THE HIGH COURT

[2015 No. 6169 P.]

BETWEEN

CARA MCDERMOTT HAWKING (A MINOR) SUING BY HER MOTHER AND NEXT FRIEND MANDY MCDERMOTT

PLAINTIFF

AND

HELEN MCNEIVE TRADING AS PERFORMERS THEATRE SCHOOL, WICKLOW COUNTY COUNCIL AND GO PLAY LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Eagar delivered on Monday the 20th day of February, 2017

1. This Court heard an application by the third named defendant seeking an order to set aside a judgment obtained against the third named defendant in default of appearance made by order of this Court dated 8th February, 2016 pursuant to O. 13, r. 11 of the Rules of the Superior Courts.

> "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."

2. The minor plaintiff was born on 14th May, 2006 and in June 2013, as a result of an agreement with the first named defendant on payment of a fee of €40 per week the instant plaintiff was enrolled in the first named defendant's camp. On 9th July, 2013 the plaintiff attended at the premises of the second named defendant while participating in the camp organised by the first named defendant. In the course of her activities, the plaintiff was climbing on monkey bars in the playground on the premises when she was caused to slip and fall from the bars causing her fall to the ground from a height and the plaintiff suffered personal injuries which this Court need not consider. The first named defendant was responsible for the control and operation of a summer drama camp at Ballywaltrim Community Centre, Bray, Co. Wicklow. The second named defendant is the local authority. The local authority are the owners of the premises. The third named defendant is a limited liability company having its registered office at Galway Technology Centre, Mervue Business Park, Wellpark Road, Galway and carries on a business *inter alia* as a designer, supplier and installer of children's play equipment.

3. Permission was given by the Personal Injuries Assessment Board to take proceedings. Proceedings were taken and on the 8th February, 2016, Barrett J. made an order pursuant to notice of motion for judgment in default of appearance against the third named defendant and ordered that the plaintiff recover against the third named defendant such amount as the court may assess in respect of the plaintiff's claim.

4. It was common case that no application for assessment had been made by the plaintiff against the third named defendant. It was also agreed that the defences of the first named and second named defendants had not yet been settled and served in the proceedings.

5. Order 13, r. 11 does not provide any specific guidance as to the circumstances in which a court might exercise such discretion in favour of a defendant applying to set aside a judgment.

Authorities

6. In *Allied Irish Banks PLC v. Robert Lyons and Josephine Lyons* [2004] IEHC 129 Peart J. gave judgment in respect of an application by the second named defendant the wife of the first named defendant to set aside a judgment of claim by the plaintiff bank against her which is obtained by the plaintiff in default of appearance. And in the course of his judgment he said:-

> *"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. In some cases where judgment has been obtained in default of appearance, there has later found to have been some irregularity in the manner in which judgment was obtained, such as where service was not properly affected on the defendant. In such a case of an irregular judgment it has been held, that it is not necessary for the defendant to make out a good defence to the plaintiff's claim in order to seek to have it set aside."*

7. Where judgment is obtained irregularly, the court who normally set aside the judgment without inquiring into the merits of the proposed defence. This is not the situation in this case. If the court is satisfied, or if the defendant accepts that judgment was obtained in accordance with the rules of court, the defendant who seeks to have the judgment set aside faces an enhanced onus of proof.

8. In *EMO Oil Limited v. Willowrock Limited t/a McCormack Fuels* [2016] IECA 200 Irvine J. discussed the appropriate principles to be applied by a High Court Judge when faced with an application to set aside the summary judgment. At para. 26 of her judgment she stated:-

> *"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 in favour of an applicant and neither does it circumscribe any time limits for the making of such an application."*

9. Irvine J. also outlined the issue of the situation where there was an irregularity which is dealt with by Peart J:-

> *"It is usual for an applicant who seeks relief under O. 13, r.11 to able to demonstrate that there was some sort of irregularity in the procedure whereby the judgment which it seeks to set aside was obtained."*

10. At para. 28, she said:-

> *"By way of contrast, if the court is satisfied or the defendant accepts that judgment was obtained in accordance with the rules of court, as is the situation in the present case, the defendant who seeks to have the judgment set aside*

faces a significantly enhanced onus of proof. They must demonstrate first that they have a bona fide defence to the proceedings and secondly that having regard to all of the relevant circumstances and the interests of both parties that the interests of justice would favour the granting of the relief sought."

