

THE HIGH COURT

[2021] IEHC 768
[2021 No. 4163P.]

BETWEEN

MARTIN TUCKER

PLAINTIFF

AND

ELIZABETH CURRY

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 7th day of December, 2021

1. This is my judgment on two undefended applications by the plaintiff, Mr. Tucker, the first for judgment in default of appearance and the second for an interlocutory injunction. The plaintiff acts for himself but in the background, there is a man who describes himself as a process server and crops up reasonably regularly in the chancery list as "*assisting*" litigants in person. The extent of this person's involvement in the case now before the court is not altogether clear but to the extent that his involvement is clear, it is clear that he does not know what he is doing. To a greater or lesser extent, this case should serve as a further reminder to litigants in person to beware of unqualified persons holding themselves out as being in a position to assist.
2. The motions were listed for hearing in the usual busy Monday list on 29th November, 2021. Ms. Curry was called but there was no appearance in court.
3. Mr. Tucker had not complied with the practice direction that the papers should be lodged on the preceding Thursday but handed into court a folder of copy papers in relation to these motions and various previous applications in the action.
4. The papers are rather a jumble and Mr. Tucker's narrative in the affidavit grounding the application is less than entirely clear. Not least, I was not immediately satisfied with the proof of service offered. Having heard the application I took the papers away for consideration.
5. The action was commenced by plenary summons issued on 17th June, 2021 and served on the defendant, Ms. Curry, by registered post on 17th September, 2021. Mr. Tucker's claim in the action is for an injunction compelling and or directing the defendant to return "*the sum in excess of €100,000 to the mortgagee Havbell Designated Activity Company*" and for damages for stress and distress said to have been caused by the actions and or negligence of the defendant.
6. The clearest articulation of the Mr. Tucker's case is in the general indorsement of claim. Mr. Tucker describes himself as a gentleman and painting contractor and as the former partner of Ms. Curry. He claims that on 6th June, 2003 he and Ms. Curry entered a seventeen year mortgage agreement with Irish Permanent plc which, he claims, Ms. Curry breached on or about 23rd December, 2020 by "*failing to pay the proceeds from life pensions to the mortgagee as part of the redemption of the mortgage in accordance with the special conditions of the mortgage and retain[ing] same for her benefit exclusively.*" Mr. Tucker claims that he has been extensively litigated against by "*the alleged 'new*

owner" of the mortgage, Havbell DAC ("*Havbell*"), despite his undertaking to redeem the mortgage. Mr. Tucker's case is that he requires the return of the sums said to have been retained by Ms. Curry "*to the mortgagee Havbell*" in order to successfully redeem the mortgage on his home.

7. It will have been noticed that Mr. Tucker at the same time contests that Havbell is the new owner of the mortgage and seeks an order compelling Ms. Curry to pay money to Havbell. Mr. Tucker's declared object in seeking the orders which he seeks is to redeem the mortgage on his home. That, of course, is consistent only with Havbell being the new owner of the mortgage and entitled to give a good discharge.
8. Mr. Tucker's case is that he has been extensively litigated against by Havbell. It is a matter of public record that he has been embroiled in litigation with Havbell for upwards of four years. I think that it is fair to say that Mr. Tucker has been no more litigated against than litigating. The most recent engagement in that litigation was a motion on behalf of Havbell, in an action brought by Mr. Tucker against Havbell, which I heard on 30th September, 2021 and on which I reserved judgment. The claim the subject of these proceedings was one of the many matters canvassed in the motion which I heard in September, but Ms. Curry was not party to that application and I stress that I have dealt with these motions by reference only to the evidence and arguments offered by Mr. Tucker in this case.
9. The plenary summons in this case was purportedly served on Ms. Curry on 28th June, 2021 by leaving a copy at the reception of a firm of solicitors who had acted for her in previous litigation. The solicitors had not indicated that they had authority to accept service and had not undertaken to enter an appearance and so the service was bad. On 8th July, 2021 Mr. Tucker sent to the solicitors a letter requiring that they enter an appearance within 21 days. The letter referred also to a copy notice of motion issued on 2nd July, 2021 and returnable for 11th October, 2021, which was a motion seeking an injunction compelling or directing Ms. Curry to return the sum in excess of €100,000 to the mortgagee Havbell. On 18th August, 2021 Mr. Tucker issued a motion for judgment in default of appearance and this appears to have been sent to the solicitors who had previously acted for Ms. Curry, together with a form of statement of claim which replicated the general indorsement of claim.
10. On or shortly after 13th September, 2021 Mr. Tucker received a letter by registered post from the solicitors to whom he had sent the various documents advising that they no longer represented Ms. Curry and returning the copy summons, statement of claim, letter dated 8th July, 2010, motion for judgment in default of appearance issued on 18th August, 2021, and the affidavit grounding that motion, sworn on 16th August, 2021. By reference to the affidavits of service filed by Mr. Tucker, the solicitors had had the summons for about two and a half months and the motion for judgment for about five weeks. If the solicitors did not have instructions, they should have said so long before they did but the leaving with and sending to the solicitors of the documents was not valid service on Ms. Curry.

