



THE COURT OF APPEAL

Appeal No. 2016 31

Irvine J.  
Hogan J.  
Mahon J.

**Padge McGrath, Mark McGrath, Dermot Kehoe, Brendan Butler and John Webb**

**Plaintiffs**

- and -

**Liam Godfrey**

**Defendant**

**JUDGMENT of Ms. Justice Irvine delivered on the 15th day of June 2016**

1. This is an appeal against the order of the High Court (Barr J.) made on 11th January, 2016 and perfected on 12th January, 2016, whereby he refused the defendant's (Mr. Godfrey's) application to set aside an order of the Master of the High Court dated 14th February, 2014. That Order granted the plaintiffs liberty to enter final judgment against Mr. Godfrey for a total sum of €1,400,000 together with interest on the sum of €1m from 8th May, 2012, and an order for their costs to be taxed in default of agreement.

**Background**

2. The background to the judgment is that on 19th December, 2012, the plaintiffs issued summary summons proceedings on foot of personal guarantees allegedly afforded by Mr. Godfrey to each of them dated 21st May, 2007. Those guarantees were stated to support a total sum of €1m. loaned by them to Greenhill Investment Limited, a company of which Mr. Godfrey was a director and which has an address in Bulgaria. That loan is not disputed. The company having defaulted upon its repayment obligations, the plaintiffs, by letter dated 8th May, 2012, called upon Mr. Godfrey to meet his liabilities under the guarantees.

3. It should be stated that Mr. Godfrey's application to set aside the order of the Master dated 14th February, 2014, was supported by his own affidavit sworn on 14th December, 2015. The matters which he relied upon were replied to by Mr. Orm Kenny, the plaintiffs' solicitor, in an affidavit of 6th January, 2016. Mr. Godfrey did not seek to file any supplemental affidavit challenging the content of Mr. Kenny's affidavit which dealt with the service of the summary summons, notice of motion and grounding affidavit and also the matters relied upon by Mr. Godfrey to support his assertion that he had a *bona fide* defence to the proceedings.

4. In his notice of appeal dated 22nd January, 2016, Mr. Godfrey made a number of assertions as to fact, many of which related to the service of the proceedings, which he had not deposed to on affidavit when his application was dealt with in the High Court. Yet further factual claims were advanced by him in his written submissions. In addition, he lodged a number of further affidavits in support of his appeal.

5. The first of these affidavits was that sworn by Ms. Anne Murphy on 8th February, 2015, wherein she stated that she had accompanied Mr. and Mrs. Godfrey to Bulgaria on 17th January, 2013, and that they had remained there until 25th January, 2013. The second was an affidavit sworn by the defendant's wife, Mrs. Margaret Godfrey, on 5th February, 2016. In her affidavit she stated that when she arrived home from Bulgaria on 25th January, 2013, she saw no document in the house with her husband's name on it. She also confirmed that during the weeks which included 24th June 2013, and 20th January 2014, no post had arrived for her husband from the plaintiffs. She also advised that on 18th December, 2013, a man had come to their home looking for her husband. When she informed him that he was not there he allegedly put his foot in the door and was persistent to the point that she told him that she intended calling the gardai with the result that he left. The third affidavit was that of Mr. Joe Godfrey, the defendant's son, who asserted that his father left home at 7:55 a.m. on 16th January, 2013, and did not return until 25th January 2013. He claimed that nobody had come to the door of the house that morning and that he had found no document left in the letterbox. Thankfully, for the purposes of this appeal, it is not necessary to consider the weight that a court might reasonably attach to affidavits, such as those to which I have just referred, wherein the deponents have each asserted that they are in a position to recollect what, if any, post came through the letterbox of their home on a particular day or in the course of a particular week several years earlier.

6. Given that this is not an appeal from an interlocutory order, the approach which has been adopted by Mr. Godfrey on this appeal in seeking to introduce the aforementioned new material is highly irregular and is not in conformity with the Rules of Court. However, given that he represented himself at the hearing of the appeal, I feel that I should briefly summarise the more significant matters referred to by him in the aforementioned documentation, given that I am satisfied that these matters are not critical to or determinative of the outcome of the appeal.

