

THE HIGH COURT

[RECORD NO. 2015 1724 P]

BETWEEN

FIRST NAMED TRUST COMPANY (IRELAND) LIMITED AND PYRAMUS CAPITAL PARTNERS LIMITED

PLAINTIFFS

V.

CIARAN FITZGERALD, CORMAC FITZGERALD, THE BLUE HAVEN FOOD COMPANY LIMITED, FIZGERALD AND PARTNERS (A FIRM), CIARAN DESMOND, BARRY MCCARTHY, COLM MCGUIRE AND DERBHAIL O'HALLORAN, ALL FORMERLY PRACTICING UNDER THE STYLE AND TITLE OF MCGUIRE DESMOND SOLICITORS

DEFENDANTS

JUDGMENT of Mr. Justice Eagar delivered on the 11th day of October 2019

1. This is a judgment on the application by way of notice of motion of the first, second and fourth named defendants who sought an order pursuant to the courts' inherent jurisdiction declaring that as of the 28th March 2018, when the plaintiffs purported to serve the plenary summons herein by ordinary prepaid post on the first, second and fourth named defendants who sought orders as follows: -

- (i) An order pursuant to the court's inherent jurisdiction declaring that as of the 28th March 2018 when the plaintiffs purported to serve the plenary summons herein by ordinary prepaid post on the first, second and fourth named defendants in compliance with the order for substituted service made herein on the 19th February 2018, the plenary summons herein had expired without being renewed and was no longer in force, and was no longer capable of being served and accordingly such service was bad, ineffective, invalid, null and void.
- (ii) Further or in the alternative an order pursuant to O. 12, r. 26 of the Rules of the Superior Courts setting aside the purported service of the plenary summons on the first, second and fourth named defendants by ordinary prepaid post on the 28th March 2018.

Or in the alternative, the following orders: -

- (iii) An order pursuant to O. 8, r. 2 of the Rules of the Superior Courts setting aside the order made herein on the plaintiff's ex parte application on the 20th March 2017 for the renewal of the plenary summons for a period of six months.
- (iv) An order pursuant to O. 8, r. 2 of the Rules of the Superior Courts setting aside the order made herein on the plaintiff's ex parte application on the 11th September 2017 for the further renewal of the plenary summons for a period of six months.
- (v) An order pursuant to O. 12, r 26 of the Rules of the Superior Courts discharging the orders made herein on the 19th February 2018 giving the plaintiffs liberty to serve the plenary summons herein and any other documents in these proceedings on the first named defendant by ordinary prepaid post to the Blue Haven Hotel, 3 Pearse Street Kinsale, Co. Cork.

- (vi) An order pursuant to O. 12, r. 26 of the Rules of the Superior Courts discharging the orders made herein on the 19th February 2018 giving the plaintiffs liberty to serve the plenary summons herein and any other documents in these proceedings on the second named defendant by ordinary prepaid post to Fitzgerald and Partners Registered Auditors, 9 Pearse Street Kinsale Co. Cork.
 - (vii) An order pursuant to O. 12, r. 26 of the Rules of the Superior Courts discharging the orders made herein on the 19th February 2018 giving the plaintiffs liberty to serve the plenary summons herein and any other documents in these proceedings on the fourth named defendant by ordinary prepaid post to Fitzgerald and Partners, Registered Auditors, 9 Pearse Street Kinsale, Co. Cork.
 - (viii) Such further and other orders, relief or direction as this Court sees fit and proper.
 - (ix) Costs incidental to the application.
2. In effect however, the main issue of dispute between the parties relates to the effect of a Protective Certificate made by Baker J. on 1st December 2017, on an application dated the 24th November 2016 for a Protective Certificate related to Ciaran Fitzgerald, the first named defendant, and Cormac Fitzgerald, the second named defendant. A subsequent order of Baker J., made on the 6th February 2017 extended the period of the Protective Certificate issued by the court on the 1st December 2017 with an expiry date of 9th February 2017, by an additional period of 40 days from the date of its original expiration to the 21st March 2017.

