

THE HIGH COURT

[2021] IEHC 121  
[2015 No. 384 S]

**BETWEEN**

**THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND**

**PLAINTIFF**

**AND**

**KARL SUGRUE AND ANN SUGRUE**

**DEFENDANTS**

**Judgment of Mr. Justice Quinn delivered on the 22nd day of February, 2021**

1. In these proceedings the plaintiff seeks judgment against the defendants in the sum of €142,894.11. This amount is comprised of personal loans to the defendants, and loans to a company of which they were directors and which were guaranteed by the defendants.
2. This judgment relates to an application by the second named defendant for the following orders: -
  - (a) An order pursuant to the inherent jurisdiction of the court "*discharging or withdrawing*" an Appearance entered by the second named defendant on 20 November, 2017;
  - (b) An order pursuant to O. 8, r. 2 of the Rules of the Superior Courts ("RSC") setting aside an order of the High Court made 23 October, 2017, renewing the summary summons.
3. The detailed history of these proceedings is of central importance to the exercise of the discretion of the court in the determination of this application.
4. On 7 June, 2011, the plaintiff granted a facility to the defendants in an amount of €33,000 by way of term loan. When the proceedings were commenced on 26 February, 2015, the amount claimed by the plaintiff in respect of this facility was €49,582.
5. On 7 June, 2011, the defendants executed a guarantee and indemnity in favour of the plaintiff to secure advances to be made to a company, namely General Safety Managers Limited ("the customer") of liabilities up to a sum of €93,500. The defendants were directors of the customer.
6. At the time of the commencement of these proceedings, the amount claimed by the bank pursuant to the guarantee was €93,311.87.
7. In the facility letter and the guarantee, the stated address of the defendants was The Grooms Cottage, Old Conna Village, Rathmichael, Bray Co. Wicklow.
8. The customer, General Safety Managers Limited, had its registered office at 26 Clare St., Dublin 2.

9. According to the applicant's own evidence, the defendants relocated on four occasions in the period relevant to these proceedings. None of these changes of address were notified to the plaintiff.
10. In early 2013, the defendants relocated to an address at No. 2 Sallymount Terrace, Ranelagh Dublin 6.
11. In June 2013, the defendants relocated to Sorcha Cottage, Bird Avenue, Clonskeagh.
12. On 20 August, 2013, the plaintiff wrote to the defendants at 2 Sandymount Terrace (not Sallymount Terrace) Ranelagh Co. Dublin. By these letters, it called on the defendants to repay a sum then claimed of €93,500 within 21 days of the date of that letter, being the amount stated to be due and owing by the customer and now claimed pursuant to the guarantee.
13. On 15 January, 2015, the plaintiff's solicitors, Messrs O'Donovan Baker, wrote to the defendants at 2, Sallymount Terrace, Ranelagh, Dublin 6 referring to the personal term loan and notifying them that the amount then due was €49,582.24 in respect of the term loan account. (In the case of the first named defendant, an additional amount of €3,427.58 was said to be due in respect of a separate loan account).
14. On 26 February, 2015, the summary summons was issued in which the total sum of €142,894.11 was claimed by reference to the amounts previously demanded. The address given on the summary summons for the defendants was 2 Sallymount Terrace Ranelagh, Dublin 6.
15. On 6 March, 2015, a summons server retained by the plaintiff, Mr. John Fox, made two attempts to serve the summons. In an affidavit sworn by him on 25 August, 2017, (which grounded the application for renewal of the Summons), he stated that he attended at 2 Sallymount Terrace, Ranelagh, Dublin 6 where he met with a gentleman who was renting the property. That person informed Mr. Fox that the defendants did not live there, and that he did not know the defendants and that he did not have a forwarding address for them.
16. On the same day, Mr. Fox attempted service at The Grooms Cottage, Old Conna Village, Rathmichael, Bray, Co. Wicklow but the defendants were not at that address.
17. On 16 March, 2015, Mr. Fox attended at the registered office of the customer, 26 Clare St. Dublin 2, noting that the defendants were both directors of the customer. He says that the defendants were not at that location. He says that he believed that they no longer operate a business from that address and that he met the landlord of the premises at 26 Clare St. who did not know the whereabouts of the defendants.
18. Mr. Fox swore also that on the same day, 16 March, 2015, he made telephone calls to landline and mobile numbers associated with the defendants but these numbers were out of service.