7. Mr. Godfrey maintains that:-

- (i) he was never served with the summary summons either personally or by ordinary pre-paid post;
- (ii) he was not at his home on 18th December, 2013, when Mr. McGlynn attended for the purposes of seeking to effect service of the notice of motion. His wife was present but she was not served;
- (iii) the summons should have been sent by registered post because post "goes missing" in Ireland;
- (iv) there were no personal guarantees and he signed no such documents;
- (v) the first he knew of any court proceedings was in July, 2015 when he was advised of the existence of a European Enforcement Order, and
- (vi) the effect of the judgment obtained against him has been that his shares in his Bulgarian companies have been seized and those companies are in the process of being liquidated and their assets sold off at a substantial undervalue.

## **Chronology and summary of the evidence before the High Court**

8. The following is a brief chronology and summary of the evidence which was before the High Court Judge at the time he made his order.

9. As I have already stated, the plaintiffs issued a summary summons on 19th December, 2012. Mr. Simon Kennedy, the solicitor on record for the plaintiffs at that time, in his affidavit of 13th March, 2013, averred that he travelled to Limerick on 16th January, 2013, for the purposes of effecting service. He telephoned Mr. Godfrey prior to his arrival and told him that he had a document to serve on him. Mr. Godfrey advised him that he was going to Bulgaria and said he would phone back with the name of the solicitor upon whom the summons could be served. When he did so he advised Mr. Kennedy that he was not prepared to accept service. He did not want to be rushed in light of his travel arrangements. He then advised Mr. Kennedy that he was not at his home at Fedamore.

10. Mr. Kennedy, according to his affidavit, then drove to the defendant's home where he states he saw a man and woman walking to a motor car. They went back into the house as soon as they noticed him. He states that he was satisfied that the man in question was Mr. Godfrey. Accordingly, he tried to telephone him again but this time his phone went through to an answering machine. He left a message stating that he intended posting the High Court writ through his letterbox.

11. Mr. Kennedy's account of what transpired between himself and Mr. Godfrey on 16th January, 2013, was brought to the Court's attention in the course of an application for substituted service made on 24th June, 2013.

12. An order for substituted service of the summons was duly perfected by Birmingham J. on 26th June, 2013, and this permitted service to be effected by ordinary pre paid post on Mr. Godfrey at his home address. Service was effected on 28th June, 2013, and an affidavit relating to that service was sworn on 17th July, 2013.

13. Regrettably, further difficulties were encountered when the plaintiffs sought to serve their motion for liberty to enter final judgment. At that stage, Mr. David McGlynn, a summons server, travelled to the defendant's address for the purposes of serving the relevant documents. Mr. McGlynn, in his affidavit sworn on 6th January, 2014, deposed to the fact that when he attended at the defendant's home the door was answered by a female who identified herself as Mr. Godfrey's wife and that when he asked to speak to Mr. Godfrey he then came to the door. As soon as Mr. Godfrey began to read the documents handed to him, Mr. McGlynn stated that Mr. Godfrey became very aggressive and abusive. As already advised, Mr. Godfrey denies any such conduct in circumstances where he maintains that he was not present on that occasion. Regardless of the dispute between the parties as to what actually occurred, the plaintiffs' advisers clearly concluded that proper service had not been effected and that it would be necessary to apply once again for an order for substituted service of the motion for liberty to enter final judgment.

14. That application for substituted service was made to Peart J. on 20th January, 2014, when he made an order permitting service of the motion to be effected by ordinary pre paid post at Mr. Godfrey's home address. Mr. Orm Kenny, the plaintiffs' solicitor, by affidavit dated 7th February, 2014, deposed to the fact that he served the notice of motion and the order of Peart J. by posting the same to the defendant at his aforementioned address on 30th January, 2014.

15. On 14th February, 2014, the defendant having failed to appear to the motion, the Master of the High Court granted the plaintiffs liberty to enter final judgment against Mr. Godfrey. Judgment was later entered in the sum of €1,543,880 on 17th April, 2014.

