Neutral Citation No. [2009] NIQB 96 | *Ref:* **GIL7644**

Judgment: approved by the Court for handing down | *Delivered:* **29/10/09**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

BANK OF IRELAND

Plaintiff:

-and-

MERVYN COULSON

Defendant.

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GILLEN J

Application

[1] This is an appeal from the order of Master McCorry dated 11 March 2009 dismissing the application of the defendant Mervyn Coulson to set aside a judgment entered on behalf of the plaintiff on 30 November 2007 on the grounds that no defence had been served by the defendant to a writ and statement of claim served by the plaintiff on 18 September 2007. Judgment was entered for the sum of £32,308.56 representing an "amount" of £30,990.21, £329 costs and £989.35 interest.

Background to the application

[2] It is plaintiff's case that the plaintiff advanced overdraft facilities to Mercol (NI) Limited of which the defendant was a director. The defendant provided a personal guarantee for the sum of £30,000.

[3] The defendant acknowledges that he signed such a guarantee.

[4] It is the plaintiff's case that Mercol (NI) Limited was indebted to the plaintiff in the sum of £46,718.10 of which £11,604.75 comprised interest charges and £3,160.77 comprised fees and charges.

On 24 October 2006 the defendant executed an unsupported personal guarantee (the "guarantee") up to the maximum principal of £30,000 in favour of the plaintiff in respect of the liabilities of Mercol.

[5] It is the case of the plaintiff that instructions were passed to its solicitors Arthur Cox on 18 July 2007 to pursue recovery of the company's indebtedness under the terms of the guarantee. A writ was issued against the defendant on 19 September 2007 for the extent of his liability under the guarantee. The plaintiff also issued a statutory demand against the company directly which was personally served at the company's registered office but thereafter this was not pursued.

[6] On 19 October 2007 a memorandum of appearance was entered by the defendant as a litigant in person. An affidavit sworn by Sharon Glenn of Arthur Cox made on 29 October 2008 records at paragraph 3(c):

> "I received a telephone call from D A Martin solicitor in which he informed me that he acted on behalf of the defendant. No defence was forthcoming from the defendant and on 5 November 2007 I wrote to the defendant solicitor confirming the plaintiff's instructions to mark judgment in default of receipt of a defence on behalf of his client. … No defence was served and no proposals for payment were received from the defendant and on 30 November 2000, the plaintiff was awarded judgment against the defendant for the total sum of £32,308.56."

[7] Thereafter the plaintiff applied to the Enforcement of Judgments Office (EJO) for enforcement of the said judgment against the defendant. The EJO accepted the said application on 28 March 2008. On 10 April 2008 the EJO issued two separate notices of intention to make orders charging land in respect of properties of the defendant. A notice of application for a Stay of Enforcement was listed for hearing before the EJO Master on 13 May 2008. The EJO Master agreed to adjourn the matter to 17 June 2008 to afford the defendant an opportunity to lodge a set aside application.

[8] At the adjourned hearing on 17 June 2008 the matter was further adjourned to 30 September 2008 to allow the set aside application to be brought before the court in the interim.

[9] It was the case of the plaintiff that on 26 June 2008 the solicitor on record received a copy of the summons and affidavit from D A Martin solicitor in this matter.

[10] The appeal against the order of Master McCorry has suffered great delay. The matter came before on 30 April 2009 for a directions hearing. At that stage the appellant had not lodged a booklet of appeal. I fixed the case for hearing on 12 June 2009 giving directions which included the appellant having three weeks to file affidavits.

[11] On 12 June 2009 no affidavits had been filed, and Mr Coulson indicated at the hearing that he had thought the appeal was to be heard on 26 June 2009 and that he wished to have available a Mr Rentmeister to act on his behalf. Consequently I adjourned the matter until 11 September 2009.

[12] On 11 September 2009 the matter came before McCloskey J. I am informed by Ms Simpson, who appeared on behalf of the Bank of Ireland, that at that hearing affidavits had not been filed by the appellant but rather statements served on the court. I am further informed that Mr Coulson indicated at that hearing that he had not had sufficient time to deal with the affidavit. A peremptory adjournment was granted until 18 September 2009.

