

THE HIGH COURT

[2022] IEHC 434
[2021 4555 P]

BETWEEN

TACIT GOLF CLUB LLP

PLAINTIFF

AND

GILES MCDONAGH AND RANGE KING LIMITED

DEFENDANTS

EX TEMPORE JUDGMENT of Ms. Justice Emily Egan delivered on the 9th day of May, 2022

Introduction

1. This ruling concerns the transitional provisions of the Rules of the Superior Courts (Procedure on Default) 2021, S.I. No. 490 of 2021 ("the new rules") which came into operation on 13th November, 2021. The new rules amend O.27 of the Rules of the Superior Courts ("the previous rules") which deals with default of pleading.
2. The specific issue arising is whether a 21-day warning letter issued in accordance with the previous rules provides a sufficient basis for the court to make an order for judgment in default of defence in respect of a motion issued under the new rules which now provide for a 28-day warning letter.

Factual background

3. The factual background is straightforward. The plaintiff issued a plenary summons in this case claiming damages against both defendants for, *inter alia*, wrongful interference with contractual rights/business relations and conspiracy to injure the plaintiff. The plaintiff also seeks an order for disgorgement of profits and unjust enrichment, an account of profits, and orders restraining the defendants from disseminating the plaintiff's confidential information and returning same to the plaintiff together with further orders pursuant to the European Union (Protection of Trade Secrets) Regulations 2018 and Directive EU 2016/943.
4. The defendants entered an appearance on 4th May, 2021 and the plaintiff delivered a statement of claim on 3rd August, 2021. Notice for particulars and replies thereto were exchanged on 15th October, 2021 and 15th December, 2021 respectively.
5. The defendants, who have not sworn a replying affidavit, submitted that the replies to particulars were inadequate. However, no motion for further and better particulars has been issued to date.
6. On 1st October, 2021, before the commencement date of the new rules, the plaintiff served a 21-day warning letter requiring the delivery of the defence, consenting to the late delivery of same and indicating that, in default, a motion for judgment in default of defence would issue. It does not appear that the defendants replied to this letter and the plaintiff issued a motion for judgment in default of defence after the commencement date

of the new rules on 1st February, 2022. The motion was returnable before the court on 25th April, 2022.

The New Rules

7. Order O.27 r.9 (1) et seq. of the new rules provides in material part as follows:

"9.(1)... if a defendant being bound to deliver a defence, does not do so within the time allowed, the plaintiff may, subject to the provisions of rule 10, set down the action on motion for judgment; and on the hearing of such application the Court shall, where it is satisfied that the defendant has been served with notice of the application, give to the plaintiff such judgment as upon the statement of claim it considers the plaintiff to be entitled to, unless the court is satisfied, for reasons to be recited in the order, that that it is necessary in the interests of justice that the time for delivery of the defence should be extended and, where it is so satisfied, the Court shall make an order:

(a) extending the time for delivery of a defence for such period as the Court considers necessary in all of the circumstances, and

(b) providing that, unless the defence is delivered and a copy of such defence is filed in the Central Office within that extended period, judgment shall be entered for the plaintiff in the Central Office without any further application to the Court.

...

"10.(1) No notice of motion for judgment in default of defence in actions claiming unliquidated damages in tort or contract may be served, unless the plaintiff has at least 28 days prior to the service of such notice, written to the defendant giving him notice of his intention to serve a notice of motion for judgment and at the same time consenting to the late delivery of defence within 28 days of the date of the letter

(2) If no defence is delivered within the said period the plaintiff shall be at liberty to serve a notice of motion for judgment in default of defence.

(3) The notice of motion shall be served on the defendant not later than ten days from the date on which it was issued, together with a letter specifically drawing the defendant's attention to the provisions of subrule (4).

(4) If the defendant:

(a) delivers a defence to the plaintiff not later than 21 days after the service of such notice of motion for judgment, and

(b) lodges a copy of the defence in the Central Office with a certified copy of the notice of motion attached thereto not later than ten days before the return date,

the said motion for judgment shall not be put in the judges' list but shall stand struck out and the defendant shall pay to the plaintiff the sum of €750 for his costs of the said motion for judgment."

8. The commencement provisions of the new rules provide in material part as follows:

"2. (1) Subject to the following provisions of this rule, the Rules of the Superior Courts as amended by these rules shall apply to proceedings whether commenced before or after the commencement date, and whether the time for delivery of any pleading or other document has expired before or after the commencement date.

