Neutral Citation No: [2014] NIQB 93 | *Ref:* **WEA9341**

Judgment: approved by the Court for handing down | *Delivered:* **26/06/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEENS BENCH DIVISION (COMMERCIAL)

Between:

BANK OF IRELAND (UK) PLC

Plaintiff

v

EUGENE JONES and EAMON JONES

Defendants

_____

WEATHERUP J

[1] This is the second defendant's application to set aside judgment in default of Defence entered on 21 October 2013. The application represented a resurrection of the argument that it is necessary to establish a serious issue to be tried in advancing an application to set aside a judgment. Mr Sands appeared for the second defendant and Mr McHugh for the plaintiff.

[2] The Writ was issued on 6 June 2013 and the Defence of the first defendant was delivered on 6 September 2013.

[3] The plaintiff claims £510,147.80 from the defendant brothers on foot of personal guarantees given as security for monies advanced to a company, Webb Construction Ltd, of which the defendants were the shareholders and Directors. The company was established in order to purchase and develop lands in Fermanagh, the purchase price being £735,000. The defendants paid £151,000 of their own money towards the purchase and it was proposed that the company would borrow the balance from the plaintiff.

[4] A meeting occurred between the plaintiff's representative and the defendants in April 2006. Nigel Walsh of the plaintiff came to a meeting at the first defendant's home to discuss the financial arrangements with the defendants. The first defendant's wife, Mary was also present. The second defendant's account of that meeting is that the money which the plaintiff was proposing to lend was to cover 80% of the cost of the purchase of the site and would not have been enough to undertake any of the proposed building works. Accordingly, Nigel Walsh assured the defendants that if they reduced the overall indebtedness to the plaintiff to 60% two things would happen. The first was that the personal guarantees would be reduced proportionately and secondly that the plaintiff would lend additional monies when required to fund the construction of dwelling houses on the site. The defendants agreed to this arrangement. The second defendant states that without the additional loan the defendants would not have been able to develop the site.

[5] A facility letter dated 13 April 2006 issued for the loan of £584,000 accompanied by a charge in favour of the plaintiff over the lands and personal guarantees from the defendants. The second defendant says that he was content to enter into the guarantee as he clearly understood that this was part of a wider agreement whereby the plaintiff would reduce the liability under the guarantees as the indebtedness was discharged and that in due course additional borrowings would be available to complete the development of the site. On 20 April 2006 the second defendant signed the personal guarantee. He states that at that time there was full planning permission for the development of the site but it would appear from Counsel's submissions that full planning permission was not obtained until 2010.

[6] The facility was renewed by the plaintiff by letter dated 1 December 2008 for a further period of 12 months. This facility letter bears what purports to be the second defendant's signature on 13 December 2008. However, the second defendant denies that he signed the facility letter. He states that he was not prepared to sign the facility letter because by that stage it was clear that the plaintiff did not intend to honour the agreement with the defendants. On 7 August 2012 the plaintiff wrote to the defendants terminating the facility and requiring all facilities to be closed within a month.

[7] Mr Walsh filed an affidavit in response. He stated that he was employed by the plaintiff between 1995 and 2008. He emphatically denied that at any meeting he assured the defendants that if the overall indebtedness to the plaintiff was reduced to a level of 60% that the personal guarantees would be reduced proportionately or that the plaintiff would lend additional monies when required in order to fund the construction of dwelling houses on the site. He stated that he had a vague recollection of meeting the defendants in connection with the acquisition of the site; he had no recollection of Mary Jones being present at the meeting; he certainly gave no assurance as to the availability of build out finance, as he called it, as the project was at too early a stage for this to have been considered; the site was merely zoned for planning in April 2006 and it would not have been possible to talk about

financing in any detail as it was unknown how many units were going to go on the site or exactly what was going to be built; if there had been any agreement about future finance he would have been required to obtain appropriate authority from within the plaintiff and would have required a specific costed application and there were no documents, minutes or memoranda in relation to any such application for finance; the only agreement reached related to the loan provided to purchase the lands and the personal guarantees associated with the specific transaction. Mr Walsh left the plaintiff in 2008 and at no stage before leaving was he ever contacted by the defendants about any finance in respect of building on the lands.

[8] A further affidavit from the second defendant dealt with the reasons for judgment being allowed to be marked. He stated that on 18 July 2013 he received the Writ and attended at his solicitor's office and instructed the solicitors to enter an appearance but he did not attend again and judgment was marked on 21 October 2013. He stated that he found it all very stressful, he has been having a very difficult time and it was difficult to address the matter. In April 2014 he was served with a Statutory Demand and a Bankruptcy Petition and this forced him to focus his attentions on the problem and that led to this application to set aside the judgment that had been obtained in default.