[13] On 18 September 2009 I am informed by Ms Simpson that the matter came before Higgins LJ. A medical report from Dr Paul Millar dated 16 September 2009 was produced on behalf of Mr Coulson. That report indicated that the plaintiff was suffering from a recognisable psychiatric illness in the form of depression of moderate severity with somatic syndrome. I was further informed however that when court staff telephoned the appellant's workplace to seek permission to serve the medical report upon Arthur Cox, the respondent personally answered the phone indicating that he was working. In those circumstances Higgins LJ refused the adjournment request and ordered the case to proceed on 25 September 2009.

[14] On 25 September 2009 the appellant's wife appeared Ms Simpson indicated that she acknowledged that her husband did owe the bank between £20,000/£25,000. McLaughlin J ordered that the appeal be listed for hearing on 9 October 2009 and was not to proceed unless Mr Coulson lodged the sum of £25,000 into court before 10.00 am on 9 October 2009.

[15] When the matter came before me, Mrs Coulson indicated that she had no idea when her husband would be fit to pursue the case and in the circumstances she was prepared to process the case on his behalf. Since the case was mounted on affidavit evidence with skeleton arguments having been filed, I was satisfied that in view of the history of this case the matter should proceed.

Legal principles governing this application

[16] In actions where the plaintiff's claim against the defendant is for liquidated demand and the defendant fails to serve a defence on the plaintiff, the plaintiff may after the expiration of the period fixed for service of the defence enter final judgment. The court may, in such terms as it thinks just, set aside or vary any judgment entered in pursuance of this order.

[17] Whether an application is made under Order 19 Rule 9 to set aside a judgment in default of defence or as was originally sought by the appellant in this case, an application under Order 13 Rule 8 where judgment has been entered in default of appearance to a writ, the principles are similar. The principles to be applied in his case are as follows.

[18] Ms Simpson informed me that the Master refused to set aside this judgment because of the delay on the part of the appellant and also because there was no evidence that there was any meritorious defence.

Delay

[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.

[21] It is at least questionable as to whether the appellant had been frank with the court on this issue of delay. In his affidavit of 16 June 2008, at paragraph 3 Mr Coulson averred as follows:

> "I lodged the memorandum of appearance myself and was awaiting some further documentation from the plaintiff. I was informed by the court office that before judgment was entered against me I would have to be served with some further summons or documentation. I am verily informed and believe from my solicitor and counsel that this is not the case where the demand is for a liquidated sum."

[22] I find this difficult to accept given the terms of the affidavit of Sharon Ruth Glenn from the firm of Arthur Cox, solicitors on record for the respondent who, in the course of an affidavit dated 17 September 2008 at paragraph 3(c) averred:

> "On 19 October 2007, a memorandum of appearance was entered by the defendant as a litigant in person. … However I subsequently received a telephone call from D A Martin solicitor in which he informed me that he acted on behalf of the defendant. No defence was forthcoming from the defendant and on 5 November 2007 I wrote to the defendant's solicitor confirming the plaintiff's instructions to make judgment in default of receipt of a defence on behalf of his client. …. No defence was served and no proposals for payment were received from the defendant and on 30 November 2007, the plaintiff was awarded judgment against the defendant …."

[23] I would find it inconceivable that the solicitors then on record for the appellant, namely D A Martin, would have told the plaintiff that further documentation was needed or that they would not have informed Sharon Glenn to this effect had they so believed it.

[24] The appellant went on to assert in his affidavit of 13 January 2009 as follows at paragraph 2 and 4:

> "In relation to the allegations of delay immediately I received notice of the judgment in default, I wrote to the Chief Clerk applying for judgment to be (set aside).
>
> 4. I assumed at having carried out this step that the matter was being attended to within the machinations of the court system. No further correspondence was received from the court offices until 10 April 2008 when notices were issued by the EJO."

[25] On the contrary, the evidence before me was that the EJO served the plaintiff a notice of intention to enforce papers on the appellant on 25 January 2008 as set out in a letter received by Arthur Cox fro the EJO confirming service. Thereafter the respondent applied to the EJO for full enforcement of its judgment against the defendant and the EJO accepted this application on 28 March 2008.

[26] I had also before me correspondence of 5 November 2007 from Arthur Cox to David Martin solicitor indicating that the former had been instructed to mark judgment in default of receipt of the defence by 7 November 2007. A letter of 10 December 2007 from Arthur Cox to the appellant personally, enclosed a copy of the judgment and confirming that a copy had been served directly on the solicitor on record for him, namely D A Martin. A copy letter of 10 December 2007 from Arthur Cox to David A Martin solicitor confirmed service of the judgment against the appellant. The appellant himself sent the letter to the Chief Clerk at the Royal Courts of Justice on 12 December 2007 indicating that he was in receipt of a fax detailing judgment by default for the sum of £32,308.56 and that he wished to have the judgment set aside. The notice of intent to enforce the money judgment under Judgment Enforcement (Northern Ireland) Order 1981 was also before me dated 22 January 2008 as was the notice of service by the Northern Ireland Court Service on 25 January 2008.

