Neutral Citation Number: [2013] IEHC 484

THE HIGH COURT

[2012 No. 595S]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

IAN DUNNE AND ANDREA CAWLEY

DEFENDANTS

JUDGMENT of Kearns P. delivered on the 8th day of November, 2013

By summary summons issued on the 16th February, 2012, the plaintiff claimed liquidated sums amounting to €4,570,579.49 against each of the defendants, together with interest thereon pursuant to the terms of certain loan agreements and/or statute.

The summons alleges that the sums due have arisen on foot of unpaid loans.

The special endorsement of claim recites that by letter of loan offer dated the 27th February, 2006, the plaintiff offered to advance to the defendants a loan by way of overdraft facility in the sum of €50,000 for a term, and at an interest rate therein appearing, repayable in accordance with the terms of the said loan offer and subject to the terms and conditions set out in the letter of approval. It is claimed that this loan agreement was accepted by the defendants by an acceptance dated the 1st March, 2006.

A further letter of loan offer was made on the 7th August, 2009 whereby the plaintiff asserts that previous loan offers were replaced by a new loan agreement in the sum of €5,232,000, the said loan to be for a term of twelve months expiring on the 31st August, 2010 unless otherwise agreed with the bank.

It is claimed that this loan agreement was accepted by the defendants by an acceptance dated the 2nd October, 2009.

It is further claimed that pursuant to the loan agreements the plaintiff advanced to the defendants the sums specified in the loan agreements, but in breach of the loan agreements the defendants and each of them have failed to make repayments as provided for in the agreements at the specified time.

It is claimed that on the 21st April, 2011, the defendants and each of them were indebted to the plaintiff in the sum of €4,365,275.66 after all just credits and allowances were taken into account.

By letters dated the 21st April, 2011, the plaintiff demanded payment of the said monies inclusive of continuing interest thereon at the contract rates as therein appeared.

A further letter of demand, to incorporate additional interest, was made on the 19th December, 2011, in which the plaintiff claimed the sum of €4,616,031.01, but claims that no monies had been paid by or on behalf of the defendants, save for €135,000 received on the 21st December, 2011.

Accordingly, it is claimed that at the date of issue of the summons the defendants are indebted to the plaintiff in the sum of €57,113.78 plus accrued interest of €1,648.87 and surcharges of €896.03 in respect of the February, 2006 loan agreement and €4,427,709.12 plus accrued interest of €21,293.79 and surcharges of €61,917.80, amounting to a total of €4,510,920.71 in respect of the August, 2009 loan agreement. The total thus claimed to be due and outstanding by the defendants to the plaintiff is €4,570,579.49.

An appearance was entered to the summary summons by the second named defendant in her personal capacity on the 2nd March, 2012. An appearance on behalf of the first named defendant was entered in the High Court on the 3rd April, 2012, by Messrs. Kennedys, solicitors, of Ulysses House, Foley Street, Dublin 1.

Thereafter by notice of motion dated the 22nd May, 2012, the plaintiffs sought in the Masters Court an order granting liberty to the plaintiff to enter final judgment as against the defendants and each of them in the sum of €4,717,580.02 together with interest as previously outlined.

The notice of motion was grounded on the affidavit of Christine Dowling who is the manager employed by the plaintiff with responsibility for the accounts the subject matter of the proceedings herein. She duly deposes that she was properly authorised to make this affidavit for or on behalf of the plaintiff.

Having deposed to the facts already recited, she deposed as follows at para. 12 of her affidavit:-

> *"In the circumstances thereof I say the defendants have no bona fide defence to the proceedings herein and that the appearance has been entered for the purposes of delay and I therefore pray this honourable court for an order within the terms of the notice of motion herein."*

By affidavit sworn on the 15th June, 2012, the second named defendant deposed that she had a genuine defence to the claim made by the plaintiff herein which she believed had a real prospect of success. In her appearance before this Court she also adopted the reasoning employed by the Master in dismissing the bank's claim in his decision in the case of *ACC Bank plc v. Heffernan* on the 18th October, 2012. Numerous grounds of defence are relied upon by the second named defendants in seeking to resist the application for summary judgment, including the assertion that the claim should have been brought by Bank of Ireland Private Banking and not the present plaintiffs.

By an affidavit sworn on the 6th November, 2012, the first named defendant also asserted that he had a full and *bona fide* defence to the plaintiff's claim, deposing at para. 35 of his affidavit that significant conflicts of fact had emerged as between the parties "*which can only be resolved at a plenary trial, following a detailed exchange of pleadings and the exhaustion of interlocutory procedures such as discovery*".