11. It was not at all clear whether the motion issued on 2nd July, 2021 was sent to the solicitors. Mr. Tucker's letter of 8th July, 2021 extending the time for the late entry of an appearance referred to a copy motion and affidavit returnable for 11th October, 2021 but the affidavit of service of Mr. Tucker filed on 18th August, 2021 in support of the motion for judgment said no more than that the letter called on the defendant to file her appearance. Mr. Tucker did not prove that the motion and affidavit referred to in his letter of 8th July, 2021 had been sent to the solicitors. The motion issued on 2nd July, 2021 and the affidavit grounding that motion were not among the papers returned by the solicitors.
12. Mr. Tucker's motion issued on 2nd July, 2021 came before the court on 11th October, 2021. There was no appearance by or on behalf of Ms. Curry. An affidavit of service filed on 8th October, 2021 exhibited the letter of 13th September, 2021 from the solicitors returning "*the proceedings*" and averred that "*the proceedings*" had been served directly on Ms. Curry by registered post and ordinary post. Mr. Tucker exhibited proof of posting on 17th September, 2021 and proof of delivery to "*Liz*" on 20th September, 2021 but if "*the proceedings*" served on Ms. Curry by registered post were the same "*the proceedings*" returned by the solicitors – and that was what the affidavit of service filed on 8th October, 2021 suggested – there was no proof of service of the motion then before the court and it was struck out.
13. On 28th October, 2021, Mr. Tucker applied *ex parte* for an interim injunction directing and or compelling Ms. Curry to account for pension monies in excess of €100,000 and a further order for an interim injunction directing and or compelling Ms. Curry to deposit the monies into an account nominated by the court. That was more or less the same relief which had been sought on 11th October, 2021 by the motion on notice which Mr. Tucker had not been able to prove had been served. That *ex parte* application was refused but in view of the fact that the solicitors had not dispelled the confusion which Mr. Tucker had created, Mr. Tucker was given leave to bring a motion on notice returnable for 28th November, 2021: which was the return date for his motion for judgment in default of appearance.
14. In the meantime, on 18th October, 2021 O'Moore J. made an order permitting service of the proceedings by ordinary pre-paid post, by text message to Ms. Curry's mobile phone, and by e-mail to Ms. Curry's e-mail address. I am uncertain how O'Moore J. was persuaded to make that order given that Ms. Curry had signed for the registered letter previously sent to her.
15. By notice of motion issued on 29th October, 2021 and returnable for 29th November, 2021 the plaintiff applied for:-

"An order for an interim injunction directing and or compelling the defendant [to] account for pension monies in excess of €100,000 and a further order for an interim injunction directing and or compelling the defendant [to] deposit the said monies into an account nominated by the court."

