

Neutral Citation: [2018] NICH 26

Ref: BUR10633

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 21/03/2018

13/096110

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

MARY McCARGO

Plaintiff;

and

GEORGE KEARNEY

Defendant.

BURGESS J

- [1] By Writ of Summons dated 20 September 2013 the Plaintiff sought inter alia:
- (a) An account of all monies received by the Defendant arising out of an alleged partnership in a farming business between the parties;
 - (b) All further accounts, inquiries and directions; and
 - (c) Orders and injunctions in respect of the disposal of the lands alleged to be partnership assets.
- [2] At the heart of the dispute was whether or not a partnership existed between the parties, something denied by the Defendant. The Plaintiff's claim was set out in her affidavit (with exhibits attached) dated 19 September 2013 whereby she sought a number of interlocutory orders.
- [3] The proceedings then continued as follows:
- (a) The Statement of Claim was served on 6 January 2014;
 - (b) The Defence was delivered on 8 April 2014;
 - (c) A reply was served on behalf of the Plaintiff on 30 April 2014;
 - (d) A Notice for Further and Better Particulars in respect of the Defence was served by the Plaintiff on 30 May 2014; and

(e) A Reply to the Notice was served on 10 April 2015, nearly 12 months later and after the expiration of the period ordered by the Court by an Unless Order made on 5 March 2015.

[4] From reading the pleadings the case of the Defendant was articulated at length in his Defence with the benefit of legal advice and assistance. The Defendant cannot have been in any doubt from the commencement of the proceedings in September 2013 up to and including the delivery of his replies to the Notice for Further and Better Particulars in April 2015, what issues were involved and the proofs that would be required. Indeed after the issue of the Writ of Summons there were a number of interlocutory proceedings which resulted in a number of undertakings being given by the Defendant in respect of certain aspects of those issues involved.

[5] The next stage in the proceedings was the issue of a Summons dated 4 July 2014 for Discovery under Order 24 Rule 3 of the Rules of the Supreme Court. An Order directing discovery by the Defendant, with the List verified by affidavit, within 28 days of the Order, was made by the Master on 30 September 2014.

[6] On 19 January 2015, by Order of the Master, the Defendant was ordered to verify on oath the particulars in the list of documentation by 4.00pm on 16 February 2015 or his Defence would be struck out. While an affidavit dated 16 February 2015 was completed (clearly with legal advice) no List had been provided. Rather the affidavit averred that the Defendant had “furnished all documents that [I] have within my possession custody or power relating to [this] matter: and that [I do] not have any other documents.” By affidavit the Plaintiff averred that neither she nor her solicitor had received documents, nor a List.

[7] On 5 May 2015 the Master ordered that the Defendant’s Defence be struck out and that the Plaintiff have judgment against the Defendant in the terms of the Writ of Summons. No application for an extension of the time provided for in the Unless Order was made, nor was an appeal lodged against the Strikeout Order or the granting of the judgment.

[8] On 25 September 2015 the Plaintiff issued a Summons before the Master seeking an order reflecting the accounts sought in the Writ and further sequential orders to reflect and operationalise the remedies granted by the judgment. A number of hearings were held to give effect to the judgment and it is clear from the documentation on the file that the Defendant had a solicitor acting on his behalf throughout. By way of example, TG Menary & Co Solicitors (who had prepared the affidavit of 16 February 2015 in relation to discovery) wrote agreeing the terms of an order regarding the sale of lands, subject to an agreed amendment.

[9] Equally clear from the documentation is that the Defendant obstructed at seemingly every opportunity to give effect to the Orders of the Court, resulting in

Contempt proceedings being instituted. These proceedings reached a stage that a Committal Application was made dated 25 January 2017 at the hearing of which the Defendant gave a number of undertakings to the court to enable the court's previous orders to be given effect, and those proceedings were then adjourned. On 27 March 2017 Horner J found the Defendant in Contempt of Court by reason of a number of breaches of the Order of the Master dated 1 July 2016, and imposed a sentence of 14 days' imprisonment suspended for the duration of these proceedings under the Writ of Summons.

[10] A further Summons dated 18 May 2017 was served by the Plaintiff in respect of inter alia the surrender for marketing of "the remaining sheep and lambs" in the possession of the Defendant, with the proceeds being paid towards part satisfaction of "the partnership debt"; and that a number of third parties provide information of any other sheep sold by the Defendant since 1 January 2005.