16. As already stated, Mr. Godfrey maintains that he only became aware of the judgment in July, 2014 and that it then took ten weeks for his solicitor to ascertain how the judgment had been obtained against him.

17. Mr. Godfrey further advised in the course of his affidavit of 15th December, 2015, that he had a *bona fide* defence to the proceedings including but not limited to the fact that the plaintiffs had entered into a contract with a limited liability company of which he was a director, namely Greenhill Investment Limited, which was registered in Bulgaria and which contract contained a clause giving the courts of Bulgaria exclusive jurisdiction concerning any contractual matters as might arise between the parties. Thus, he maintained that he had no liability to the plaintiffs and that the justice of the case required that the judgment be set aside and that he be given liberty to defend the action.

18. In reply, Mr. Orm Kenny in his affidavit sworn on 6th January, 2016, referred to the history concerning the service of the proceedings so as to demonstrate that Mr. Godfrey could not have been unaware of the existence of the proceedings. He maintained that it was perfectly clear that the defendant was engaged with the proceedings from the time the plaintiffs first sought to effect service of the summons upon him on 16th January, 2013. He thus challenged the credibility of Mr. Godfrey's claim that he was taken by surprise when judgment was entered against him. Further, Mr. Kenny asserted that Mr. Godfrey could have no *bona fide* defence to the proceedings because the claim was against him personally and not as against his company. The claim was one based upon guarantees which were repayable on demand and lawful demand had been made by letter dated 8th May, 2012. Further, the guarantees provided that the parties thereto would submit to the jurisdiction of the Irish courts.

## **The relevant principles**

19. The jurisdiction of the Court to set aside a judgment obtained in default of appearance is contained in Ord. 13, r. 11 of the Rules of the Superior Courts, 1986. It provides as follows:-

"Where final judgment is entered pursuant to any of the preceding rules of this Order, it shall be lawful for the Court to set aside or vary such judgment upon such terms as may be just."

20. It is clear from this rule that the relief that may be afforded to an applicant is one which is at the Court's discretion. However, the rule provides no guidance as to the circumstances in which a Judge might exercise that discretion and neither does it seek to impose any time constraints upon the intended applicant. Helpful assistance in relation to the first of these matters is however to be found in the decision of Peart J. in *Allied Irish Banks plc v. Lyons* [2004] IEHC 129, in which he emphasised the breadth of the discretion conferred by the rule and the necessity for the Court to seek to achieve justice for both the plaintiffs and the defendant. This is what he said at p. 4 of his judgment:-

"Clearly a wide discretion is given to the Court in its task of achieving justice between the parties, but the interests of both parties must be taken into account in the weighing exercise undertaken by the Court in considering the interest of each party, and not simply the hardship and distress pleaded on behalf of the applicant in this case."

21. It is usual for an applicant who seeks relief under Ord. 13, r.11 to be in a position to demonstrate that there was some sort of

irregularity in the proceedings or the procedure whereby the judgment was obtained. Where such an irregularity is established the Court will normally set aside the judgment without enquiring into the merits of the applicant's proposed defence and will do so without the imposition of any terms. The logic which underpins this approach is that given that the judgment should never have been obtained in the first place the parties should rightly be restored to the position they would have enjoyed had judgment not been so obtained. This is what Clarke J. stated at para. 2.1 of his judgment in *O'Tuama v. Casey* [2008] IEHC 49 concerning the jurisdiction of the Court in such circumstances:-

"[W]here judgment is obtained irregularly, the court will normally set aside the judgment without enquiring into the merits of the proposed defence. The logic of this position is that the judgment should not have been obtained in the first place and a plaintiff who has obtained judgment irregularly should not have any benefit by reason of having obtained judgment in that fashion. On the other hand, where judgment is obtained regularly, the court may, nonetheless, be persuaded to set aside the judgment so as to permit the defendant to defend the proceedings but will only do so after considering the possible merits of the defence which the defendant would wish to put forward."