19. In his affidavit grounding the application to renew the summons, the plaintiff's solicitor, Mr. O'Donovan, says that on 16 April, 2015, he instructed a firm called Mediator Trace and Serve to find an up to date address for the defendants. He says that the trace agent called to a number of addresses in South Dublin and North Wicklow but the defendants had moved away from each of those addresses. He says that the agent had ascertained that the first named defendant was a member of a gentleman's club, but that it was not possible to locate the first named defendant at that address.
20. In September 2015, the defendants relocated to 42 Ashurst, Mount Merrion Avenue, Blackrock, Co. Dublin.
21. Mr. O'Donovan also says that in or around June 2016 his firm was advised that both defendants had returned to Ireland from a holiday in Canada. He does not state the source of this knowledge. The second defendant, who is the applicant in this matter says that she has never been to Canada. This evidence is not contradicted by any evidence given by the plaintiff.
22. In January 2017, the defendants moved to 4, Harbour St., Mullingar, Co. Westmeath, which is their current address.
23. On 22 March, 2017, Mediator Trace and Serve reported to the plaintiff's solicitors that they had established that the defendants were residing at 4 Harbour St., Mullingar, Co. Westmeath.
24. On 22 September, 2017, the plaintiffs filed an affidavit of Mr. John O'Donovan of O'Donovan Baker Solicitors, sworn on 20 September, 2017, grounding an application for an order renewing the Summary Summons.
25. The affidavit of Mr. O'Donovan referred to the reports of Mr. Fox as to the attempts at service effected in March 2015, the information from Mediator Trace and Service in April 2015 and in March 2017 and says that: -

*"reasonable efforts were made by the plaintiff to serve the summary summons on the defendants within the twelve-month period since the summons issued on the 26th February 2015".*
26. Mr. O'Donovan continues: -

*"I say and believe that in all the circumstances good reason exists to renew the summons herein".*
27. On 23 October, 2017, Meenan J. made the order renewing the Summons.
28. In November 2017, the Summons was served on the defendants at 4, Harbour St. Mullingar.

29. On 20 November, 2017, an Appearance was entered at the Central Office of the High Court, signed in person by each of the defendants.
30. On 15 December, 2017, the plaintiff's solicitors O'Donovan Baker wrote to the defendants. By this letter, they acknowledged receipt of the Appearance and explained that the next step in the proceedings would be the issue of a motion before the Master of the High Court for liberty to enter final judgment. They stated that if the defendant was not disputing the liability and wished to make payment proposals, they invited her to do so within 14 days from the date of that letter, failing which the necessary motion would issue.
31. On 4 January, 2018, the second defendant replied to O'Donovan Baker in the following terms: -

*"Further to your letter of the 15 December 2017, which could not have come at a worst time just before Christmas, my husband Karl has been in very poor health for the last few years, he also suffers from depression. Which was being exacerbated (sic) as a result of a serious illness. He is attending a psychiatrist and is awaiting a diagnosis on his mental health problems. His next appointment is in two weeks' time.*

*At 72, my own health is not the best. I would be very grateful if you could give me a few weeks to gather paperwork for my full reply".*