[11] The response of the Defendant has been to issue a Summons dated 22 February 2018 seeking an Order under Order 24 Rule 20 of the Rules of the Supreme Court "revoking the order of 7 May 2015 and reinstating the Defendant's defence with leave to defend." By the Defence that was struck out the Defendant denied that a partnership existed between the Plaintiff and himself (paragraph 4 of the Defence); he denied the Plaintiff had any interest in any of the lands on which the farming business was carried out, or made any contribution to the purchase of that land by way of deposit or in repayment of a bank loan (paragraph 5 of the Defence); and the role of the Plaintiff is identified as solely "lending assistance to the Defendant and his brother in relation to the administration requirements of operating the business" (paragraph 8 of the Defence). Paragraph 39 of the Defence denies that the Plaintiff is entitled to any relief whether as claimed in the Writ of Summons or at all, and in particular denies that the Defendant is liable to account to the Plaintiff for the sums set out in the Statement of Claim, whether as alleged or at all.

[12] By this application the Defendant seeks to return to a position of total denial of every aspect of the Plaintiff's claim. This was reinforced by an affidavit from Mr George Clarke, the Defendant's solicitor, dated 30 January 2018 where, having rehearsed all other aspects of interlocutory proceedings, and having stated that an apportionment of funds should be made on a fair and just and equitable basis, avers at paragraph 18 that forensic accountants have been instructed to investigate "the alleged partnership".

THE LEGAL FRAMEWORK

[13] The Writ sought an account based on a partnership alleged to exist between the parties. Once that basis is established the court may direct the manner in which the accounts are to be carried out. By Order 36 of the Rules of the Court of Judicature the Court may refer the whole of the proceedings or an issue therein to a Master, referee or arbitrator (agreed by the parties) and on receipt of the report of whoever is appointed, can fix a date for further consideration.

[14] In this case there are two aspects to be determined by the Court in order to address the relief sought in the Writ. First, to determine if there was a partnership; and then secondly, if there was a partnership, what were the respective rights of the parties in that partnership. By the judgment it has been determined there was a partnership and the Master was charged to undertake the consequential steps, and has been undertaking that task. The Defendant now seeks to set aside the Judgment. In doing so he argues (a) that the court should revisit the reasons for the default of the Defendant to comply with the Unless Order and set the default judgment aside; and (b) that in any case the second issue relating to the shares of the respective partners has not been determined. He argues that there therefore are issues still to be decided before an account can be settled.

THE UNLESS ORDER

[15] The Summons now being considered by the court seeks relief under Order 24 Rule 20, which provides that:

“Any order made under this Order (including any order made on appeal) may, on sufficient cause being shown, be revoked or varied by a subsequent order or direction of the court made or given at or before the trial of the cause or matter in connection with which the original order was made”.

[16] No evidence has been put forward to dispute that it was within the power of the court to make an Order for Discovery, and further no grounds have been put forward to challenge the right and power of the Court to make the Unless Order. Indeed in relation to making an Order for Discovery, apart from the automatic provisions provided for in the Rules of the Supreme Court, the Defendant himself seeks time to put in a further affidavit supporting a new List of documents. However even at this stage on the affidavits and representations made before the court there is an absence of certainty on the Defendant’s part as to what he does have in his possession or has the power to obtain, relevant to his obligations to make discovery.

[17] As regards the Judgment, the Defendant was clearly on notice of the requirements for discovery and the consequences of not complying with what was not the first order of the Court. He claims a lack of understanding and education were the reasons for his default. However he had legal representation throughout and indeed swore an affidavit that he had handed over everything relevant to the issue, when the Plaintiff averred that no documents had been handed over. We are now informed that after all these years steps of the most basic type (for example contacting banks for statements) are being undertaken, in turn totally undermining an averment in a sworn affidavit that he had no access to or in his possession any further documentation.

[18] I have also considered the actions of the Defendant since the Judgment was entered, to which I have referred, and reject any argument that the Defendant was not au fait with what was involved, or that he lacked the ability to engage in the process.

