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Judgment: approved by the Court for handing down | *Delivered:* **8/3/2010**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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BETWEEN:

DANNY MALONE
And
MICHAEL MALONE

Plaintiffs/Respondents;

and

HUGH MALONE
AND
EAMON MALONE

Defendants/Applicants.

_____

Ruling

_____

DEENY J

[1] This case raises a point of law, which seems to be novel in the jurisdiction of Northern Ireland, as to the point in proceedings when a defendant must object to the jurisdiction of the court, if he wishes to do so. The defendants, who are the brothers of the plaintiffs, are sued in respect of a commercial development for housing on lands at Dunfanaghy, County Donegal. They contend, inter alia, that the proceedings are misplaced, partly because they contend they are related to a limited company registered in the Republic of Ireland rather than to the defendants as individuals. They sought an Order from the Master by Summons of 24 September 2009 striking out the plaintiff's Writ of Summons and Statement of Claim on a number of grounds. The Master refused that application and the defendants have appealed to the High Court.

[2] The point of law which initially arises was dealt with as a preliminary issue by agreement between counsel at the hearing of the appeal today. Mr Gerry Simpson QC led Mrs Haddick for the defendant appellants and Mr Mark Orr QC led Mr Rodgers for the plaintiff respondents. The issue is whether the defendants are at liberty to argue that this court does not have jurisdiction to hear this appeal and the earlier summons. The submissions of the plaintiff respondents were presented in his customary pithy manner by Mr Orr and I would propose to address them first.

[3] The Rules of the Supreme Court in Northern Ireland provide at Order 12 rule 7(1) as follows:-

> "A defendant to an action may with the leave of the court enter a conditional appearance in the action."

Mr Orr points out that this the defendants failed to do. The course of events was that a Writ of Summons was served on 19 March 2009 and the defendants through their solicitors served an appearance on 3 April 2009 but it was in the normal and unconditional form.

The first thing I observe is that the verb in Order 12 rule 7 is that a defendant to the action "may" enter a conditional appearance and even then he requires the leave of the court to do so.

[4] Secondly, counsel for the respondents points out that Order 12 rule 8 expressly entitles a defendant at any time before entering an appearance or if he has entered a conditional appearance within the time limited for service of a defence to apply by summons or motion for an order setting aside the Writ or Service of the Writ, etc and again that was not done by the defendants here. Again the wording in the Rules of Supreme Court is permissive rather than mandatory. A defendant may do that and it will be noted that they may do it before entering the appearance or if they have entered the conditional appearance before the time limited for service of a defence but certainly the defendant did not do that here. The English Rules were different in regard to both those matters. Mr Orr submitted that traditionally in this jurisdiction a defendant challenging the jurisdiction would avail of either rule 7 or 8 of Order 12.

[5] However what the defendants/appellants did do is as follows. A Statement of Claim was served by the plaintiffs on 26 June 2009 and on 17 September 2009 they served a Defence. The plaintiffs, a little over enthusiastically, brought a Summons over the vacation to strike out for failure to serve the Defence but the intervening long vacation meant that the Defence was served timeously within the 21 days required by the Rules. Importantly for the defendants this Defence did plead the jurisdictional point and the language pleaded it quite clearly. I think it was less than ideal that it pleads it

as one of a whole succession of paragraphs of what is described as paragraph 3 but that is a lack of felicity and style it might be thought rather than fatal. The fact of the matter is the jurisdictional point was taken then.

[6] Slightly oddly the Summons which was issued a few days later on 24 September seeking to strike out the proceedings does not expressly take the jurisdictional point either, which again is far from ideal. However in the supporting affidavit of Stephen Killen, solicitor, it is the first point made at paragraph 3(1) in support of the application.