Agreed facts

3. On the 21st December 2015 the plaintiffs issued proceeding by way of a plenary summons seeking: -
- (i) Indemnification pursuant to the investment agreements between the plaintiffs and the first, second and third named defendants relating to the third named defendant made on or about the 19th December 2008, the 23rd December 2009 and the 13th April 2010, or alternatively damages.
 - (ii) Damages for the misrepresentation and breach of contract (including without limitation for breach of warranty) against the first, second and third named defendants,
 - (iii) Damages for breach of duty and for negligent misstatement.
 - (iv) Damages and/or equitable compensation for breach of fiduciary duty.
 - (v) Orders directing all necessary accounts and inquiries.
 - (vi) Interest.
 - (vii) Such further or other relief as to this honourable court seems just and appropriate.

(viii) An order providing for the costs of the proceedings.

4. It was agreed that the claim made by the plaintiff was for alleged liabilities of €3,100,000 against the first and second named defendants. This appeared in the prescribed financial statements issued by the Insolvency Service of Ireland on the 10th April 2017 and identified that sum was claimed by the plaintiffs. Finally, it was agreed by the parties that personal service was effected on the first, second and fourth named defendants on the 19th December 2016 when the plenary summons in these proceedings was still current, having been issued on the 21st December 2015.
5. The first issue that has to be determined by the court is the background and circumstances of the service of the High Court plenary summons on that date.

Service of the plenary summons

6. Attached to the affidavit of Ronan Hynes solicitor, in the firm of Keating Connolly Sellors, the firm of solicitors on record for the plaintiff, was an email from Gerry Crowley to the plaintiff's previous solicitor Mr. Michael Murphy, solicitor of Holmes O'Malley Sexton. In that email, Mr. Crowley stated that he had personally served the first named defendant at 3 Pearse Street Kinsale on the 19th December 2016, that he had served the second named defendant at 9, Pearse Street Kinsale on the 19th December, that he had served the third named defendant, the Blue Haven Food Company Limited, at 3 Pearse Street Kinsale on the 19th December 2016 by serving same on the first named defendant and finally served the fourth named defendant, Fitzgerald and Partners, on the second named defendant, Cormac Fitzgerald, at 9 Pearse Street Kinsale on the 19th December 2016.
7. Further to the email the court noted the affidavit of personal service of the High Court plenary summons and notice of change of solicitor sworn by Gerry Crowley, summons server, on the 17th July 2017. In that affidavit he detailed serving the defendant Cormac Quinn on the 19th December 2016 at 11 a.m. at 9 Pearse Street Kinsale Co. Cork and that at the same time he served Fitzgerald and Partners Solicitors by delivering a copy to Cormac Fitzgerald at the same time, the 19th December 2016. He further said that on the 19th day of December 2016 at 11:30 a.m. on 3 Pearse Street Kinsale, he served the first named defendant Ciaran Fitzgerald by delivering and leaving with him a copy of the High Court plenary summons and on the same date and same time, he served the Blue Haven Food Company Limited by delivering and leaving a copy with Ciaran Fitzgerald.
8. In the affidavit of Ciaran Fitzgerald sworn on the 16th January 2019, Mr. Fitzgerald states that Gerard Crowley had earlier in December 2016 approached the first and second named defendants seeking to serve each of them with a plenary summons. They had given him notice that High Court Protective Certificates had been issued to each of them. Therefore they could not accept service of the proceedings. He also says that at that time Mr. Crowley said that he would get back to his instructing solicitors to talk about the matter. In those circumstances, he said the plaintiff had notice of the issue of the Protective Certificates.

