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Judgment: approved by the Court for handing down (subject to editorial corrections)	*ICOS No:* 23/34085/02 *Delivered:* 11/06/24

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

STEPHEN WILSON

Plaintiff

and

JOSEPH O'HARE TRADING AS O'HARE TRANSPORT

Defendant

Mr J O'Connor, instructed by Reid Black Solicitors on behalf of the plaintiff.
Mr Spence, instructed by DAC Beachcroft on behalf of the defendant.

MASTER HARVEY

Introduction

[1] This is an application by the defendant seeking an order pursuant to Order 13 rule 8 of the Rules of Court of Judicature (Northern Ireland) 1980 setting aside a default judgment entered against the defendant on 29 June 2023 as the defendant failed to enter an appearance. I am grateful to both counsel for their helpful and concise oral submissions.

[2] From the defendant's affidavit of 4 January 2024, the cause of action relates to an accident at work on 14 March 2022 when the plaintiff, an employee of the defendant, was driving a tractor unit of the defendant which was attached to a trailer on which there was a sealed container. The container held two "jaw crushers" which it appears were heavy items and were being driven from Belfast Port to an engineering firm in County Tyrone. As the plaintiff drove round a left hand bend the tractor and trailer overturned and the plaintiff suffered personal injuries as a result.

The legal principles

[3] This court recently set out the legal principles relevant to such applications in the case of *Southern Health and Social Care Trust v Tennyson* [2022] NIMaster 7. I reiterate some of the principles here to assist the parties. The power is contained within Order 13 rule 8 of the Rules of Court of Judicature which is in the following terms:

> "Default of appearance to writ
>
> Setting aside Judgments
>
> 8. Without prejudice to rule 7 (3) and (4) the court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."

Meritorious defence

[4] At paragraphs 33-34 of his judgment in *Bank of Ireland v Mervyn Coulson [2009] NIQB 96,* Gillen J stated that in order to set aside a default judgment, the defendant must show that he has a "meritorious defence" and, referring to a number of authorities, set out the legal principles in relation to the meaning of that expression:

> "[34] The principles to be derived from these authorities are these. First, the procedure for marking judgment in default is not designed to punish the defendant by destroying his right to a fair and full hearing in relation to the plaintiff's claim but rather as part of the disciplinary framework established by the rules of the court which are designed to ensure proper and timeous conduct of litigation (see McCullough's case at p. 584a)
>
> [35] Courts must be wary to form provisional views of probable outcomes which experience has shown can readily be shown to be fallacious when the matter is tried out. In essence I think that Lord Wright at p. 489 in Day's case captured the approach that the courts should adopt when he said: "In a case like the present there is a judgment which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in its favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown the court will not … desire to let judgment pass and which there has been no proper adjudication …"

[5] In *McCullough v BBC - NILR [1996] NI p584* Girvan J highlighted the danger of forming views at an interlocutory stage of the case, stating;

> "If, on the other hand, there is a real triable issue between the parties justice will normally require that the matter should be allowed to go to trial. In determining whether if there is a real triable issue between the parties … I do not see in justice why a defendant should be deprived of the opportunity of presenting his defence merely because the court on the limited material available to it at that stage and on the inevitably somewhat superficial interpretation of that material concludes that the defendant will probably fail. Experience shows that provisional views of probable outcomes can readily be shown to be fallacious when a matter is tried out."

[6] In *Day v Royal Automobile Club Motoring Services Limited [1999] 1 W.L.R 2150* The English Court of Appeal (p2157) stated, that in exercising its discretion to set aside a default judgment and assessing the merits of a defence;

> "The approach is distorted if one uses "real prospects of success" as a positive test. That wrongly encourages a test of judging fact on affidavit and then coming to a provisional view of the probable outcome. I agree, however, that the arguable case must carry some degree of conviction but judges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set aside against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on the interlocutory application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it. I would therefore be a little hesitant to elevate the test into, as it is advanced in The Supreme Court Practice, "a real likelihood that a defendant will succeed."

[7] In *American Cynamid v Ethicon Ltd 1975* Lord Diplock at 407 gave his interpretation of the appropriate legal test in such cases;

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried."

[8] In *Bank of Ireland (uk) plc v Eugene Jones and Eamon Jones 2014* J Weatherup helpfully set out the merits threshold for a defendant;

> "(i) In order to set aside a judgment it is necessary that a defendant establishes that there is an arguable defence.
>
> (ii) It is not necessary that a defendant establishes that the defence has a real prospect of success.
>
> (iii) It is not necessary for the Court to form a provisional view of the probable outcome of the case.
>
> (iv) The Court will not set aside a judgment if there is no defence to the claim apparent from the materials before the Court. The merits threshold will require the defendant to establish an arguable defence. This has also been expressed as a prima facie defence, a serious defence, a real triable issue, a defence with merits to which the Court should pay heed."

Delay

[9] There are a number of authorities dealing with delay in bringing such applications as the present case, including *Quinn v McAleenan and McConville [2010] NIQB 31*, in which Gillen J took into account the "subsequent delay in attempting to set the decree aside."