[7] The position therefore is that the plaintiffs/respondents say that the defendants having failed to enter a conditional appearance or bring a Summons under Order 12 rule 8 when they should have are debarred from now raising the jurisdictional point. As I have indicated counsel were unable to find any Northern Ireland authority on the point but there is one English case with two from Dublin and three from the European Court of Justice. It might be most convenient to begin by quoting from Halsburys Laws of England, Volume 8, (3) dealing with Conflicts of Laws, bearing in mind that such matters were previously dealt with by the Brussels's Convention which I will turn to in a moment and more recently by European Regulations. At paragraph 78 the learned authors say as follows:-

> "In addition to cases where jurisdiction may be specifically conferred a court before which a defendant enters an appearance has jurisdiction. However this does not apply where exclusive jurisdiction is conferred on the courts for a particular Regulation state or contracting state or, as the case may be, of a particular part of the United Kingdom. Jurisdiction is not conferred if an appearance was entered solely to contest the jurisdiction. Thus if the defendant takes the steps prescribed by national procedural law for a challenge to the jurisdiction of the court on the first available opportunity he will not be treated as having conferred jurisdiction on the court by the entering of an appearance. If national procedural law also requires that he lodge a defence on the merits the court is still entitled to find that the defendant has not conferred jurisdiction by entering his appearance."

[8] The first of the matters to which I will turn are to be contained in footnote 7 relating to the penultimate sentence of that passage at paragraph 78. At footnote 7 the authors cite in particular the case of Elefanten Schuh GmbH v. Jacqmain [1981] ECR 1671 to which I will return but also the case of Rohr SA v. Ossberger [1981] ECR 2431. They do quote the one English authority which

seems relevant and this is Kurz v. Stella Musical GmbH [1992] Ch. 196; [1992] 1 All England 630. The authors say it is the purpose for which a defendant enters an Appearance not the form of the appearance itself which is determinative. which is clearly of assistance to the defendant appellants here. The decision in Kurz is a decision of first instance of Hoffman J and I respectfully agree with his decision on the facts allowing the defendants to plead their jurisdictional point but one observes that the rules which applied in England even then differed from the rules here. There was no equivalent to our Order 12 rule 7 but there was an Order 12 rule 8 to like effect. But importantly that rule was mandatory in language and the defendant was obliged to issue such a Summons. The defendant had done so there. It also took some other actions such as discovery and applications for extensions of time and indeed some correspondence but the learned judge, rightly in my view, took the view that that did not amount to an abandonment of its option of challenging the jurisdiction of the court. Again in that event the Order 12 rule 8 Summons had been brought timeously on 19 March 1991 which was just within an extension of time granted by the court. The facts are sufficiently different to mean that it is not of much assistance to the court here.

[9] The two Irish cases have been opened to the court by Mr Simpson. There is a considered judgment of Morris J at first instance in the first of them: Campbell International Trading House Limited and Another v. Peter Van Aart and Another [1992] 2 Irish Reports 305 and again I respectfully agree with the views expressed by the judge there. It is important to note that the Irish Rules at that time did not provide the opportunity to put in a conditional appearance but there was some form of informal arrangement by which people would sometimes write that on to an Appearance. The Rules were clearly different. His view was subsequently upheld by the Supreme Court and I will read a passage from the judgment of Chief Justice Finlay at page 317:-

> "No indication of any description was given by the first defendant between that time and late February or early March 1991 to either the court or to the first plaintiff of any challenge to the jurisdiction of the court and in those circumstances I am quite satisfied that the mere absence which was relied upon by the first defendant in this case of an actual form inserted in the Rules of the Superior Courts 1989 providing for an appearance especially directed towards the Act of 1988 and the Convention solely to contest the jurisdiction has no bearing on the case. Having regard to the terms of Article 18 it was quite clear that if a person wishes or intends to contest the jurisdiction of the court in proceedings brought pursuant to the Act of 1988 and the Convention that it is necessary in entering the appearance that they

> should so indicate. It may not be necessary to do it in any particular form. Conceivably it is not necessary to do it exactly contemporaneously with the entry of appearance but it is certainly necessary to do it by some method informing the plaintiff of the fact that the purpose of the entry of an appearance is to contest jurisdiction. That could be done, conceivably, by a letter accompanying the appearance, by a letter immediately following the appearance or by notice of motion accompanying or following the appearance and contesting the jurisdiction."

[10] Mr Simpson calls in aid, inter alia, that his solicitors, Haugheys, had written on 18 December 2008 to Messrs Arthur Cox, solicitors for the plaintiff, and they raised a number of matters but the final matter was to say that they did not accept that Northern Ireland was the appropriate jurisdiction for any proceedings between their respective clients and that they reserved their clients right to challenge the jurisdiction of the courts of Northern Ireland to hear any such dispute.