22. It is important in this context to note that the Court will demand proof of strict compliance with the Rules of Court by a party who seeks to stand over a judgment obtained in default of appearance. This, in my view, is extremely important having regard to the potential grave consequences for any defendant against whom judgment is obtained, as is aptly demonstrated by the matters deposed to by Mr. Godfrey in the present case. In this case the plaintiffs maintain that that they strictly complied with the relevant Rules of Court and that the affidavits of Mr. Kennedy and Mr. McGlynn clearly establish that the service effected on Mr. Godfrey was in compliance with the Court orders earlier referred to.

23. If, a court is satisfied that a plaintiff obtained judgment in an entirely regular manner, the defendant who seeks to set aside that judgment faces a significantly enhanced burden of proof. The relevant principles would suggest that they must demonstrate first that they have a *bona fide* defence to the proceedings. After all, it would be wholly unjust to a plaintiff if a court were to set aside a judgment which they had obtained unless it was satisfied that it was doing so for the purposes of enabling a defendant mount a credible defence to the proceedings. In this regard Peart J. in *Allied Irish Banks plc v. Lyons* accepted that the threshold to be met by the defendant was higher than merely establishing an "arguable case". He adopted the threshold approved of in *The Saudi Eagle* [1986] 2 Lloyd's Reports 221, where it was held by Sir Roger Ormrod that it was insufficient to establish an "arguable case". It was necessary for the applicant to demonstrate that their intended defence had a "real chance of success". Secondly, the applicant must convince the court that, having regard to all of the relevant circumstances and in particular the interests of each of the parties, the balance of justice would favour the setting aside of the judgment.

24. Balancing the interests of the parties is far from straightforward when a court is satisfied that the applicant has established the existence of a defence which has a real chance of success. The deliberations of Peart J. in *Allied Irish Banks plc v. Lyons* demonstrate the dilemma for the presiding judge. In that case Peart J. had to balance the prejudice to AIB who had obtained judgment and registered that judgment as a mortgage against the second named defendant's premises against the prejudice to be visited upon her if she were not permitted to defend the proceedings. The latter alternative would have left the second named defendant to seek to remedy her situation by suing her solicitor whose mistake it was that enabled the bank to obtain judgment and register it against her home. He referred to the stress, potential costs and uncertainty regarding the outcome of that litigation, which he noted would be ongoing at a time when the bank would be free to seek to execute its judgment against her family home.

25. Often times, in its efforts to strike a balance between the interests of the parties, the court will grant the relief sought but impose terms and conditions on the defendant in an effort to provide some type of security for the plaintiff who is likely to be prejudiced by the granting of the relief sought.

26. The most frequent example of this type of application i.e. an application to set aside a judgment which was regularly obtained is one brought by a defendant who seeks to rely upon some mistake on the part of their solicitor as a result of which judgment was obtained against them. The decision in *Allied Irish Banks plc v. Lyons* is one such example.

## Decision

27. In the present case the High Court judge decided Mr. Godfrey's application on the grounds that he was satisfied that the summary summons and the motion seeking liberty to enter final judgment had been validly served in accordance with the two orders for substituted service earlier referred to. In other words he was satisfied that the judgment had been obtained in a regular fashion in accordance with the Rules of the Superior Courts. In coming to that conclusion the trial judge referred to the relevant affidavits of service.

28. Mr. Godfrey's principal complaint before the High Court was that he only became aware of the instigation of the proceedings after judgment had been obtained and that he had not been served with any notification of the proceedings. What he did not contest, however, was the plaintiffs' assertion that service had been effected in a regular manner in strict compliance with the Rules of Court and the orders for substituted service.

29. Thus, I am satisfied that the High Court judge was correct in concluding that the judgment had been validly obtained by the plaintiffs. That being so, the only basis upon which Mr. Godfrey was entitled to seek to have the judgment set aside was to demonstrate that he had a real chance of successfully defending the proceedings and to convince the Court that in all of the circumstances and having regard to the interests of all of the parties, that the balance of justice favoured the granting of the relief sought.