The decision of the court with regard to the service of the summons

9. As was noted by this Court in *EBS Ltd. v. Dempsey* [2017] IEHC 576: -

“It is of course impossible for a court to seek to determine in a situation where affidavits contradict each other where the truth lies. The court notes that as this is the application by the defendant it is surprising that no application was made to cross-examine Colum Smith or Peter McKenna on their affidavits where they are so trenchantly opposed”.

10. In this case the court notes that it is surprising that no application is made to cross – examine Gerard Crowley or Ronan Hynes solicitor on their affidavits where they are so *“trenchantly opposed”*. It appears to the court that failure to seek to cross – examine the summons server and the solicitor engaged in and who had carriage of the proceedings places the defendant in the position that the court is satisfied that they were served as claimed. The court notes that Mr. Fitzgerald does not state where the alleged meeting with Gerry Crowley took place, in his affidavit. The court also accepts that Mr. Crowley, as a professional summons server, would have reverted to his instructing solicitor, Michael Murphy, of Holmes O’Malley Sexton, to tell him of the misuses that were alleged to have been said to Mr. Crowley by the first and second named defendants. It is clear that Mr. Fitzgerald’s affidavit is lacking in any detail as to where this meeting took place and the court does not accept the affidavit of Ciaran Fitzgerald in relation to such a meeting.

The Personal Insolvency Act, 2012

11. The legal basis for Protective Certificates is found in the Personal Insolvency Act of 2012. In the introductory title as indicated by counsel for the defendants, this being that the law relating to insolvency, to amend the Bankruptcy Act 1988, to provide for the establishment and functions of a body to be known as the Insolvency Service of Ireland and having regard to the following objectives: -

“(a) The need to ameliorate the difficulties experienced by debtors in discharging their indebtedness due to insolvency and thereby lessen the adverse consequences for economic activity in the state,

(b) The need to enable creditors to recover debts due to them by insolvent debtors to the extent that the means of those debtors’ reasonably permits, in an orderly and rational manner”.

In this case, John O’Callaghan, a Personal Insolvency Practitioner, in an affidavit sworn on the 16th January 2019, indicated that he had previously acted on behalf of the first and second named defendants in their respective personal insolvency proceedings.

12. He refers to two sets of proceedings, one in relation to Ciaran Fitzgerald and one in relation to Cormac Fitzgerald. He states that both the first and second named defendants applied to the High Court for a Protective Certificate on the 24th November 2016 and Baker J. issued a Protective Certificate to each of them by order dated the 1st December 2016. The Protective Certificate was subsequently extended twice by the court which finally expired on the 28th April 2017. It confirms that the plaintiffs were not given notice by him of either of the Personal Insolvency proceedings prior to the applications for Protective Certificates or listed as debtors in either proceeding because he was not

instructed by the first named and second named defendant of any debt owing to the plaintiffs prior to the applications for Protective Certificates. He says that the first awareness he had of any claim against the first and second named defendants being maintained by the plaintiffs was on or about the 3rd February 2017 when he received a letter dated the 2nd February 2017 signed by Ms. Noeleen Morris as manager of the second named plaintiff. The letter applied to personal insolvency proceedings of the first named defendant and expressed surprise and concern as to his application for personal insolvency arrangement and said that the second named plaintiff was not notified of the issue of the Protective Certificate. The letter does not explain how and when the plaintiffs learned of the Protective Certificate. The letter went on to make a claim that the first and second named defendants had personal liabilities in excess of €3.1 million due and owing to the plaintiffs which were the subject of the above litigation. In reply to that correspondence a reminder dated the 27th March 2015, Mr. O'Callaghan responded to her by letter dated the 10th March 2017 which referred to both the first and second named defendants. He explained that the delay in the insolvency litigation had been caused by one of the secured creditors attempting to appoint a receiver during the Protective Certificate period. He says that service of the proceedings on the first and second named defendants on the 19th December 2017 during the period of the Protective Certificate expresses his view that in his opinion such service would be contrary to s. 96 of the Personal Insolvency Act 2012, if at the time of service, the plaintiffs had been given notice of the issue of the Protective Certificate. He said that he did not give the plaintiffs any such notice but he says it is clear from the correspondence as exhibited that they received some notice at some time prior to the 2nd February 2017.