[11] Incidentally that case was followed in another decision of the Irish Supreme Court – Devarajan v. Ballagh [1993] 3 Irish Report 377. The judgment of the Supreme Court was again given by Chief Justice Finlay and it does not seem to be necessary to quote from it.

[12] It will be recalled that the provision which governs this area of relationship between states, or at least those state which have subscribed, was the Brussels's Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968. Article 18 of that Convention read as follows:-

> "Apart from jurisdiction derived from other provisions of the Convention a court of a contracting state before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply where an appearance was entered solely to contest the jurisdiction or where another party has exclusive jurisdiction by virtue of Article 16."

[13] Those words that the 'rule shall not apply where an appearance was entered solely to contest the jurisdiction' might have been thought to be clear and strong. Mr Simpson drew attention to several decisions of the European Court where they were interpreted in a particular way. Undoubtedly the leading case was the judgment of the Court in Elefanten Schuh v. Jacqmain op.cit. That was a dispute involving someone who was working in Belgium for a subsidiary of a German company and where he somewhat belatedly took a

point as to the appropriate jurisdiction of the court which was hearing the matter and the Court therefore had to decide whether he had complied with the requirements of Article 18. Apparently under German law he was forced to make a choice between contesting the jurisdiction or arguing the point on the merits whereas he wanted to do both in case he should not succeed on the jurisdictional point.

[14] The court was dealing with two questions. Firstly is the jurisdiction contained in Article 18 applicable if the defendant has not only contested jurisdiction but has in addition made submissions on the action itself and, secondly, if it is must jurisdiction be contested in limini litis? At paragraph 17 the European Court held as follows:-

> "Therefore the answer to the second and third parts of question one should be that Article 18 of the Convention must be interpreted as meaning that the rule on jurisdiction which that provision lays down does not apply where the defendant not only contests the court's jurisdiction but also makes submissions on the substance of the action, provided that, if the challenge to jurisdiction is not preliminary to any defence as to the substance, it does not occur after the making of the submissions which under national procedural law are considered to be the first defence addressed to the court seised."

As I have indicated that view was followed by the European Court both in the decision in Rohr and the decision in Gerling of 1983.

[15] Applying that to the law in Northern Ireland one must take into account the fact that the later Council Regulation of the European Communities No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was worded slightly differently. The relevant provision is Article 24 and reads:-

> "Apart from jurisdiction derived from other provisions of this Regulation a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where an appearance was entered to contest the jurisdiction or where another court has exclusive jurisdiction by virtue of Article 22."

[16] It can be seen that the word solely has been deleted from the second sentence in effect reflecting the decision of the European Court to give a rather

broad interpretation to the previous Article 18 under the Brussels's One Convention.

[17] The position here is that a defendant wishing to plead the jurisdiction may with the leave of the court enter a conditional appearance. He may also bring a summons under Order 12 rule 8 in the circumstances provided therein but it seems to me in the light of the authorities and the wording of the Rules that he is also at liberty to plead the jurisdiction in his (first) Defence. He would be in difficulty if he left it out of his first defence and a subsequent application to amend would not in my view, subject to any wholly exceptional circumstances, be appropriate. But here the defendant did raise the jurisdictional issue in its defence. It is entitled to say that it put in an appearance to contest the jurisdiction along with other issues in case it was not successful in that but the European Court has expressly allowed it to do that. In this jurisdiction a defendant should plead all their defences and it is appropriate if you are putting in a defence therefore to plead not only to jurisdiction but to other matters. The defendants could not be said to have misled the plaintiffs as it alerted them to the issue by the letter of 18 December 2007.

[18] As it happens their summons of only a week later of 24 September to strike out the proceedings did cover other matters apart from jurisdiction and so it seems to me neither unreasonable nor unfair that they should have adopted this approach although as I have indicated neither the defence nor the summons are set out in what one might regard as an optimal way.

[19] Therefore in light of all the authorities I am satisfied that the defendant/appellants are entitled to take the jurisdictional point before this court.

[The court went on to rule in favour of the plaintiffs on the jurisdictional and other issues and allow the action to continue in Northern Ireland.]