30. The fact that a court may be satisfied that a judgment was regularly obtained having regard to proof of compliance with an order for substituted service, does not mean that a defendant who can establish that they have a real chance of successfully defending the proceedings and can prove that they knew nothing of the proceedings might not seek to rely upon that fact to urge that the justice of the case would favour the judgment being set aside. For example, if a defendant against whom judgment was obtained on foot of an order for substituted service which directed that service be effected by ordinary post to his home address, could establish that his house lay vacant in Ireland three months either side of the date upon which service was effected because he and his family were on a six-month sabbatical in another jurisdiction, undoubtedly the court, even though satisfied that valid service had been effected, would be entitled to consider whether those facts might, having regard to the interests of the other party, justify the judgment being set aside. However, he would only be entitled to pursue that argument if he could satisfy the court that he had a real chance of successfully defending the claim.

31. However, a plaintiff who obtains an order for substituted service does not have to prove that the defendant actually received the documents the subject matter of that order in order to satisfy the court that the judgment was regularly obtained. After all, an order for substituted service is only made if the court is satisfied that in effecting service in the manner proposed, the proceedings are

likely to reach the defendant or come to his knowledge. The right to order substituted service exists, *inter alia*, so as to ensure that proposed defendants will not readily be able to evade service of legal documents and thus thwart a plaintiff's right of access to the courts. It would be pointless if, in circumstances where a plaintiff had obtained judgment having complied with an order for substituted service, a defendant could seek to set aside that judgment, regardless of whether they had a bona fide defence to the proceedings, based upon an assertion that they had not actually physically received the proceedings. A wily defendant might decide to evade service comfortable in the knowledge that once advised that judgment had been obtained he would likely be in a position to successfully apply to have the judgment set aside on a simple averment that he personally had never received copies of the proceedings.

32. Accordingly, even if Mr. Godfrey had the right and entitlement to rely upon the affidavits of Margaret Godfrey, Anne Murphy and Joe Godfrey, the same could not avail him for the purposes of arguing that the judgment was obtained irregularly such that he was entitled, without any further consideration of the existence of his likely defence to the proceedings, to have the judgment set aside.

33. Notwithstanding the conclusion of the trial judge that the summons and notices of motion were properly served and the judgment regularly obtained, the High Court nonetheless enjoyed discretion to set aside the judgment if satisfied that Mr. Godfrey had a real chance of successfully defending the proceedings and that having regard to the interests of all of the parties that the justice of the case warranted such an approach. Accordingly, the second issue for this Court's consideration is whether the trial judge's failure to exercise that discretion in favour of the defendant can be impugned.

34. As is often stated, even though an appellate court enjoys the right to interfere with an order made by a High Court judge in the exercise of his or her discretion, significant deference should be afforded to such orders and they ought not lightly be interfered with. See the decision of this Court in *Collins v. Minister for Justice*, [2015] IECA 27 and that of MacMenamin J. in *Lismore Builders v. Bank of Ireland Finance* [2013] IESC 6.

35. As advised earlier, where a plaintiff has obtained judgment in a regular manner, prior to setting aside such a judgment, the Court must be satisfied that the defendant has demonstrated that they have a defence which has a real prospect of success.

36. Mr. Godfrey, in his only affidavit sworn in the High Court, raised only one ground upon which he might defend the proceedings. He sought to rely upon the fact that the contract entered into between the plaintiffs and Greenhill Investment Limited had an exclusive jurisdiction clause which provided that any contractual dispute between the parties thereto would be governed by the laws of Bulgaria and subject to the exclusive jurisdiction of the Bulgarian courts.

37. Mr. Orm Kenny, in his replying affidavit, drew the Court's attention to the fact that the plaintiffs' claims were brought on foot of personal guarantees. They were not claiming pursuant to the terms of the contract referred to by Mr. Godfrey in his affidavit. He also referred to the jurisdiction clause in those guarantees which provided that the parties thereto had agreed to submit to the jurisdiction of the Irish courts. Thus he maintained on his client's behalf that Mr. Godfrey had no potential defence to the proceedings and that in the circumstances it would be unjust for the Court to set aside the judgment.