11. The situation in this case is that similar to that of the case of *EMO Oil Limited v. Willowrock Limited t/a McCormack Fuels* [2016] IECA 200.

12. The affidavit of Mark O'Shaughnessy of A&L Goodbody Solicitors sworn on 10th June, 2016 exhibits an affidavit from Peter Moller Neilsen dated 10th June, 2016, who is described as the General Counsel for Kompan A/S and that he is based in Denmark. In the affidavit, he says that Kompan A/S was established in Denmark in 1970 and manufacturers playground equipment. GoPlay Limited was established in Ireland in 2001 and supplied playground equipment throughout the island of Ireland. He pointed to administrative issues resulting in the obtaining of the judgment in default of appearance and relies mainly on issues relating to insurers. He also points to the fact that GoPlay Limited became Kompan Ireland Limited. He says that, in particular, due to a number of claims and disruption in personnel at the western European headquarters at the time, the correspondence was not sufficiently appreciated and brought to the attention of the appropriate person. He then says that Kompan Ireland Limited had a defence, in particular because the first defendant as event organiser had failed to supervise adequately and caused or permitted sun cream to be applied to the infant plaintiff's hands prior to her playing on the overhead ladder thereby causing her hands to be slippy and presumably thereby being the proximate cause for her slipping from the overhead ladder and falling.

13. He further states that the plaintiff has pleaded against Kompan Ireland Limited that it supplied an overhead ladder that was excessively high and/or it provided an inadequate safety surface beneath the overhead ladder and he says the third named defendant has vigorous controls with respect to safety and playgrounds. That all playgrounds manufactured and/or supplied by Kompan Ireland Limited are fully complainant with European safety standards. He says that Kompan Ireland Limited have a real and arguable defence to the plaintiff's claim. He says that since neither the first or second named defendants had delivered a defence, he believes that the plaintiff would not be prejudiced by the judgment being set aside.

14. Mark O'Shaughnessy, solicitor at A&L Goodbody Solicitors, swore a second affidavit on 1st July, 2016 and referred to a supplemental affidavit of Peter Moller Neilsen which was dated 1st July, 2016. In that affidavit he stated that there was a joint inspection of the accident locus at Ballywaltrim Community Centre between an engineer retained by Kompam Ireland Limited and representation of the plaintiff, the first named defendant and the second named defendant. This site inspection occurred on 20th June, 2016 and the site inspection concluded:—

1. The playground in question opened on 26th May, 1999.

2. The playground equipment relevant to the alleged incident was supplied by Wickstead, a company based in the United Kingdom and the equipment and safety surfacing was installed by Malcolm Broadstock.

3. The safety surface was changed from rubble tiles to wet pore rubber surface at a date unknown but after the accident the subject of these proceedings.

4. The third named defendant carried out some works in 2009 involving some replacement of parts and that the third named defendant did not carry out any of the repairs or modifications to the monkey bars or to the safety surface underneath same on any date prior to the accident the subject matter of these proceedings and he says that Kompam Ireland Limited had a real and arguable full defence to the plaintiff's claim.

15. He referred to the draft full defence which had been prepared by the third named defendant. It is clear from one of the exhibits to Mr. Nielson's affidavit that there is a sign on Ballywaltrim playground entitled "Ballywaltrim Playground Bray" which indicates an involvement of Go Play.

16. Niall Murphy, solicitor for the plaintiff, swore an affidavit on 11th January, 2017. He referred to the sign attached to the railings of the playground and the quotation "designed and installed by Go Play Limited quality play equipment". He said that a letter of claim was sent to Go Play on 16th October, 2014 and an application was made to the Personal Injuries Assessment Board on the same date. He said proceedings were issued on 30th July, 2015 and the personal injuries summons on the third named defendant by registered post on 12th August. As no appearance was entered on behalf of the third named defendant Mr. Murphy's office wrote a letter dated 23rd September, 2015 seeking an appearance and consenting to a further 21 days with which to enter same. As no appearance was entered on behalf of the third named defendant a motion issued seeking judgment in default of appearance on 21st June, 2016. When judgment was entered against the third named defendant on 8th February, 2016.