32. No reply issued to the letter of 4 January, 2018.
33. On 23 July, 2018, the plaintiff issued a motion for liberty to enter final judgment returnable before the Master on 19 October, 2018.
34. According to the second named defendant, on receipt of the notice of motion for liberty to enter final judgment, she contacted her daughter for advice who advised her to then seek independent legal advice. She then made contact with Messrs. Barry Healy & Co. Solicitors. Arising from the retainer of Messrs. Healy, when the matter was listed before the Master on 19 October, 2018, an adjournment was sought by counsel for the defendant on the basis that she had just instructed a solicitor and required time to defend the proceedings and file a replying affidavit. On this basis, the matter was adjourned to 16 November, 2018.
35. On 7 November, 2018, Barry Healy & Co wrote to O'Donovan Baker notifying them that they had been instructed. They stated: -
- "Our intention is to enter an appearance and defend this matter in circumstances where our client has a bona fide defence to the bank's claim".*
36. Messrs. Healy & Co. then referred to the order for renewal of the proceedings. They referred to the fact that a personal appearance had been filed, "on her behalf by her husband", albeit that the personal appearance was filed with her own signature. They

stated that their client had no legal advice at the time that appearance was entered, and that it was their intention to bring a motion to set aside the personal appearance and the order renewing the summons. They then requested sight of the affidavits grounding the application for renewal.

37. On 9 November, 2018, O'Donovan Baker replied, stating that they were not obliged to furnish Messrs. Healy with a copy of the grounding affidavits. They stated that if Messrs. Healy & Co. were to serve a notice of change of solicitor, they would then furnish them with a copy of the affidavits as a matter of courtesy.
38. On 15 November, 2018, Barry Healy & Co. replied repeating their request for copies of the affidavits grounding the renewal application. They stated that they would not be filing a notice of change of solicitor as there is no solicitor currently on record. They repeated that their client had no legal advice when the personal appearance was entered and that their application would be to set aside that appearance. They concluded by stating that they would not be entering an appearance until they had an opportunity to consider the papers grounding the application for renewal of the summons.
39. On 3 December, 2018, O'Donovan Baker replied stating that they were not refusing to furnish copies of the affidavits but that in circumstances where Messrs. Healy & Co. had not entered an appearance and were therefore not on record they could not do so.
40. This correspondence continued between the solicitors and ultimately the second defendant travelled to Dublin in March 2019 when she attended at the Central Office of the High Court and paid €30 to take up copies of the relevant affidavits. She states that she attended on 17 March, 2019, (St. Patrick's Day) but I assume that to be an error having regard to Order 118 Rule 4 (1) of the Rules of the Superior Courts.
41. In the meantime, the proceedings before the Master were adjourned from time to time by consent.

**This application**

42. On 2 July, 2019, the notice of motion seeking an order discharging the appearance and setting aside the order renewing the summons was filed in the High Court with a return date of 21 October, 2019.
43. The motion was grounded on an affidavit sworn by the second defendant on 30 May, 2019. No explanation was given for the fact that the motion was issued only on 2 July, 2019.
44. Again, the proceedings before the Master were adjourned to facilitate the bringing of this application and the disposal thereof.
45. The application is made pursuant to O. 8 of the Rules of the Superior Courts. That rule was amended effective 11 January, 2019, but the renewal order was made under the previous version of the Rule, and both parties referred only to that version on this application: -

"O.8 (1) The court . . . if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent summons be renewed for six months from the date of such renewal inclusive and so on from time during the currency of the renewed summons.

(2) In any case where a summons has been renewed on an ex parte application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order". (emphasis added)

46. The application to set aside the renewal order cannot proceed unless an order is first made discharging the appearance, as sought at para. 1 of the notice of motion.
47. In the ordinary way the application to set aside renewal of the summons would not be disposed of until the court has determined whether to discharge an appearance which has been filed in the case. Nonetheless, it is clear from the judgment of Mahon J. in *Jackman v Getinge AB & Others* [2009] IEHC 612, that it is open to the court to consider the merits of the applications together, and to be informed by the balance of justice between the parties were the court to make either of the orders sought.