[9] The setting aside of a judgment is a matter in the discretion of the Court and that discretion is exercised by an assessment of the justice of the case as between the plaintiff and the defendants. The proper approach to be taken to setting aside a judgment in default has at times given rise to some debate. In the House of Lords in Evans v Bartlam [1937] AC 473 the proper approach to such an application was expressed in a number of ways. Lord Wright referred to the primary consideration being whether the defendant had merits to which the Court should pay heed. Lord Atkin referred to the requirement for the defendant to have a prima facie defence. Lord Russell referred to there being a serious defence.

[10] The approach to the merits of any defence was expressed in stronger terms by the Court of Appeal in Saudi Eagle [1996] 2 Lloyds Law Reports 221. Sir Roger Ormrod, having referred to Evans v Bartlam, stated that a defendant who was asking the Court to exercise its discretion to set aside a judgment obtained by default should show that he had a defence that had a real prospect of success. That requirement is now regarded as stating the approach in stronger terms than the members of the House of Lords in Evans v Bartlam.

[11] Further, Sir Roger Ormrod referred to another aspect of such applications that has proved contentious. He stated that in order to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside.

[12] In McCullough v BBC [1996] NI 580 Girvan J stated, in relation to the approach to such applications -

> "If it is clear that if a defendant has in reality no defence to the plaintiff's claim the setting aside of the judgment would be unjust to the plaintiff and would not be unjust to the defendants since it would merely delay the enforcement of the plaintiff's undoubted rights and send to trial an indefensible case. 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 trial.

The test for intervention was there stated to be a real triable issue.

[13] On the question of the Court forming a provisional view Girvan J stated –

> "In determining if there is a real triable issue between the parties I respectfully differ from Sir Roger Ormrod for I see no compelling reason why the Court should be required to form a provisional view of the probable outcome if the judgment were to be set aside."

The reason for rejecting the need for a provisional view of probable outcome concerned the early interlocutory stage, the limited material available and the inevitably somewhat superficial interpretation of that material. The Court deals with such applications on affidavit and it would be difficult to make an appropriate assessment of the evidence in those circumstances. When a case is argued out and evidence is heard and tested what might appear to have been a weak case may be made out.

[14] In the Court of Appeal in England and Wales in Day v RAC Motoring Services Ltd [1991] 1 All ER 1070 Ward LJ considered Evans v Bartlam and compared it with Sir Roger Ormrod's approach in Saudi Eagle and in his usual colourful way stated that it appeared that there had been a movement of the goal posts. Saudi Eagle, in referring to a real prospect of success, had expressed the test in stronger terms than the House of Lords.

[15] In Tracy v O'Dowd and Others [2002] NIQB 48 Higgins J followed Girvan J's approach in McCullough v BBC and was satisfied first of all that the test had been overstated in Saudi Eagle when requiring a defence with a real prospect of success and secondly that it was difficult to form a provisional view of probable outcome when that might depend on the credibility or recollection of witnesses or the evaluation of evidence.

[16] I agree with the approach adopted by Girvan J and Higgins J on the issue of the nature of the merits test before a judgment may be set aside and on the issue of the nature of the assessment of the material to be undertaken by the Court. Against that background the following might be stated -

(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.

[17] The defence to the plaintiff's claim that has been offered by the second defendant concerns the agreement alleged to have been reached at the meeting of 2006, disputed as it is by the representative of the plaintiff, as to the circumstances in which the loan would be advanced. Mr Walsh denies the agreement and there is no supporting documentation. There is a conflict of evidence that requires resolution. It is not a matter that can be resolved on affidavit. To reach a resolution of the dispute the witnesses will have to be heard and their evidence tested.

[18] A second issue arises on the merits of the defence because, whatever might have happened at the 2006 meeting, there was a 2008 facility letter that laid down loan conditions that did not include the matters that the second defendant alleges were agreed in 2006. The second defendant says that his signature is not on the 2006 letter and that he had refused to sign because the plaintiff was not honouring the 2006 agreement. There is no other evidence in relation to the signature on the letter. This is not a matter that can be determined on affidavit.

[19] On the matters raised by the second defendant there is an arguable defence.

[20] The reasons for judgment having been marked should be taken into account. It is not a pre-condition of setting aside a judgment that a defendant has to provide a good excuse for the judgment having been entered by default or good grounds for setting aside the judgment beyond establishing the requisite merits. The reasons given for the judgment having been entered are weak. The reasons given for the delay in moving to set aside the judgment are weak. In effect the matter was ignored by the second defendant until he was faced with the threat of bankruptcy. I take these matters into account but as I am satisfied that there is an arguable defence to the plaintiff's claim and that the issues should be determined by the Court. I propose to set aside the judgment entered against the second defendant on 21 October 2013.