself has no effect on a defendant, bar that that I have identified, unless and until those proceedings are actually served. It is clear that the court cannot exercise jurisdiction over a defendant until such time as he is served and is on notice of the proceedings and to that extent I think it is axiomatic that the service of proceedings is a fundamental step in any form of litigation that comes before the courts. It has immediate and direct consequences because following upon the service of proceedings the defendant is in a position where the clock has started to run and time begins to accrue for the purposes most particularly of entering an appearance. This of course is very important because in the event that a defendant does not enter an appearance within the time limited in that behalf by the Rules he runs the risk of judgment in default being entered against him, as indeed occurred in this case.

10. So in my view, it is undoubtedly the case that the service of the proceedings is a step and a very important step in proceedings. As I have already pointed out, and again I do not think there could be any dispute about this, it has long been the case that the delivery of pleadings constitutes the taking of a step and thus a proceeding within the meaning of O.122. So by way of example the service of a notice for particulars or indeed a reply to particulars is clearly a step even though it has no direct consequences in terms of the running of time under the Rules and is done indeed without any intervention or direct intervention by the court.

11. I think it would be surprising indeed if such were to be regarded as a step amounting to a proceeding and yet the service of the summons itself with direct and immediate consequences for the defendant were not to be so regarded.

12. So for all of these reasons I am of opinion that the service of the summons in this case does amount to a proceeding within the meaning of O. 122 and it seems to me therefore that the motion must fail.