[19] The Defendant is now seeking a revocation of the Unless Order and seeks an extension of time to comply with the Order for Discovery. I refuse that application. The relevant legal principles were addressed by Maguire J in *McNeely v Pierse Contracting Limited and others* delivered on the 22 February 2018. I adopt the approach set out, and acknowledge that a court will be reluctant to take the step of bringing a party's case to an end in circumstances where an unless order has not been complied with. However such a step is unavoidable in some cases.

[20] In *Hughes v Hughes* [1990] NIJB Carswell J (as he then was) set out the approach to be taken in exercising the discretion to extending time under an Unless Order. He stated:

“One starts from the position that the application should prima facie be refused; but in some cases the presumption which the lack of explanation creates may be rebutted by showing that the other factors in which there is evidence before the court are strongly in his favour, or that the balance of prejudice is such as to make it necessary in the interests of justice that he should nevertheless be granted an extension of time.”

[21] The Defendant has not established a strong case, or anything approaching a strong case to grant such an extension. Some 5 years after the issue of the Writ of Summons the Defendant seeks to open up a full inquiry into a relationship claimed to have existed a considerable period of time ago. He does so in circumstances where all of the matters which he asks to be considered, and which he wishes to put before the Court, he had either in his possession or has had access to several years ago. He has given no reasonable or plausible explanation as to why he did not engage and comply with the Court Orders, and indeed had breached a previous unless order, where no sanction was imposed. I consider that there would be distinct prejudice to the Plaintiff in this matter to allow the Defendant after all of this time to reopen the basic arguments which form the basis of the Judgment. It is not the case that since the Judgment that the Defendant has simply done nothing, or that he protested his claim that a partnership did not exist, even absent an appeal against the Order the Master. Instead he has engaged in the outworkings of the terms of that Judgment even though in doing so has been prepared to disobey and obstruct Orders of the Court to give effect to it. It therefore cannot be ignored that for some 2½ years the Defendant has done absolutely nothing to set the Judgment aside, during which time, with the benefit of legal advice throughout, he never legally contested the basis of any of the orders being made, for example to sell the lands or livestock, but instead acted on the basis of the Judgment.

[22] It is difficult to think of a more unmeritorious application as that now made by this applicant.

THE POSITION ON PARTNERSHIP SHARES

[23] The Plaintiff submits that in the absence of any document evidencing the operation of the partnership the issue of the shares to which each partner is entitled requires to be determined. However as to the claim by the Plaintiff to whom judgment was granted, the Statement of Claim was specific as to the lands in Folio 18902 County Down and Folio 33946 County Down, described as partnership lands. Paragraph 11 of the Statement of Claim makes clear that the Plaintiff was claiming to hold two-thirds (one-third having been purchased from her brother) and the Defendant one-third in the lands as tenants in common – reflecting what indeed is in the Land Registry Certificates. That apportionment has been determined by the Judgment and requires no further determination.

[24] As to the business itself, there are two aspects. First, payments made to the partnership directly by the partners or through purchases made by them on behalf of the partnership. These, when properly substantiated for the purpose of the accounts, will be reflected in the respective capital accounts of the two parties. The determination of shares in the partnership is relevant only to the amount of any distributable profits (or losses) also to be allocated to the parties' Capital Accounts – less what is determined as having been withdrawn by each party. Any dispute on the issue of income will be dealt with through the accounting process, as will the issue of withdrawals or retention of partnership funds which it is alleged have not been accounted for in the Accounts of the Partnership.

[25] As to the division of profits (or losses) the Plaintiff in her List of Documents included unaudited accounts showing the partnership trading, profit and loss account and balance sheet from 2004 until 2009. To the extent of any previous trading period, the opening balances of the Capital Account will give a starting point for any calculation. Of more relevance is how division of profits and losses are dealt with, and in this respect the unaudited accounts set out in each of the above years how this was dealt with.

[26] The Judgment determined the existence of the partnership, and the Plaintiff's claims whether to the lands or business, are contained in the pleadings and discovery made before judgment was granted – and formed part of that judgment for the purposes of an accounting process.

[27] I see no basis for setting the Judgment aside. I believe that the Master should be directed to continue to carry out the accounting exercise with any issues around the question of shares being amenable to being addressed by the Master.

[28] In the circumstances the application of the Defendant is refused. If necessary the Court will reconvene to hear any submissions as to any further directions to be given by the Court to the Master in terms of settling the accounts between the parties.

[29] The Court will also hear any submissions in relation to the costs of these proceedings.