[10] In *Bank of Ireland v Coulson*, Gillen J stated:

> "[19] There is no rigid rule that the applicant must satisfy the court that there is a reasonable explanation why the judgment was allowed to go by default, though obviously the reason, is any, for allowing judgment and thereafter applying to set it aside is one of the matters which the court will have regard in exercising its discretion. (See Evans v Bartlam (1937) AC 473 at 480). The application should be made promptly and within a reasonable time. Delay if coupled with prejudice to the plaintiff or a bona fide assignee of the judgment debt will also be factors.
>
> [20] In this case, there was a delay between the judgment being marked, namely 30 November 2007 and the application for stay of enforcement on 13 May 2008 and the application to set aside the judgment on 20 June 2008
>
> …

> [31] Whilst therefore there is no rigid rule that the applicant must satisfied the courts that there is reasonable explanation why judgment was allowed to go by default I have taken into account in exercising my discretion the fact that no reasonable excuse was given for the delay. (See Day v RAC Motoring Services Limited (1999) 1 AER 1007."

[11] In *Gentry v Miller [2016] EWCA Civ 141* a delay of 4 months was in itself deemed sufficient for dismissing the application.

[12] In *Mountain Ashe Portfolio Ltd (as Trustee of CF Structured Products BV) v Vasilyev [2021] EWHC 1853 (comm)* the court set aside a judgment despite a 15 ½ week delay, albeit indicating this was "right on the line."

Consideration

[13] I must assess whether the defendant has shown grounds why the discretion to set aside should be exercised in its favour.

[14] This includes determining whether the defendant has established an arguable, serious or prima facie defence and as per Gillen J in *Bank of Ireland v Coulson,* whether there are merits in the defendant's case to which this court should pay heed.

[15] The basis of the defendant's defence is twofold. The accident was caused "either by a combination of the jaw crushers moving in the container and the manner of the plaintiff's driving." Turning to the latter point, there is absolutely no evidence before the court that speed or the manner in which the plaintiff drove was a factor in the accident. The only exhibits to the affidavit are a copy of the writ and a solitary letter to the plaintiff's solicitor. This defence is put forward with little conviction and I consider it is not a serious or meritorious defence.

[16] In relation to the movement of the load causing the lorry to overturn, the defendant's affidavit asserts that neither the defendant nor the plaintiff were allowed to break the seal of the container or open it and had to assume they were properly secured… "Therefore, if the crushers moved and this caused or contributed to the plaintiff's injuries, it is the party responsible for loading and securing the crushers which will be found liable." There was reference during the hearing to a third-party company in China being responsible for loading and securing the crushers. This is not mentioned in the affidavit. It is not clear what contractual relationship exists between the defendant, the third party in China or the Engineering firm in Tyrone. There is no other evidence put forward to explain why this should absolve the defendant of liability such as to constitute a meritorious defence.

[17] The plaintiff credibly asserts these are matters for potential third-party proceedings between the defendant and the other entities involved. The plaintiff was injured in the course of his employment while using work equipment and has sued his employer for breach of contract and breach of statutory duty "in and about the safekeeping, management, care and control of the plaintiff during his employment…" The plaintiff argues that in the circumstances this is a case of strict liability against the employer. The defendant accepts it had a non-delegable duty of care to their employee but that it acted reasonably and did not breach that duty. Further the defendant asserts that there is no prejudice to the plaintiff if the judgment is set aside. While it is not the role of this court to conduct a mini-trial to determine if the defence has a real prospect of success, I consider the plaintiff's submissions carry greater weight and insufficient merits have been put forward by the defendant to which the court should pay heed.

[18] While delay is not the determining factor, this issue is relevant when one considers the comments of Gillen J in *Bank of Ireland v Coulson*. He noted that the court rules are part of a disciplinary framework "designed to ensure proper and timeous conduct of litigation." I have similarly taken into account in exercising my discretion the fact that no reasonable excuse was given for the delay.

[19] The plaintiff issued proceedings on 5 April 2023. I have no evidence before me as to what correspondence was issued prior to the issue of proceedings by either party or whether the defendant set out in writing that liability was in dispute. I was told by respective counsel there were various emails and phone calls but none of this was presented to the court. No appearance was entered on behalf of the defendant after being served with the writ and no explanation is given as to why, therefore, I am oblivious as to why judgment was allowed to go by default. The plaintiff sought and obtained judgment on 29 June 2023 and served this on 9 August 2023. The next step taken by the defendant was to write to the plaintiff three months later to indicate liability was in dispute and seeking consent to having the matter set aside. I have no explanation as to why this took three months. It appears no response was received from the plaintiff, but no other correspondence has been provided to the court. The defendant took no action for a further two months until bringing the instant application in January 2024.

[20] There is no attempt to explain the five month delay from service of the default judgment to the date of issuing this application, other than the defendant was waiting to hear from the plaintiff. For their part, the plaintiff's counsel asserts that "11 phone calls" from the plaintiff's solicitor to the defendant went unanswered. Again, none of this is before the court in affidavit and no replying affidavit was filed.

[21] As stated in the authorities, if a judgment is regular then there is an almost inflexible rule that there must be an affidavit of merits showing a defence on the merits. There is an affidavit in this case, however, it is two and a half pages long and

is completely lacking in any detail or conviction as to the merits of the defence being put forward. For an application of this nature, having regard to the consequences depending on the outcome, I consider that the scant materials provided by the defendant are both unsatisfactory and inadequate.

[22] I do not consider based on the limited amount of material available to me, on the facts of this application, that there is an arguable defence which would require me to set aside the judgement. The default judgment was both regular and properly obtained and as stated in the authorities, it is part of the disciplinary framework in the rules of the court which ensure the proper and timeous conduct of litigation. The applicant must show grounds why the discretion to set aside should be exercised in its favour. In this application they have failed to do so.

Conclusion

[23] I refuse the defendant's application to set aside the judgment and award costs to the plaintiff. I certify for counsel on behalf of both parties.