#### **Discharge of an appearance**

48. Extensive case law was opened on this subject and the principles to be drawn from that case law which are relevant to the facts are as follows: -

- (i) There is no rule of court expressly providing for the discharge of an appearance;
- (ii) The court has an inherent jurisdiction to discharge an appearance (*per Costello Taher Meats (Ireland) Limited v State Company for Foodstuff Trading* [1991] 1 IR 443);
- (iii) A mistake or error on the part of a defendant can be a ground for the exercise of the discretion to discharge the appearance (*Taher Meats*);
- (iv) A mistake of fact or a misapprehension of fact is a ground which can be invoked to set aside an appearance (Per McDonald J. in *Downey v The Council of The King's Inn* [2018] IEHC 258);
- (v) A mistake as to the law will generally not be such a ground (per McDonald J. in *Downey* following dicta of Carswell J. in *Bradford v Department of the Environment* [1986] NI 41);
- (vi) The jurisdiction is not limited to cases of mistake (*Firth v John Mowlem and Company Ltd* [1978] 1 WLR 1184);
- (vii) The court will take into account the prejudice potentially caused to the plaintiff by the discharge of an appearance and a court will not generally discharge the appearance if there is prejudice to the plaintiff (per McDonald J. in *Downey*).

49. No cases have been cited to me in which the application was grounded on an allegation that the appearance was entered under duress or undue influence.
50. In her affidavit sworn on 30 May, 2019, the second defendant states that when she received the Summons in November 2017 she was shocked and surprised to hear that such claims were outstanding. She says that her husband had assured her that he had cleared all of their personal debts to the plaintiff in or about 2016. She states that after receipt of the Summons, she was instructed by her husband that she would need to enter an appearance to the claim "so that he could then deal with the matter". She says that she did what she was told and attended with him at the Central Office of the High Court on 20 November, 2017, to sign the necessary form to enter a personal appearance.
51. The second defendant continued as follows: -

*"I suggested to my husband that I should get legal advice in relation to this matter, but I was told that he wouldn't be able to deal with the bank unless I went with him to the Four Courts and signed the appearance form. I say that my husband was suffering from serious ill – health issues at the time which led to outbursts of rage and aggression. I say that I felt controlled by him and unable to defy him or seek independent legal advice at the time. I say that I was mistaken to believe him and was effectively operating under duress in my decision not to seek legal advice".*

#### **Duress and undue influence**

52. No affidavit has been filed on behalf of the plaintiff to contradict this averment. It would be difficult for any witness on the part of the plaintiff to contradict the second defendant's evidence as to communications in November 2017 between her and her husband. However, in relation to the claim of duress the important considerations are as follows: -
- (i) The second defendant was not acting simply as a guarantor of borrowing obligations of her co-defendant. She was a joint borrower acting in her own right as far as the personal term loan was concerned, and in relation to the guarantee was a co-guarantor with her husband in respect of the debts of the company of which she was also a director.
  - (ii) The applicant submits that she acted to her detriment, in that the application to set aside the renewal order is rendered more difficult by the entry of the appearance. That submission is correct in a limited sense. But as a general rule, the entry of an appearance is not an act to the disadvantage of the party entering the appearance. The entry of an appearance has the effect of protecting a defendant from a default judgment which might otherwise be entered against him or her.
  - (iii) No suggestion has been made that the plaintiff was in any manner party to, caused or contributed to the alleged duress or undue influence.

#### **Mistake**

53. The defendant states that she was "mistaken to believe him and was effectively operating under duress". The reference to a mistake is a reference to believing the husband's

assertion that he would be unable to deal with the plaintiff unless the appearance was entered by her.

54. It is clear from this evidence that the entering of the appearance was a deliberate act. The only extent to which it could be said to have been a mistake was the acceptance by the applicant of her husband's belief that failure to do so would preclude the defendants from dealing with the bank. That was a mistaken apprehension, not about any facts, but as to the consequences which would flow if an appearance were not entered. It is therefore not a mistake of the kind contemplated in the cases referred to above.

