

THE HIGH COURT

2010 84 CA

BETWEEN/

EUGENE O'CONNOR

PLAINTIFF

AND

NUREDALE LIMITED T/A PANDA WASTE SERVICES

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on the 22nd day of October, 2010

1. This is an appeal from an order of Her Honour Judge Linnane dated 20th April, 2010 whereby she refused to set aside the default judgment obtained by the plaintiff on 12th April, 2010. In his civil bill dated 4th November, 2010, the plaintiff claimed that on the 5th November, 2007, the defendant had offloaded a skip which had the effect of damaging the plinth stone supporting the cast iron railings surrounding a site at St. George's Church, Hardwicke Place, Dublin 1, thereby causing serious damage to a wall below. The plaintiff is the owner of these premises and it is contended that there was displacement of the stone capping and partial collapse of the wall. The plaintiff now claims damages in the sum of €18,846. It is only fair to record that liability is denied in full by the defendant.

2. The defendant entered an appearance on 19th February, 2009. There then followed several exchanges involving requests for further particulars but, as no defence had been delivered, on 26th November, 2009, the Circuit Court ordered that the defendant deliver a defence within two weeks of that date. No defence was filed within the time stipulated and the plaintiff brought a further motion seeking judgment in default of defence. This culminated in a further order of the Circuit Court on 9th February, 2010, allowing the defendant yet a further two weeks to deliver its defence. That period of time also elapsed without a defence having been filed and the plaintiff was compelled to bring yet a further motion seeking judgment in default. This culminated in a default judgment which was given in favour of the plaintiff on 12th April, 2010.

3. The solicitor for the defendant has very fairly acknowledged that the third motion for judgment was duly served on her office on the 16th March, 2010. She has averred on affidavit that, by reason of human error, the matter was not attended to by her office in a diligent fashion. This had the unfortunate result that the defendant was unrepresented at the hearing on 12th April, 2010, which resulted in the default judgment against her client. A complicating factor was that the defendant's counsel had been quite seriously ill for at least some of the relevant time. Once the existence of the default judgment came to the attention of the defendant's solicitor, she immediately set about issuing a motion seeking to have that judgment set aside. However, as already indicated, Her Honour Judge Linnane subsequently refused to set aside the default judgment and it is in those circumstances that the present appeal comes before me.

4. With much hesitation and not a little reluctance, I have come to the view that this appeal ought to be allowed, albeit on strict terms which I will later outline in this judgment. Article 34.1 of the Constitution guarantees the plaintiff a right of access to the courts. That right would, indeed, be a hollow one if there was no effective mechanism whereby a summary judgment could not be obtained in the case of a defendant who was in default of pleading. There is, accordingly, to some extent at least, a constitutional duty cast upon the courts as guardians of the judicial power of the State to ensure that litigation is conducted in a timely and efficient fashion so as to ensure that this right of access to the courts is, to adapt the words of O'Byrne J. in *Buckley v. Attorney General* [1950] I.R. 67, 81, given "life and reality". There are, in any event, parallel duties of timeliness and efficiency cast upon the State so far as the conduct of litigation is concerned by virtue of Article 6 of the European Convention of Human Rights: see, e.g., *Gilroy v. Flynn* [2004] IESC 98, [2005] 1 ILRM 29 and *McFarlane v. Ireland* [2010] ECHR 1272. None of this, however, requires that the judicial discretion to strike out for want of defence must be exercised in an unbending, mechanical or unforgiving fashion. Quite the contrary: the courts must, to some extent, accommodate ordinary human frailties, failings and foibles, at least where it is possible to do so without material injustice to the other party.

5. It is not in dispute but that in the present case, the solicitor for the defendant genuinely made an error which she has candidly - and very commendably - admitted in her affidavit. It would be likewise unfair not to give some weight to the fact that counsel for the defendant was at the time suffering from a serious illness from which he has happily now recovered. All these factors suggest that the discretion permitting the defendant to defend the case on the merits should be exercised in its favour, as but for this error, one may reasonably (even if, in the circumstances, somewhat charitably) assume that a defence would have been filed in advance of the return date for the third motion.

6. Of course, I am not unmindful of the fact that these unsatisfactory delays must have been maddeningly frustrating for the plaintiff. Yet, unfortunate as these delays have been, I feel that I could not prevent the defendant from defending the case on the merits unless I was satisfied that the plaintiff's case was either (a) unanswerable (or, at all events, very nearly so) or (b) that he would have suffered irremediable prejudice as a result of the defendant's delays.

7. As to (a), I am not in a position to form any judgment on the merits and no evidence is before me as would enable me to form the view on a summary basis that the plaintiff's claim was unanswerable or nearly so. Indeed, since no evidence was tendered on this point at all, I must abstain from expressing any view on the merits of this dispute. In the course of oral argument Ms. Carroll, counsel for the plaintiff, urged me to have regard to the fact that the defendant did not avail of an opportunity to inspect the site immediately after the incident, but even accepting this to be the case, I cannot see that this has any direct bearing on the strength or otherwise of the plaintiff's case.

8. As to (b), the plaintiff's position is already protected inasmuch as Her Honour Judge Linnane directed that the defendant lodge the sum of €18,066.25 in court pending the outcome of this appeal as a condition of obtaining a stay on execution of the summary

judgment. It will be a condition of the leave to defend which I propose to grant to the defendant that this sum (which approximates to the full value of the sum claimed by the plaintiff) remain lodged in court pending the determination of these proceedings. I further direct that the defendant be allowed one week from today's date to deliver a defence. I might add that I cannot presently envisage circumstances in which that time period would be further extended.

9. Furthermore, subject to hearing counsel on the point, I propose also to award the costs of this appeal to the plaintiff. In this way, I trust that the mutual rights and interest of the plaintiff and defendant to this litigation can be fairly balanced and safeguarded. For good measure, I would further direct that once pleadings are closed - which I trust will be in very early course - the plaintiff should have liberty to apply to the Circuit Court for the earliest available trial date convenient to the parties.