[27] In his affidavit of 13 January 2008 the appellant further avers that it was after he had applied to the EJO for a stay of the notices and the listing for hearing on 13 May 2008 that he needed to retain a solicitor to apply properly to have the judgment set aside and that he instructed D A Martin and that the application to set aside the judgment was drafted and issued on 16 June 2008.

[28] Once again that does not appear to meet with the facts since the affidavit of Sharon Ruth Glenn avers in her affidavit of 17 September 2008 that the appellant's solicitors had first telephoned the offices of Arthur Cox in connection with the matter as far back as 19 October 2007 and again on 1 November 2007. Arthur Cox and Company also wrote to the appellant's solicitors on 5 November 2007, a copy of which correspondence was before me.

[29] Ms Simpson contended that the Master had specifically commented on these matters and indicated that he could not accept the truthfulness of the defendant's affidavit evidence. I was informed by counsel that the inaccurate explanation for the delay in applying to set aside the judgment was such that the Master commented he could not accept the truthfulness of the defendant's affidavit evidence and was one of the reasons why he made his decision in this case.

[30] I found no further explanation of this matter in the course of the appeal before me.

[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.

The merits

[32] If a judgment is regular, then there is an almost inflexible rule that there must be an affidavit of merits i.e. an affidavit stating facts showing a defence on the merits (Farden v Richter (1889) 23 QBD 124).

[33] For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. The meaning of this expression has been discussed in a number of authorities including Alpine Bulk Transport Company Inc. v Saudi Eagle Shipping Company Inc., The Saudi Eagle (1986) 2 Lloyd's Report 221 CA, Day's case, Ann McCullough v British Broadcasting Corporation (1996) NI 580.

[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 …"

I therefore have asked myself whether there are merits in the defendant's case to which this court should pay heed.

[36] I have come to the conclusion that no such merits exist in this case for the following reasons. First, the plaintiff's claim is in respect of a guarantee. The maximum that could have been claimed under this guarantee was a sum of £30,000. I was satisfied from the evidence produced that the affidavits of Mr McGimpsey that the total amount due to the plaintiff by the company Mercol excluding legal costs is £46,718.10. Mr McGimpsey, the manager in the Area Credit Department (NI) of the Asset Restructuring Unit of the plaintiff had been directed to make an affidavit dealing with this aspect of the

case by Master McCorry according to Ms Simpson. No affidavit of Mr Coulson's challenges this figure of £46,718.10. Indeed it is clear from Mr Coulson's affidavits that essentially he was challenging the charges of £3,141.32, the overcharges on the Euro current account and Euro treasury account and the interest charges. The problem that this created for Mr Coulson is that it is clear from the affidavit of Mr McGimpsey of 29 October 2008 that £46,718 which was due by the company, the only amounts being claimed by way of interest was one of £11,604.75 and fees and charges amount to £3,160.77. The cumulative total of interests and charges therefore could not have reduced the sum now claimed to below £30,000. Hence even if the appellant was entirely correct about all of the interest and fees charged, it would not have served to reduce the sum owed by Mercol to the bank, which he had guaranteed, to below the sum now claimed of £30,000. Hence there are no circumstances in which there could be any merit in the defence now being raised.

Mrs Coulson

[37] This point is underlined by the skeleton argument of the appellant dated 6 March 2009 which does not purport to challenge the primary sum. Indeed Mrs Coulson had expressly recognised this to some extent given that it is common case that she admitted before McLaughlin J that a sum of £20,000/£25,000 was due in any event. Hence McLaughlin J had made an order that £25,000 be lodged in court before this appeal was allowed to proceed. Having looked at the figures now I have no doubt that the defences raised by the appellant do not bring the total due under the guarantee below £30,000 even if he was proved to be entirely correct in his submissions. For that reason alone I hold that there is no merit whatsoever in the defence.

[38] Accordingly I have come to the conclusion that the Master was correct in his decision to refuse to set aside this judgment and I affirm the Master's order.