17. He states that on 2nd June, 2016 almost four months after the judgment had been entered against the third named defendant, the plaintiff received correspondence from A & L Goodbody Solicitors representing "Kompam Ireland Limited (previously known as Go Play Limited)" and in this correspondence the third named defendant requested that the plaintiff consent to the setting aside the judgment as entered into against the third named defendant. He responded by saying that in circumstances where the plaintiff is a minor he was not in a position to provide consent.

18. Mr. Murphy then states that a joint engineering inspection took place on 20th June, 2016 in relation to the case. On foot of that inspection the plaintiff's engineer has advised that if he needed some information to be obtained from the other attendees at the inspection that in fact Go Play Limited did not design or install the equipment in question. Mr. Tennyson, acting for the plaintiff, believes that another entity, namely Wicksteed Leisure Limited in fact supplied the playground equipment and Malcolm Broadstock trading as Seesaw Design was the installer of the equipment and that this information corresponds with the information set out by Peter Moller Neilsen in his supplemental affidavit. He then says that in the interest of the minor plaintiff he believes that it would be premature to consent to setting aside a judgment entered against the third named defendant in the absence of convincing evidence that the third named defendant was not involved in the installation or design of the equipment in question and says that this information may emerge from discovery in the course of the proceedings from the first and/or second defendant and that in order to protect the plaintiff's position with regard to Wicksteed and Malcolm Broadstock he had written a letter of claim to both entities.

19. Counsel on behalf of the third named defendant submitted that the affidavits of Peter Moller Neilsen set out the administrative circumstances surrounding the entry of judgment in default of appearance obtained by the plaintiff as against the third named defendant and that due to personnel changes in the western European headquarters at that time the importance of the correspondence was not appreciated and accordingly the correspondence was not brought to the attention of the third named defendant, insurance broker Willis Tower Watson. The correspondence was only finally prioritised and notified to the Danish division of Willis Tower Watson on 10th March, 2015 and has subsequently notified the Irish division of the insurance broker on 17th April, 2015

that it was only subsequently discovered, after communications with the insurance broker on 13th May, 2016, that the insurers for the third named defendant had not in fact engaged directly with the plaintiff's solicitor and arriving from this information general counsel for Kompam A/S immediately retained A & L Goodbody Solicitors on 30th May to represent the interests of the third named defendant. He said that as a result of the consequences of the joint inspection carried out at the accident locus on 20th June, 2016 and litigation engineers for all defendants attended and that the outcome of this inspection was that the playground equipment relevant to the alleged accident was supplied by Wicksteed, a company based in the United Kingdom, and the said equipment to include the safety surfacing was installed by Malcolm Broadstock. That the third defendant had carried out some works in 2009 involving some replacement of parts but the third defendant did not carry out any repairs or modifications to the monkey bars or the safety surface underneath same on any date prior to the accident the subject matter of these proceedings. He referred to the draft defence of the third named defendant which stated that the plaintiff's injury was not caused or occasioned by any act or omission on the part of the third named defendant but was caused by Wicksteed Leisure Limited and Malcolm Broadstock. And he said that it was clear from the matters that the third defendant had a full defence to the proceedings with a real prospect of success.

20. He stated that the third defendant acknowledged administrative error, oversight and inadvertence arising from an incorrect assumption that insurers with the plaintiff's claim which was a mistaken belief that led to the plaintiff obtaining a regular judgment against the third named defendant, that the third named defendant at no time deliberately decided to ignore the proceedings.

21. With regard to the plaintiff's possible prejudice he states that proceedings are at a stage where all defendants have recently completed an inspection at the locus on 20th June, 2016 and that neither the first nor second named defendant has delivered their respective defence. In conclusion he submitted that in all the circumstances justice will be properly achieved by the granting of the order sought in the notice of motion.