16. The notice of motion referred to an interim injunction but clearly what was intended was an interlocutory injunction.
17. Also before the court on 29th November, 2021 was Mr. Tucker's motion for judgment in default of appearance which was issued on 18th August, 2021, that it, before the plenary summons was properly served.
18. On any application to the court *inter partes* the court must first be satisfied that the respondent has been properly served. The onus is on the applicant to prove service.
19. As to the motion for interlocutory orders, Mr. Tucker swore an affidavit of service on 8th November, 2021 in which he deposes that he served "*the notice of motion returnable for the 29th of November, 2021 on the defendant by text message at approximately 21:49 hours on the 3rd of November, 2021, further, I served copies of the proceedings on the defendant by email to [e-mail address given] on even date at 21:44 hours and I say that I sent true copies of the within proceedings by pre-paid registered post at 15:02 hours on the 4th of November, 2021 and I beg to refer to a copy of the registered post slip and copy of correspondence warning the defendant of the consequences of ignoring the proceedings annexed hereto.*"
20. The mode of service referred to in Mr. Tucker's affidavit of 8th November, 2021 is more or less that permitted by the order of O'Moore J. of 18th October, 2021, save that Mr. Tucker used registered post instead of ordinary post.
21. To anyone keeping up with the detail, the obvious first problem is that there were two motions returnable for 29th November, 2021 and it is not clear which of them is said to have been served on 3rd and 4th November, 2021. Secondly, all that is said to have been served by text is the notice of motion, and not the (or any) grounding affidavit. Thirdly, what is said to have been served by e-mail and post is "*copies of the within proceedings*", without any indication of what those documents might have been.
22. Behind the copy affidavit of service in Mr. Tucker's folder, but not exhibited, is a copy letter of 3rd November, 2021 by which Mr. Tucker chided Ms. Curry for failing, refusing and neglecting to enter an appearance and suggesting that she might be in contempt of court. The letter went on to say that there were two motions listed for hearing on 29th November, 2021 and that a failure to attend might result in judgment against her, including injunctive orders to lodge the proceeds of pension policies said to have been unlawfully retained by Ms. Curry to an account nominated by the court. In the same divider of the folder was a receipt for a registered letter posted on 4th November, 2021 at 15:02; a copy e-mail sent at 21:44 on 3rd November, 2021; and a photograph of an MMS timed for 21:49. The postal receipt, of course, does not disclose what was in the envelope which was posted. The e-mail reads "*Ms Curry, please find attached, by way of service on you, Regards, Martin Tucker*", but does not even show that there was an attachment, much less what any attachment might have been. The photograph of the MMS shows a message which reads "Dear Ms Curry, please find attached by way of

service upon you. Regards, Martin Tucker” and a copy of Mr. Tucker’s letter of 3rd November, 2021, only.

23. I am not satisfied that Mr. Tucker has proved service of his motion seeking in interlocutory orders and I must strike that motion out.
24. As to the motion for judgment in default of appearance, I looked earlier at Mr. Tucker’s affidavit of service of 8th October, 2021 and concluded that it did not prove service of his motion returnable for 11th October, 2021. I think that the motion for judgment in default of appearance might very well have been sent to Ms. Curry by registered post, but I am not satisfied as a matter of probability that it was.
25. In any event, the premise of the alleged failure to enter an appearance was that the summons had been properly served and that Ms. Curry had failed to appear. The affidavit of service of Neil Armstrong filed on 2nd July, 2021 shows that Mr. Armstrong attended at the offices of Reddy Charlton solicitors on 28th June, 2021 and left at the reception for the attention of Mr. Andrew Murnaghan a copy of the plenary summons and showed – presumably to the receptionist – at a distance by reason of the ongoing COVID-19 situation, the original sealed summons. As I have said, the solicitors were never asked whether they had authority to accept service and the service was bad. The motion for judgment having predated the service of the summons on 17th September, 2021, Ms. Curry cannot have been be in default and that motion could not have succeeded.
26. However, absent sufficient proof of service, the appropriate order is that both motions should be struck out without consideration of the merits.
27. I need to add a postscript. On 3rd December, 2021 I received a letter from Mr. Tucker apologising for his incomplete booklet and enclosing a supplemental affidavit which he swore and filed on 30th November, 2021. Mr. Tucker is a seasoned litigant. I find it hard to credit that he is not perfectly well aware that it is quite improper for any litigant to attempt to communicate with a judge otherwise than in open court. If he did not previously know this, he does now.