38. Having regard to the content of Mr. Kenny's affidavit and the fact that Mr Godfrey advanced no other potential ground of defence in the course of the High Court hearing, I am quite satisfied there was no legal or factual basis upon which Barr J. could have exercised his discretion in favour of Mr. Godfrey.

39. Mr. Godfrey, in the course of this appeal, has sought to convince the Court, by reference to materials that were not put before the High Court, if the judgment were to be set aside that he could mount a defence to the claim which has a real chance of success. His defence centres upon his assertion that he never saw or signed any personal guarantees. However, that is nothing more than a bald averment and he has not set out any facts to challenge such evidence as has been advanced by the plaintiffs in support of their claim. For example, notwithstanding the affidavit of Mr. Kenny in the High Court, which made it abundantly clear that the plaintiffs' claim was based upon individual guarantees, and which guarantees were exhibits to the grounding affidavit, Mr. Godfrey did not challenge the validity of that claim, or the validity of the documents themselves. Further, by letter of 8th May, 2012, (exhibit PMcG 3 to the affidavit of Padge McGrath), the plaintiffs' solicitors wrote to Mr. Godfrey at his address at Fedamore, Co Limerick, referring to the personal guarantees which he had allegedly executed in favour of each of the plaintiffs and wherein five separate demands referring to those guarantees were enclosed. He has not denied on affidavit receipt of this letter and its contents and neither as he provided any explanation as to why he did not challenge its contents. Also, in the course of the appeal before this Court, when referred to one such guarantee Mr. Godfrey accepted that the signature thereon would appear to be his. In any event, given that these were not matters raised before the High Court they do not fall to be dealt with by this Court in its assessment as to the manner in which the trial judge exercised his discretion.

40. For my part, having regard to the evidence which was before the High Court I am quite satisfied that Barr J. cannot be faulted for the manner in which he exercised his discretion. Insofar as Mr. Godfrey has come before this Court is a lay litigant I believe that it is important for Mr. Godfrey to understand that even if he had put all of the evidence which he has sought to introduce in this Court before the High Court, it would have been well within the High Court judge's discretion to have refused to set aside the judgment.

## **Conclusion**

41. For the reasons stated earlier in this judgment I am not satisfied that the High Court judge erred in the manner in which he exercised his discretion when he refused the defendant's application to set aside the judgment obtained by these plaintiffs on 17th April, 2014.

42. The judgment so obtained was procured in a regular manner and in accordance with the Rules of the Superior Courts. In particular, service of the relevant documentation was effected on the defendant in the manner provided for in the orders made providing for substituted service. These were the orders made by Birmingham J. on 26th June, 2013, and Peart J. on 27th January, 2014.

43. The High Court judge, having been satisfied that the plaintiffs had fully complied with their obligations under the Rules of the Superior Courts concerning service of the summons and the motion for judgment, was entitled to uphold the aforementioned judgment.

44. In circumstances where the judgment was obtained in a regular manner, the onus was on the defendant to demonstrate the existence of a defence which had a real prospect of success and thereafter to establish the existence of some special circumstances such that, having weighed the interests of both parties, would have warranted the trial judge setting aside the judgment. Integral to that issue was proof by the defendant that he would be in a position to pursue a defence which had a real chance of success if the order were to be set aside. For my part, I am satisfied that he did not discharge that onus in the materials which he put before the

High Court. That being so there was no need to consider further whether any issues which Mr. Godfrey has raised concerning his knowledge of the proceedings might have given the Court good reason to set aside the judgment.

45. For the sake of completeness, having regard to the fact that Mr. Godfrey appeared before this Court as a lay litigant and sought to introduce evidence which he had not put before the High Court, I will do more no more than express my considered view that even if all of that evidence had been placed before the High Court judge, I am satisfied that he would have been acting well within his discretion had he refused to grant the defendant the relief which he sought.

46. For all of these reasons I would dismiss the appeal.