

**THE HIGH COURT  
THE CIRCUIT COURT  
SOUTH EASTERN CIRCUIT  
COUNTY OF TIPPERARY**

**[2019 No. 34 CA]**

**BETWEEN**

**MALCOLM TREVER JONES**

**PLAINTIFF**

**AND**

**NICHOLAS MAHER AND BY ORDER NICHOLAS MARTIN MAHER**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Meenan delivered on the 27th day of January, 2020**

**Introduction**

1. This matter comes before the Court by way of an appeal by the plaintiff against an Order of the Master of the High Court, dated 10 May 2019, whereby the Master extended the time in which to appeal a decision of the Circuit Court, of 30 May 2018, by a period of fourteen days. On 30 May 2018, the Circuit Court, sitting at Clonmel, Co. Tipperary, refused an application to set aside the decision of the County Registrar striking out the defendants' defence on the grounds that an Order for discovery had not been complied with. Further, the Circuit Court granted to the plaintiff judgment against the defendants in the sum of €65,837.90, together with costs.
2. Central to this application is the failure of the defendants to make discovery, notwithstanding the fact that an Order for discovery was made on consent before the County Registrar, South Eastern Circuit, County of Tipperary. In reaching my decision it is necessary to look, in some detail, at the circumstances and reasons, insofar as any reasons have been offered, for this failure.

**Background**

3. The proceedings relate to a claim for damages for breach of contract, brought by the plaintiff by way of an Equity Civil Bill, dated 22 June 2015. The agreement is alleged to have been entered into in or about November, 2011 whereby it is alleged that the defendants agreed to act as agent for the plaintiff in the purchase of cattle by the plaintiff and to arrange transportation to the United Kingdom. The plaintiff contends that the parties agreed that the defendants would furnish details of all VAT claims paid and refunds received. The plaintiff maintained that it was entitled as a matter of law, and/or arising from the said agreement, to be paid all and any VAT refunds.
4. Amongst the reliefs claimed by the plaintiff is an Order for discovery of: -
  - (i) All bank statements (from November, 2011 to date) in respect of the defendant's bank account held at Bank of Ireland;
  - (ii) An Order for discovery of all invoices in respect of animals sourced by the defendant for the plaintiff between 3 December 2011 and 9 February 2014; and

- (iii) All documents in respect of VAT refunds received by the defendant arising out of the said purchases.

Clearly the issue of discovery was a fundamental matter in these proceedings. Although the Defence delivered denies the entitlement of the plaintiff to discovery, discovery was ordered, on consent, on 16 February 2017 in the terms as set out in the Equity Civil Bill. Discovery was to be made within six weeks of the said date.

5. Discovery was not made in the six weeks allowed and so a motion to strike out the Defence was brought on 19 April 2017. This motion came before the County Registrar on 20 July 2017. An Order was made striking out the defendants' Defence, but a stay was put on the Order for a period of three weeks, and in the event of discovery being made within that period the said Order would be vacated. Two matters should be noted at this stage. Firstly, the motion to strike out the Defence had been adjourned to 20 July 2017 so as to enable the defendants to make discovery and, allowing for the further period of three weeks from 20 July 2017, the defendants had some 23 weeks within which to make discovery. Secondly, it should also be noted that by letter, dated 17 May 2017, the Solicitor for the defendants wrote to the plaintiff's Solicitor as follows: -

"I note that your motion is listed for tomorrow before Clonmel Circuit. I confirm that we are in the process of compiling the document (sic) sought under your request for discovery but will require a little longer to compile same. I would be obliged if you would adjourn your motion to allow us comply with the orders herein..."

6. The next step in the proceedings was a motion brought by the plaintiff seeking judgment in the sum of €65,837.90, the Defence having been struck out. In the meantime, an application to extend the time to appeal the Order striking out the Defence was granted to the defendants. However, it would appear that the defendants failed to prosecute any appeal. A notice of trial, dated 6 March 2018, was then served on the defendants.
7. By letter dated 25 May 2018, the Solicitors for the plaintiff wrote to the Solicitors for the defendants indicating that if the affidavit of discovery was furnished by 28 May 2018, instructions would be taken in relation to whether or not the Defence should be re-instated. Notwithstanding this offer, no affidavit of discovery was forthcoming nor was there any indication of an intention to comply with the Order of discovery. It will be noted that this was now some twelve months after the letter of 17 May 2017, referred to at para. 5 above.
8. On 30 May 2018, the plaintiff's application for final judgment was heard by the Circuit Court. On the same date, the Circuit Court heard an application by the defendants seeking to extend the time to appeal the Order of the County Registrar striking out the Defence for failing to make discovery. This application was grounded on an affidavit sworn by the Solicitor for the defendants. What is striking about this affidavit is the absence of any plausible explanation as to why discovery was not made. There are references to personal difficulties of the Solicitor involved, but this is not an explanation for a failure to

make discovery. This is all the more so in light of the letter of 17 May 2017, already referred to, and the fact that there was no attempt to engage the Solicitor for the plaintiff, as per the letter of 25 May 2018.

9. According to the affidavit of Ms. Eileen Hayes, the Circuit Judge heard the defendants' application in full and refused it on its merits. In the course of submissions before this Court, there were some suggestions that fair procedures were not applied. There does not appear to be any basis for this.

#### **Principles to be applied**

10. This is an application to extend time for the purposes of bringing an appeal against an Order of the Circuit Court. The principles which should be applied are well established. I refer to the decision of the Supreme Court in *Éire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] IR 170. These principles are: -

1. The applicant must show that he had a *bona fide* intention to appeal formed within the permitted time.
2. The applicant must show the existence of something like mistake and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient.
3. The applicant must establish that an arguable ground of appeal exists.

These principles, though well established, should not be considered as if they were statute law. The court retains an overall discretion and it may be that, in a particular case, these principles would not fully apply. However, the case before this Court is not such a case.

#### **Application of the principles**

11. It cannot be doubted that where a Defence has been struck out, provided there are the necessary proofs, the plaintiff is entitled to judgment. In this case, the Defence was struck out by reason of the defendants' failure to make discovery. Therefore, central to any appeal is the Order striking out the Defence. Leaving aside matters as to whether or not there was a *bona fide* intention to appeal or a mistake, it is clear to me that the defendant has advanced no arguable ground to appeal the Order striking out the Defence. The Order for discovery was made on consent and, notwithstanding the 6 weeks allowed being extended to some 23 weeks, no discovery was made. Even after the Defence was struck out there was still no attempt to make discovery. This was so right up to 28 May 2018, some two days before the final hearing. This was in circumstances where a conditional offer had been made by the Solicitor for the plaintiff indicating that discovery could still be made. Further, there has been no serious attempt in any of the affidavits filed in these proceedings to give any plausible explanation as to why discovery was never made. Therefore, it follows that the defendants have failed to establish that any arguable ground of appeal exists which could result in the Defence being re-instated.
12. In the course of the affidavit grounding this application, the first named defendant, on behalf of both defendants, refers to a number of matters which appear to indicate

difficulties in the relationship with their Solicitor. There may or may not be substance in this, but it does not amount in any way to an explanation as to why an Order for discovery, on consent, was not complied with, despite numerous opportunities to do so. If there are issues in the relationship between the defendants and their then Solicitor that is not a problem which should be visited on the plaintiff.

**Conclusion**

13. By reason of the foregoing, I reach the conclusion that the Master erred in extending time for an appeal of the Orders of the Circuit Court and I will allow the appeal. I will hear counsel as to the consequential Orders.