The position of both defendants therefore was unmistakable. They were fully contesting the plaintiff's claim. By no stretch of the imagination, therefore, could this be described as an "uncontested case" as envisaged by Order 37 of the Rules of the Superior Courts. However, in adopting this position, neither defendant raised any allegations as to defects in the form of the proceedings.

The matter in due course came before the Master on the 7th November, 2012. Having heard the plaintiff's counsel and on hearing the second named defendant and, in the case of the first named defendant, his counsel, he ordered that the summons be dismissed and that the plaintiff pay to the defendants the costs of the proceedings when taxed and ascertained.

By notice of motion dated the 12th November, 2012 the plaintiff has brought an appeal against the order of the Master herein.

A single point has arisen for consideration by this Court at the outset, namely, whether the Master had a jurisdiction to dismiss the proceedings, as he did, or was he compelled in the circumstances where this was a contested case, to put the matter in the Judges' list.

Counsel on behalf of the bank contend he had no jurisdiction to make the order which he did and in making this submission are supported by counsel for the first named defendant. The second named defendant, who is not legally represented, only participated in this argument to the extent of maintaining that she had a full defence to the plaintiff's claim, including a defence based on the proposition that, as the loans had been advanced by Bank of Ireland Private Banking, that the wrong plaintiff had brought the claim.

DISCUSSION
Neither a digital audio recording nor written decision from the Master exists in this case. However, all parties agreed that the rationale for the Master's decision was that indicated by him in a written decision which he delivered on the 18th October, 2012.

The case in question was *ACC Bank plc v. Thomas Heffernan and Mary Heffernan*, also a claim brought by a lending institution for recovery of sums alleged to be due and outstanding by the defendants.

I propose to set out fully the reasoning of the Master in relation to his jurisdiction as elaborated at pp. 8-9 of his written decision:-

> *"Contrary to popular belief, the Master's Court is not a Court of full and original jurisdiction. The Master can exercise quasi judicial functions but only within his remit as specified in the Rules of the Superior Courts. For example, the Master cannot determine whether service of a Summons should be deemed 'good' where the Rules of the Superior Courts have not been complied with. That is a task reserved for a full judge who is presumed to know where the interests of justice lie. Insofar as he does have quasi judicial functions, can it be said, as a general principle, that the Master is authorised to make determinations which might be prejudicial to a party or inimical to justice solely because the affected party may, under the Rules, simply appeal the determination. Does the appeal option quiet any claim of breach of Article 37?*
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> *In short, therefore, the Master must make some decisions and affected parties may appeal. If the issue is whether the Master should overlook or waive the rigour of one of the Rules, the safest course is to apply the rule strictly and allow a judge, on appeal, to determine whether, in any given instance, the rule is being misapplied as the master of justice and not its slave. It is not for the Master to rewrite the Rules on a whim. It is for the judges to permit deviations from their own Rules, but the Master should probably adhere to them.*
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> *Consequently, if the papers are not 'in order', the case cannot proceed past the Master's Court stage.*
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> *I know of no reported decision on what the term 'in order' means, but in the context in which it is employed (the Rules of Court), it must mean in accordance with the Rules and the law. Special Summons proceedings are not in order if they are grounded on an affidavit which deposes to a fact which is, at a matter of law, inconsistent with the relief sought. A Summary Summons seeking a relief not listed in O. 2 (e.g. a declaration, or administration of an estate) will be struck out as 'not in order'. The plaintiff must start again.*
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> *I take the view that a Summary Summons in regard to which it is patent that the plaintiff's solicitor cannot properly advise that the defendant has no defence is a bad summons. It is not in order. Its deficiency is a matter of law: the legal implications of the facts known to the plaintiff prior to the commencement of the proceedings.*
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> *Where it is clear from the papers that the plaintiff's solicitor is mistaken in his opinion that no Ryanair v. Aer Rianta defence is available to the defendant, the Summary Summons must be ruled to be not 'in order' and struck out. Such a case is just not appropriate for a Summary Summons. It is not necessary to consider further whether the summons should be characterised as misconceived, or worse: an abuse of process. That would be an aspect for judicial determination.*
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> *The mediaeval English King Edward the First is often referred to as the English Justinian. This is not quite accurate as King Edward was not a codifier like Justinian, but there were significant legal reforms during his reign, including legislation still sometimes cited such as Quia Emptores [1290] and The Statutes of Westminster I and II 'De donis conditionalibus'. He also took great interest in the administration of 'the King's justice' in the courts. In his biography of the King (Guild Publishing 1988), Professor Michael Prestwich of Durham records the King's refusal to allow proceed a case 'based on a dubious writ'. The biographer writes that 'Edward himself, who was present in court rose, declaring "I have nothing to do with your disputations, but, by God's blood, you shall give me a good writ before you arise hence"'.*
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> *I concur. I am striking out the Summary Summons in this case. The plaintiff can always start again with a Plenary Summons."*

It is apparent from the thinking processes applied by the Master that he takes the view that if a plaintiff's solicitor cannot properly advise that the defendant has no defence, then the summons is deficient and not in order.