13. Attached to this affidavit was the order of Baker J. which included all the specified debts. In the schedule of specified debts attached to the order of Baker J. dated the 1st December 2016, there is no mention of the proceedings involving First Named Trust Company (Ireland) Limited, and Pyramus Capital Partners Limited.
14. It is clear from the affidavit of John O'Callaghan that he had never issued notice to the plaintiffs in this case of an application for Protective Certificate.
15. The second affidavit of Ronan Hynes, solicitor, indicates that the plaintiffs had not been given the required notice of Protective Certificates issued in respect of the first and second named defendant.
16. The court has already held that the court accepts Mr. Crowley's account of the service of the proceedings on the Fitzgeralds from the 19th December 2016 and that the court accepts that he had no contact with the first and second named defendants in relation to these proceedings prior to the 19th December 2016. He says that in explicit recognition of the plaintiffs' claims, the first and second named defendants had participated in a mediation of the dispute on the 27th October 2015 following the failure of which the proceedings were issued against them in December 2015.
17. Section 93 of the Act of 2012 provides as follows: -

“Where a personal insolvency practitioner has been instructed pursuant to section 53 to make a proposal for a Personal Insolvency Arrangement, the personal insolvency practitioner shall notify the Insolvency Service of the debtor’s intention to make a proposal for a Personal Insolvency Arrangement and apply on behalf of the debtor for a protective certificate”.

18. Section 96 (1) provides: -

“Subject to subsections (3), (4) and (5), a creditor to whom notice of the issue of a protective certificate has been given shall not, whilst the protective certificate remains in force, in relation to a specified debt:

- (a) initiate any legal proceedings;*
- (b) take any step to prosecute legal proceedings already initiated;*
- (c) take any step to secure or recover payment;*
- (d) execute or enforce a judgment or order of a court or tribunal against the debtor;*
- (e) take any step to enforce security held by the creditor in connection with the specified debt”.*

19. Section 96(3) provides: -

“(3) Without prejudice to subsections (1) and (2), whilst a protective certificate remains in force, no other proceedings and no execution or other legal process in respect of a specified debt may be commenced or continued by a creditor to whom subsection (1) applies against the debtor or his or her property, except with the leave of the court and subject to any order the court may make to stay such proceedings, enforcement or execution for such period as the court deems appropriate pending the outcome of attempts to reach a Personal Insolvency Arrangement, but this subsection shall not operate to prohibit the commencement or continuation of any criminal proceedings against the debtor”.

Counsel on behalf of the defendant argued that subs. 3 applied in circumstances where a Protective Certificate remained in force.

20. Counsel on behalf of the plaintiff submitted that subs. 3 must be read with s. 96(1) which indicates that a creditor to whom notice of the issue of the Protective Certificate has been given, shall not whilst the Protective Certificate remains in force in relation to a specified debt, initiate any legal proceedings. In this case counsel for the plaintiff argued that the creditor had not been given notice of the Protective Certificate in relation to a specified debt, and in fact it seems clear that at the time of the application for the Protective Certificate the personal insolvency practitioner had not been given notice by the debtors

of the claim made by First Named Trust Company (Ireland) Limited and Pyramus Capital Partners Limited particularly having regard to a specified debt.

21. It is quite clear that s. 98 (1) provides: -

“(1) Where a protective certificate has been issued, the personal insolvency practitioner shall as soon as practicable thereafter—

(a) give written notice to the creditors concerned that the personal insolvency practitioner has been appointed by the debtor for the purpose of making a proposal for a Personal Insolvency Settlement Arrangement and, subject to section 101 (2), invite those creditors to make submissions to the personal insolvency practitioner regarding the debts concerned and the manner in which the debts might be dealt with as part of a Personal Insolvency Arrangement, and such notice shall be accompanied by the debtor’s completed Prescribed Financial Statement”.