22. Counsel on behalf of the plaintiff set out the time line in relation to actions in relation to the proceedings. She said that in relation to the third named defendant's draft defence, the first draft defence was a blanket defence denying all allegations of negligence and breach of duty and breach of statutory duty. However the second draft defence expressly denies the company was responsible for producing, designing, supplying and installing the playground equipment and/or safety surfacing underneath. She submitted that the basis for these allegations appear to arise solely from information received from the engineer retained on behalf of the company to carry out an inspection of the locus of the accident. A report identifies the source of the information relied on for the purpose of the report as being representative of the second named defendant, Wicklow County Council. She also referred to the photograph of a sign attached to the railings of the playground. The sign is entitled "Ballywaltrim Playground, Bray" and sets out a number of rules applicable in the playground. At the foot of the sign and prominently it reads "Designed and installed by Go Play Limited quality play equipment". The Go Play logo is displayed and there are what appear to be contact numbers for the company in Galway and Wexford. She also referred to *Allied Irish Banks PLC v. Robert Lyons and Josephine Lyons* [2004] IEHC 129 and said that it was settled law that a defendant applying to set aside judgment obtained against it must satisfy the court that it is a defence that is more than arguable and has a real prospect of success. She referred to the judgment of Lynch J. in *O'Callaghan Limited v. O'Donovan* (Unreported, Supreme Court, 13th May, 1997, an ex tempore decision of Lynch J. on 13th May, 1997 and in particular, Lynch J. refers to the case of *The Saudi Eagle* [1986] 2 Lloyd's Rep. which says:—

> *"All of [their Lordships] clearly contemplated that a defendant who is asking the court to exercise its discretion in his favour should show that he has a defence which has a real prospect of success."*

And she submitted that applying the law to the facts of the case:—

> 1. The claim made by the plaintiff against the third named defendant is clear. The claim is that the third named defendant designed and/or supplied and/or installed the relevant equipment which was defective.
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> 2. The company's proposed defence to the claim is that it did not design, supply or install the equipment.
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> 3. That in order to succeed in setting aside the judgment against them that the third named defendant must demonstrate on affidavit a defence to the claim that has a real chance of success. And she submitted that the third named defendant had fallen far short of doing this and in fact produced no real evidence whatsoever to support the contention.

23. The Court has carefully considered the evidence set out in the affidavits together with the submissions of counsel for the plaintiff and the third named defendant.

24. If the matter had concluded with the first affidavit of Peter Moller Nielsen the Court would have held that the third named defendant had failed to "surmount the enhanced onus of proof" identified by Irvine J. in *EMO Oil Limited v. Willowrock Limited t/a McCormack Fuels* [2016] IECA 200 and would have concluded that the third named defendant had failed to provide sufficient evidence or indeed any appropriate evidence to support its contention that it has a bona fide defence to the case.

25. However the Court has to have regard to the second affidavit of Peter Moller Neilsen which is agreed with largely by the solicitor for the plaintiff, Mr. Niall Murphy's affidavit on 11th January, 2017.

26. The Court finds as a fact that:—

> 1. Neither the first named nor the second named defendants have lodged defences.
>
> 2. It appears to be agreed that the playground equipment was supplied by Wicksteed (UK) and was installed by Malcolm Broadstock, this information coming from Wicklow County Council.

27. The Court finds that there is no real prejudice to the plaintiff who is still substantially a minor, and will be for some considerable time, and that the third named defendant has established that they have a bona fide defence to the proceedings. Having regard to all of the relevant circumstances, the interests of justice favour the granting of the reliefs sought and the Court will make an order setting aside the judgment obtained against the third named defendant in default of appearance made on 8th February, 2016 pursuant to O. 13, r. 11 of the Rules of the Superior Courts.

Eavanna Fitzgerald, B.L., instructed by Murphy's Solicitors for the plaintiff;

Michael McGrath, S.C., and Kevin Callan, B.L, instructed by A & L Goodbody Solicitors for the third named defendant