

Between:

START MORTGAGES LIMITED

Plaintiff

– and –

JOHN DOORLEY AND MAJELLA FLAHERTY

Defendants

JUDGMENT of Mr Justice Max Barrett delivered on 27th November, 2018.

1. This is an appeal against a decision of the Master in which the principal reliefs sought are: (1) an extension of time within which to bring this appeal; (2) a discharge of the Master's order of 18.07.2018 striking out the special summons as against the 1st-named defendant and adjourning same against the 2nd-named defendant; (3) a re-instatement of the proceedings.

2. Under O.63, r.9 of the Rules of the Superior Courts 1986, as amended (RSC), "Any party aggrieved by an order...made by the Master may, within six days from the perfecting of the same, or...in the case of a refusal from the date of such refusal, apply to the Court to discharge such order or to make the order refused." Here the order sought (an order transferring the matter into the Chancery Special Summons List) was refused on 18.07.2018, the perfected order issuing on 19.07.2018; the motion grounding this application issued on 30.07.2018, beyond the 6-day time limit. The court has before it an affidavit from a litigation manager with Start Mortgages who avers, *inter alia*, as follows:

"[F]ollowing counsel's attendance in the Master's Court on 18th July, 2018, I received [an]...email dated the same date...from Lavelle Solicitors reporting...what...occurred in the Master's Court that morning in that the Master...struck out the proceedings as against the First Named Defendant. The email...noted that counsel's advice was to appeal...[U]pon receipt of the report and counsel's advice, I formed the intention to appeal...I was at the time unaware of the specific time limits in which to file such...appeal...[W]ritten instructions were only provided to the solicitors on 26th July, 2018...Lavelle Solicitors also mis-diaried the matter with the result that the appeal was...lodged a couple of days late."

3. The diary error seems something of a 'red herring'. Given the delayed instructions from Start Mortgages, it does not appear that application could have been made to the court within the applicable 6-day period.

4. The best starting-point when it comes to the enlargement of time to appeal is the judgment of Lavery J. in *Éire Continental Trading Co Ltd v. Clonmel Foods Ltd* [1955] IR 170, which pointed to the following as proper matters for consideration: (1) that an applicant had a *bona fide* intention to appeal formed within the relevant time; (2) that an applicant shows the existence of something like mistake, with mistake as to procedure, in particular the mistake of counsel or solicitor as to the meaning of the relevant rule, being insufficient; (3) that an arguable ground of appeal exists. Here, item (1) and (it will be clear from the consideration which follows below of the issues raised by the Master) item 3 are satisfied. So it seems is item (2): the litigation manager does not indicate that she made a mistake as to procedure; she was completely unaware of the 6-day rule. But even if the court is wrong and the litigation manager's ignorance of the 6-day rule is a mistake as to procedure or (somehow – and despite the contention of the 2nd-named defendant to this effect, the court respectfully does not see how) what occurred is attributable to a mistake by a solicitor as to the meaning of the relevant rule, the court: (A) is mindful of (a) the extent of discretion pointed to by Greene MR in *Gatti v. Shoosmith* [1939] 1 Ch.841, and (b) the less than stringent approach to the judgment of Lavery J. adopted by e.g., Geoghegan J. in *Brewer v. Commissioners of Public Works in Ireland* [2003] IESC 51, as well as (c) Irvine J.'s observation in *Danske Bank v. Kirwan* [2016] IECA 99, para.[7] that "*the judgment of Lavery J. should not be read as if it were a statute*"; and (B) is satisfied that its discretion should be exercised in favour of Start Mortgages as the court does not see that the enlargement of time occasions any injustice, especially where, as will be seen below, each reason for the original refusal to transfer seems to it, with respect, not to be good reason.

5. The Master appears to have had three concerns about the documentation before him:

(i) (a) the illegibility of an exhibited advertisement and (b) absence of an original copy of the newspaper in which that advertisement was placed. As to (a), the court respectfully agrees with the Master that the exhibited advertisement was illegible. The court respectfully disagrees with the Master having required a copy of the original newspaper (*the Khaleej Times*): all the documents in the court booklets were copy documents so it is not clear why the clear copy of the advertisement provided was considered objectionable, unless perhaps (the court does not know) the objection was that it was handed up, rather than being exhibited, in which case (if so) a fresh affidavit could have been ordered, though, it seems to the court that some reliance might also be placed on the good faith of solicitors/counsel in this regard.

(ii) the Master could not make out the email address of the 1st-named defendant in the affidavit of service as there was a court stamp covering same. The email address is *just* discernible; however, it is also, in any event, clear from Exhibit B of the affidavit of service.

(iii) the Master observed that the order for service directed service by listed methods but did not permit such service. The court respectfully does not accept this logic: if an order directs something to be done, it cannot but be construed as permitting what is directed (save where what is directed is not permitted at law in which case the order ought never to have issued; this is not the case here).

6. There is no other reason apparent to the court why the substituted service was not good service, having been done in accordance with the Order for Substituted Service of 26.01.2015, and been served four days before the applicable return date (in accordance with O.38, r.1, RSC).

7. Having regard to the foregoing, the court will grant the orders sought and direct that this matter be transferred for hearing into the Chancery Special Summons List.