The second named defendant expressly adopted the Master's line of reasoning, arguing that she did believe she had a defence to the plaintiff's claim, that the plaintiff's officers were aware of this and accordingly could not have, or should not have, sworn an affidavit

which contained the averment in the affidavit grounding the application for summary judgment.

I will leave to one side for the moment the point offered to the Court by Mr. Ralston, counsel for the first named defendant, that had the plaintiff's grounding affidavit failed to contain such an averment, it might also have been ruled "out of order" and dismissed or struck out for that reason also.

I am satisfied that the particular issue in this case can be resolved simply by reference to the Rules of the Superior Courts.

The relevant portions of Order 37 of the Rules of the Superior Courts provide:-

> *"Hearing of proceedings commenced by summary summons*
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> *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 judgment 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 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.*
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> *……..*
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> *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 judgment 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.*
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> *……..*
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> *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."*

These rules are clear and unambiguous. The Master's jurisdiction to dismiss an action arises only in uncontested cases. This is not an uncontested case.

The Master has no discretion in a contested case. Where a case is contested, the Master is obliged by rules of court to transfer the case to the court list for hearing at the first opportunity. The only qualification to that requirement is that he may, on consent, adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons. Further, where a case is contested and there is some inadequacy as to form, the Rules do not confer on the Master a jurisdiction to dismiss the proceedings out of hand – his jurisdiction, clearly spelt out in the Rules (Order 37, Rule 6), permits him only to go so far as to decline to transfer the case to the court list until those deficiencies are rectified and the matter thereby becomes 'in order'. While that point does not arise specifically in this case it is nonetheless worthy of emphasis.

The power to dismiss a contested case is clearly reserved to the High Court by Order 37, rule 7 which provides:-

> *"Upon the hearing of any such motion by the Court, the Court may give judgment 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."*

No part of Order 37 confers jurisdiction on the Master in a contested case to analyse affidavits filed in reply by a defendant to retrospectively impugn or invalidate a grounding affidavit sworn in support of a claim for a liquidated sum so as to permit or effect a finding that it is or might be in conflict with the stated requirements of Order 37.

No objection to the form of the proceedings was taken by either of the defendants in the Master's Court, as was confirmed by counsel for the first named defendant and by the second named defendant also. The contention by the second named defendant that the action should have been brought by the private banking division of the plaintiff company is not an allegation or assertion which goes to the correctness of the form of the proceedings, but rather is an issue which may fall to be considered if a judge decides that the matter should proceed to full plenary hearing. Even if that contention was correct I am satisfied that the Master, for the reasons outlined above, would not in any event have had power to dismiss this contested case for that reason.

More importantly, it appears to me that the reasoning of the Master in this instance was incorrect. It is quite inappropriate, in my view, to take from replying affidavits the notion that the plaintiff's officers must have sworn to a known untruth when swearing the grounding affidavit. That is to misinterpret and misunderstand the relevant provisions of Order 37. It is quite wrong, in my view, to infer from the fact that issues are raised in defence by a defendant that the plaintiff's grounding affidavit was therefore not in proper form. This view of the Master is apparently based on his view that the plaintiff's deponent must have known that some contest was likely and that an affidavit in the particular form as filed by the defendants was also likely. This is logic working backwards from a subsequent event to an event precedent (which was carried out in accordance with the Rules) and purporting to invalidate the earlier step by reference to untested assertions made by the defendants which at this stage only go so far as to demonstrate that this is a case which they propose to contest.

I do not believe it is open for the Master to conduct such an exercise or to find on this basis that there is a want of form in the affidavit supporting the motion for judgment, nor do I believe he possesses the jurisdiction under Order 37 to dismiss proceedings in the manner in which he did in this particular case.

I would allow the appeal and direct that the matter be entered in the Judges' list in the manner provided for at Order 37, rule 7 of the Rules of the Superior Courts.