

THE HIGH COURT

[2017 No. 6090 P]

BETWEEN

DANSKE BANK A/S AND STEPHEN TENNANT

PLAINTIFFS

AND

SUZANNE GILLESPIE (OTHERWISE SUZANNE CLARKE)

DEFENDANT

**EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 19th day of October, 2017**

**Introduction**

1. This is an application pursuant to Order 56A(2)(1)(i) of the Rules of the Superior Courts (as introduced by S.I. 502 of 2010) seeking that the entire proceedings be adjourned for such a period as this Court seems just to enable the parties attend mediation.

**Details**

2. Outline details concerning orders made by Abbott J. and the efforts made by the plaintiffs to commence these proceedings in view of those orders were given to the Court by Mr. Fanning, counsel for the plaintiffs. It appears that attempts were made on behalf of the plaintiffs to obtain a ruling from Abbott J. on whether his orders, made in November 2014 particularly, had a supervening effect on the issues which the plaintiffs wished to pursue in these proceedings concerning the payment of rents by the occupants of a McDonalds outlet in Kilkenny. In other words, a considerable period of time elapsed, according to Mr. Fanning, through no fault of the plaintiffs in obtaining a ruling from Abbott J. on whether his order in family law proceedings was supreme in dealing with the issues raised by the plaintiffs in these proceedings. This Court understands that Abbott J. gave the plaintiffs liberty to issue these proceedings and that direction was given on 27th June, 2017. These proceedings were then instituted by way of summons issued on 5th July, 2017.

**Injunction Application**

3. A notice of motion was issued on 6th July, 2017, returnable for 27th July, 2017, seeking a plethora of orders relating to the properties described in the first schedule to the plenary summons stretching from (a) to (n).
4. That injunction application came before Gilligan J. on 5th October, 2017. Mr. Fanning uses the word "*stunt*" when describing the first mention by the defendant in open court that mediation should be considered when it came before Gilligan J. on that Thursday, 5th October. Solicitors for the defendant later that day, following the view expressed by Gilligan J. that a formal application should be made, invited the plaintiffs "*to have the above entitled action referred to mediation*".
5. In the meantime, on Tuesday, 18th October, Twomey J. made an order pursuant to s. 40 of the Civil Liability and Courts Act 2004 that the *in camera* rule be lifted for the purposes of enabling the issue of a motion in these proceedings.

6. I understand that the proceedings were adjourned on 5th October to 19th October by Gilligan J., being a day on which he could fix a hearing date for the interlocutory injunction application by the plaintiffs.
7. The letter dated 17th October, 2017, from the solicitors for the plaintiffs took umbrage at the issue of a notice of motion seeking an adjournment to facilitate mediation, which is the subject of this judgment. That letter referred to their reply of 6th October, 2017, which expressed a belief that mediation "*would {not} be necessary or appropriate*" while suggesting a without prejudice settlement meeting which came about at around 16:00 on 18th October. The letter continued: -

*"Notwithstanding the foregoing, your client has somehow deemed it appropriate to issue a fundamentally inconsistent application concerning mediation returnable for the day after the impending settlement meeting, 19th October, 2017. You will appreciate that this step causes our client: -*

- (a) *to question whether your client has any genuine intention of attempting to resolve the dispute tomorrow; and*
- (b) *to believe that your client's true objective is to procure delay of the proceedings."*

8. The Court understands that the offer of mediation has been refused on behalf of the plaintiffs. Without prejudice settlement meetings were conducted in March 2017 and also yesterday, 18th October.

#### *Atlantic Shellfish*

9. The Court appreciates the citing of the judgment delivered by Irvine J. in *Atlantic Shellfish Ltd v. Cork County Council* [2015] IECA 283; [2015] 2 I.R. 575 ("*Atlantic Shellfish*") and the references to the paragraphs following the heading "*What are the principles to be applied?*" (paras. 31 – 38).
10. We can certainly get to the second point for consideration, which is set out at para. 33, bearing in mind that this Court recognises the benefit of ADR and that the defendant acknowledges her rather impecunious status may disadvantage her in contesting any particular set of proceedings.
11. Paragraph 33 in *Atlantic Shellfish* reads: -

*"It is also clear from the provisions of O. 56A, r. 2(1) that the court should only exercise its discretion if it considers it 'appropriate' to do so 'having regard to all the circumstances of the case'. That begs the question as to the circumstances in which it is 'appropriate' to make the order." (emphasis added by this Court).*

12. It is not necessary to go through the factors exhaustively as identified by Irvine J. because it is not a box ticking exercise which the Court undertakes when determining this

type of application. However, Irvine J. identifies in para. 38 factors which may influence the exercise of the court's discretion which include "*the manner in which the parties had conducted the litigation up to the date of the application*". Overriding all of this is the potential futility of inviting parties (one side already refusing) to attend mediation as proposed by Ms. Browne, counsel for the defendant. She proposed a specific mediator with dates when that mediator was available in November together with the costs to be discharged by each party (€3,000 per day plus VAT each for the first day and €2,000 plus VAT for each party in respect of all subsequent days).

### **Decision**

13. The rules of court are not there to hinder the administration of justice. I hear what Mr. Fanning has said about the right of access to the courts which cannot be hindered also. This Court is more interested in administering justice fairly and feels that the best way in dealing with this is to allow the parties to bring a motion for directions as to how these proceedings can be brought to an early conclusion. Although I cannot at an interlocutory stage make definitive findings in relation to the conduct of the litigation to date, I cannot but notice the rather circuitous route of getting to this stage together with the fact that there have been two without prejudice settlement negotiations involving experienced senior counsel.
14. There is an outstanding motion seeking interlocutory reliefs restraining the defendant. It seems to me that it is about time that a statement of claim is delivered in these proceedings while I recognise that the long vacation has intervened since the issue of the summons. I shall, therefore, invite the parties to either bring a motion or put forward suggestions now as to how these proceedings can be managed effectively while minimising effort and cost for all parties. I understand from Ms Browne that the defendant in these proceedings alleges forgery and asserts that she has particular rights which have been ignored by the plaintiffs.
15. The plethora of interlocutory reliefs sought in the plaintiffs' notice of motion if pursued without focus has the potential of delaying the proceedings to an unreasonable extent. A greater degree of certainty and finality should be brought to the whole situation given the history which has been outlined by both counsel.
16. In the circumstances, I refuse the application to adjourn the proceedings in order to allow the parties to engage with mediation. Apart from the two unsuccessful without prejudice negotiations, it seems to me that it is best to give directions in order to advance these proceedings including consideration of how and when the interlocutory injunction application should proceed. Although issues in dispute between the parties may be amenable to mediation, I consider that it is too early and not appropriate for the Court to intervene in the way sought at this stage having regard to the apparent futility of same, to the absence of an exchange of pleadings and to the imminent finalisation of the affidavits for the interlocutory injunction application.
17. Following consideration of the suggestions made by Counsel, I direct that:-

- (i) the plaintiffs deliver their statement of claim by 26th October, 2017;
- (ii) the defendant delivers a defence and counterclaim by 9th November, 2017;
- (iii) the plaintiffs shall be at liberty to file a replying affidavit by 16th November, 2017, in the interlocutory injunction application;
- (iv) the proceedings should be listed before this Court for mention and for further directions, if necessary, on 16th November, 2017; and
- (v) the motion seeking interlocutory relief are adjourned for hearing before this Court on 22nd November, 2017.

**Postscript**

18. On the 23rd April, 2018, the Court of Appeal dismissed the appeals by the defendant from the interlocutory orders made. On the 22nd November, 2019, the Court was informed that the entire action had been settled.