(2) For the purposes of any step to be taken on or after the commencement date in proceedings commenced prior to the commencement date:

(a) any step taken prior to the commencement date shall be treated as having been taken under the provision of the Rules of the Superior Courts as amended by these rules that most closely corresponds to the relevant provision of the previous rules under which that step was taken;

(b) where the Rules of the Superior Courts as amended by these rules provide a longer period than under the previous rules for a party to deliver a pleading or other document, the party alleging any default shall not proceed against the party alleged to be in default until such longer period has in fact expired, irrespective of whether any warning letter or letter of consent issued prior to the commencement date was expressed in terms of a shorter period."

Analysis

9. At the hearing of the motion, the defendants contended that, as O.27 r.10 (1) of the new rules provides that no motion for judgment in default of defence in actions claiming unliquidated damages in tort or contract may be served unless the plaintiff has written a 28-day warning letter, the motion ought not to have been issued and the court therefore had no jurisdiction to make an order for judgment in default of defence.
10. Article 2(1) of the commencement provisions of the new rules makes it clear that the new rules apply to proceedings commenced either before or after 13th November, 2021 irrespective of whether the time for delivery of any pleading has expired before or after that date. Self-evidently, the present proceedings fall within this category.
11. The present application is governed by Article 2(2) of the commencement provisions which governs the transitional position in respect of any step taken after 13th November, 2021 in proceedings commenced prior to that date. The proceedings commenced prior to 13th November, 2013. Both the service of the warning letter and the issue of the motion are capable of constituting a "step". The warning letter was issued prior to the 13th November, 2021 but the motion was issued thereafter. Article 2(2) therefore applies.
12. Article 2(2)(a) of the commencement provisions provides that any step taken prior to 13th November, 2021 shall be treated as having been taken under the provision of the new rules as that most closely corresponds to the relevant provision of the previous rules under which the step was taken. Therefore, the 21-day warning letter which issued prior to the 13th November, 2021 under the previous rules shall be treated as having been served under O.10 r.1 of the new rules.

13. Article 2(2)(b) then provides that where the new rules provide for a longer period than the previous rules for a party to deliver a pleading, the party alleging default shall not proceed until such longer period has in fact expired, irrespective of whether any warning letter or letter of consent issued prior to the 13th November, 2021 was expressed in terms of a shorter period.
14. Article 2(2)(b) of the commencement provisions governs the present application because the new rules provide for a longer warning period than the previous rules, 28 days as opposed to 21 days. Therefore, as the plaintiff in this motion served a 21-day warning letter under the previous rules, it may not "*proceed*" against the defendants, by the issue of a motion for judgment in default of defence, until the 28-day period has in fact expired. Although expressed in negative terms, this means that, if the 28-day period has in fact expired the plaintiff may issue a motion for judgment in default of defence. In this case, in excess of 28 days expired between the service of the warning letter issued on 1st October, 2021 and the date of issue of the motion on 1st February, 2022. Any doubt in this regard is firmly put to rest by the final clause of Article 2(2)(b) to the effect that the party alleging default may proceed irrespective of whether any warning letter or letter of consent which issued prior to 13th November, 2021 was expressed in terms of a shorter period. In this case, the warning letter issued prior to 13th November, 2021 and was expressed in terms of a shorter period, 21 days as opposed to 28 days. However, as the longer period had in fact expired prior to the issue of the motion, the plaintiff was entitled to proceed to issue same.
15. I accordingly determine that the motion for judgment in default of defence was properly issued in this case and that, all things being equal, the plaintiff would be entitled to the relevant orders together with an order for costs.
16. In this particular case, there is no evidence that the plaintiff complied with O.27 r.10 (3) and (4) which provide that the notice of motion shall be served not later than ten days from the date on which it was issued together with a letter specifically drawing the defendants' attention to the fact that, if the defendants deliver a defence within 21 days and lodges same in the central office, the motion shall not be put into the judge's list but shall be struck out with the defendants paying the plaintiff the sum of €750 for the costs of the motion for judgment. No letter has been exhibited by the plaintiff in compliance with this order. In my view, this does not deprive the court of jurisdiction as the relevant provision of the rules clearly contemplates that the motion for judgment may be issued prior to the service of this letter. However, it seems to me that the plaintiff's apparent failure to issue this letter means that it is necessary in the interests of justice to make an "unless order" rather than to grant judgment in default of defence. In addition, I will limit the plaintiff's costs of the motion to €750.

Decision

17. I will make an "unless" order in this case. I will therefore extend the time for the delivery of defence for four weeks and order that unless the defence is delivered and a copy thereof filed in the Central Office within this extended period, judgment shall be entered for the plaintiff and, thereafter the matter shall be set down before the court for the

assessment of any damages to which the plaintiff may be entitled and for the determination of any relief other than damages. I award the costs of the motion to the plaintiff and further measure these costs in the amount of €750.