22. It is clear in this case that the personal insolvency practitioner has in his own affidavit agreed that he did not give written notice to the plaintiffs in this case and this Court accepts the *bona fides* of John O’Callaghan, the personal insolvency practitioner, that he did not give notice to the plaintiffs in this case because he had not been aware of the debt.

23. The court is satisfied that the defendants in this case did not inform Mr. O’Callaghan of the proceedings which have been issued and which were served on them on the 19th December 2016.

24. In the first affidavit of Ronan Hynes sworn on the 30th October 2018 he exhibits an undated letter which was addressed to Mr. Michael Murphy, solicitor, at Holmes O’Malley Sexton indicating they were returning the attached summonses to him quoting as follows:

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“Please note that we are returning the attached summons to you as due to our protected status we are unable to accept or be served summons of this nature.

Please correspond directly with our legal representatives Petrie Sheehan Solicitors, Village Green, Douglas Cork.

Signed

Ciaran and Cormac Fitzgerald”.

25. It is quite clear that this letter was issued after the Protective Certificate by Baker J. but this information does not appear to have been given to the personal insolvency practitioner. Further, the fact that the letter was undated seems extraordinary.

26. It seems extraordinary to this Court that the defendants have not arranged for the personal insolvency practitioner or their solicitor to send such a letter.
27. In these circumstances the court is satisfied that the plaintiffs were not given the required notice of the Protective Certificates issued in respect of the first and second named defendants. It is clear that the Protective Certificates issued by Baker J. mentions neither the plaintiffs nor their claims, and having regard to the fact that the Fitzgeralds had already taken part in mediation proceedings in this matter, they clearly had not passed this information on to their personal insolvency practitioner. The court is satisfied that it is a matter for the debtor to take care to identify all of his liabilities and to ensure that they are appropriately disclosed to the personal insolvency practitioner and addressed appropriately in the personal insolvency proceedings. The court is satisfied that the Fitzgeralds did not make full and honest disclosure and failed to comply with their requirement to have a duty of candour to make full inquiries as to any areas of possible concern in relation to their financial circumstances.
28. The court is also satisfied that s. 96(3) does not assist the defendants in that it is clear that s.96(3) must be read in conjunction with s. 96(1) as s. 96(3) requires that: -
- “ . . . no other proceedings and no execution or other legal process in respect of a specified debt may be commenced or continued by a creditor to whom subsection (1) applies against the debtor or his or her property, except with the leave of the court and subject to any order the court may make to stay such proceedings, enforcement or execution for such period as the court deems appropriate pending the outcome of attempts to reach a Personal Insolvency Arrangement, but this subsection shall not operate to prohibit the commencement or continuation of any criminal proceedings against the debtor”.*
29. Mr. O’Callaghan considered the claims significant in that he produced or prescribed financial statements for Mr. Ciaran Fitzgerald dated the 10th April 2017 in which the plaintiff’s claim was listed with an estimated value of €3.1 million. This prescribed financial statement post – dates all applications to the court for the issue and renewal of Protective Certificates.
30. In all the circumstances of the case, the court is satisfied that the service of the proceedings on Ciaran Fitzgerald, Cormac Fitzgerald and Fitzgerald and Partners was not covered by the Protective Certificate issued by Baker J. on the 1st December 2016.
31. The notice of motion which sought various reliefs in relation to orders of this Court made in the course of 2017 related mainly to the renewing of the plenary summons and substituted service on other defendants was not relevant to these proceedings in the circumstances that the court is satisfied that the proceedings were served on the first, second and fourth named defendants on the 19th December 2016.
32. In all the circumstances the court will refuse the reliefs sought by the first, second and fourth named defendants in the notice of motion.