### **Prejudice**

55. The plaintiff submits that this application was made at a time when its return date was more than six years after a date on which part of the claim in the proceedings, namely for the guaranteed amount of €93,311 could arguably have become statute barred, the demand pursuant to the guarantee having been served on 20 August, 2013. Whilst the plaintiff does not concede that such an argument would prevail, it is a potential real prejudice to the plaintiff.
56. The plaintiff had agreed to adjourn its motion for judgment before the Master of the High Court on a series of occasions from 19 October, 2018, through to 21 October, 2019. Those adjournments were consented to for the express purpose of allowing the defendants the time to bring this application. The defendant then only issued the application for a return date more than six years after the date of the demand made pursuant to the guarantee. Having done so, she created the prejudice referred to by the plaintiff, and cannot benefit from the consequences.
57. As regards the defendant, the only arguable prejudice is that it presents an obstacle to the application to set aside the order renewing the summons. As a general rule however, the entry of an appearance is not an act prejudicial to the interests of a defendant, even in circumstances such as this.
58. In exercising discretion on this application, I am informed also by the overall timetable of events, in particular, by the combined effect of the defendant relocating four times during the relevant period and the delay in bring the application. I consider these matters in more detail below and have concluded that this is not an appropriate case to discharge the appearance.

### **Application to set aside renewal of summons**

59. Extensive case law was opened to me regarding instances in which the court has set aside renewal orders. Many of these have related to cases in which attempts to effect service have been made very late or "at the last minute" in terms of the life of the original summons (*Murphy v Mulcahy & HSE* [2015] IEHC 377 and *Gibbons v Kitara Ltd* [2016] IEHC 627). Other cases have related to such matters as the use of an incorrect address without conducting a suitably diligent search for a current address (*Jackman v Getinge AB*), or even cases where no attempt at service was made because the plaintiff's solicitor was in correspondence with the defendant's insurers (*O'Keeffe v G & T Crampton Ltd and Another* [2009] IEHC 366).



60. The breadth of the jurisdiction was considered by Finlay Geoghegan J. in *Chambers v Kenefick* [2005] IEHC 402, [2007] 3 IR 526, at page 4, when she stated as follows: -
- "Firstly, the Court should consider is there a good reason to renew the summons. That good reason need not be referable to the service of the summons. Secondly, if the Court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the Court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Thirdly, in considering the question of whether it is in the interests of justice as between the parties to renew the summons because of the identified good reason the Court will consider the balance of hardship for each of the parties if the order for renewal is or is not made".*
61. The evidence in this case is that the summons was issued on 26 February, 2015, and on 6 March, 2015, efforts were made by the plaintiff's summons server, using the only addresses at that time known to the plaintiff.
62. On 16 March, 2015, the summons server made attempt at a further address, being the registered office of the original borrower company, again in an effort to trace the defendants. He also made telephone calls to telephone numbers associated with the defendants which were out of service.
63. There is a dearth of evidence as to what transpired between April 2015 and March 2017. Mr. O'Donovan refers to his firm having been advised in June 2016 that the defendants had returned to Ireland from a holiday in Canada. There are two difficulties with this. Firstly, the second defendant has sworn on affidavit that she has never been to Canada and this is not contradicted by the plaintiff. The second difficulty is that Mr. O'Donovan does not offer any information or evidence as to what steps were taken following receipt of this information to effect service during the remainder of 2016. The next event recorded is that on 22 March, 2017, the plaintiff received a report from the tracing agency to the effect that the defendants had been located at 4 Harbour Street, Mullingar, Co. Westmeath.
64. Again, there is no evidence as to what transpired between March 2017 and October 2017 when the order was made renewing the summons, which in turn led to the service of the summons in November 2017.
65. It is submitted on behalf of the plaintiff that the explanation for this series of intervals is that the *"trail had gone cold"*.
66. Although the court has been presented with limited evidence as to what transpired for the two-year period following April 2015, the plaintiff has given evidence of reasonable attempts at service made immediately after the issue of the Summons, and thereafter that the *"trail went cold"*. That characterisation of the *"trail"* can only be taken to have

been caused by the five different addresses held by the defendants over the relevant four year period.

67. The affidavit grounding the application to renew the summons asserts that reasonable efforts were made, and continues by stating that "*in all the circumstances good reason exists to renew the summons*". No expansion is given as to what those good reasons are, but it is clear from the judgment of Finlay-Geoghegan J. in *Chambers v Kenefick* that the court may have regard to the entire chronology of events and the conduct of the parties in assessing whether good reasons exist and where the justice of the case lies.
68. It was not until March 2017 that the plaintiff discovered the new address in Mullingar at which the defendants were residing. It delayed from then until September 2017 in filing the application for the renewal of the summons, although it moved promptly thereafter to effect service at the address known to it.
69. On the defendants' side, after the summons was served in November 2017, the second defendant did not file this application until 2 July, 2019. In the intervening time, the defendant corresponded with the plaintiff, by her letter of 4 January, 2018, stating that she needed time to make a full reply. She only made contact with a solicitor after she had been served with the plaintiff's application to the Master for liberty to enter final judgment, having the return date of 19 October, 2018. On 7 November, 2018, Messrs. Barry Healy & Co. opened correspondence with O'Donovan Baker. Criticism can be levelled at both parties in relation to the events which transpired thereafter. While the plaintiff may be faulted for not releasing to Messrs Healy copies of the affidavits grounding the renewal application, the applicant obtained those affidavits from the Central Office in March 2019. Therefore this does not explain why this application was not filed until 2 July, 2019.
70. The plaintiff consented to numerous adjournments of the motion before the Master of the High Court, and yet the defendant waited until 2 July, 2019, to file this application, albeit grounded on an affidavit sworn by the second defendant on 30 May, 2019. No explanation has been given for the interval between the swearing of that affidavit and the filing of this motion. That may have been simply administrative, but its significance is that by filing it only in July the return date was 21 October, 2019, arguably a date after the expiry of the statute of limitations in relation to the larger proportion of the claim for €93,311.
71. The defendants resided at five different locations in the space of less than four years. They cannot be faulted for that fact of itself. Nor is there any evidence to suggest that their relocation of address was motivated by a desire to avoid the plaintiff's claims or these proceedings. However, such efforts as were made by the plaintiff to effect service were thwarted by these changes of location, leading finally in 2017 to the discovery of the defendants' new address at Mullingar.

### **Conclusion**

72. It is clear from *Jackman and Chambers* that the court must undertake a balancing exercise to establish where the justice of the matter lies, having regard to the potential

prejudice to either side. This exercise must include an examination of how it is said such prejudice is caused.

73. Whilst the plaintiff has provided limited information as to events between April 2015 and March 2017, I accept the explanation that the "*trail went cold*" and that this state of affairs was caused by the defendants residing at five locations in the relevant four year period without notifying the plaintiff.
74. This set of circumstances was the principle cause for the lateness of the application to renew the Summons.
75. When the summons was served in November 2017, the applicant wrote one letter to the plaintiff's solicitors in January 2018, and then waited until served with the Notice of Motion returnable before the Master on 19 October, 2018, before taking any further steps, including the appointment of a solicitor. The defendant then waited until July 2019 to file this application, the effect of which was to obtain a return date 6 years after the date of the demand on the guarantee, thereby creating a potentially significant prejudice to the plaintiff.
76. There have been material delays by each of the parties. I have concluded that the four changes of address in as many years, followed by the delay in bringing this application at a time when the plaintiff had indulged the defendants with numerous adjournments, has the effect that the balance of justice favours the refusal of this application.