THE COURT OF APPEAL

2015, No. 377

Birmingham J.
Hogan J.
Stewart J.

BETWEEN/

JAMES MOONEY

PLAINTIFF /

RESPONDENT

- AND -

THE OLD SHEBEEN LIMITED

DEFENDANT /

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 25th day of May 2016

1. This is an appeal from a decision of the High Court (O'Malley J.) delivered *ex tempore* on the 6th July, 2015 which rejected an application to extend the time in order to permit the defendant company ("Old Shebeen") to appeal against a decision of the Master of the High Court on the 9th March 2012. In his decision on that day the Master had struck out the defendant's defence for failure to make discovery within the eight week period which had been previously permitted in an earlier order which had been made by the Master on 20th January 2012.

2. While late applications to set aside orders of this kind are not always sympathetically received, the background to this application is decidedly unusual. The essence of the present appeal brought by Old Shebeen against the order of the High Court is that it had no knowledge at all at the time of the making of the order of 20th January 2012, even though that order recites that the company was represented on the day in question by solicitor and counsel. The company says that the firm of solicitors which was then representing it was, unbeknownst to it, at the same time being wound down in a disorderly fashion. The company insists that it received no communication from those solicitors regarding the making of such an order. Subsequent endeavours to locate the identity of counsel instructed by those solicitors have proved unavailing.

3. The underlying proceedings concern an action brought by the plaintiff for a workplace accident which he contends happened as far back as March 2005. On 4th April, 2007, an authorisation issued from the Personal Injuries Assessment Board pursuant to s. 14 of the Personal Injuries Assessment Board Act 2003. On the 2nd October, 2007 the plaintiff issued a personal injuries summons against the defendant company.

4. At para. 1.2 of the personal injuries summons it is pleaded that the defendant is a limited liability company having its registered address at Main Street, Moate, Co. Westmeath. Among other things the company owns, operates and maintains a licensed premises known as the Old Shebeen. It is further pleaded that all material times, the plaintiff was employed by the defendant at the said premises as a maintenance handyman. The claim is thus made that on the 15th March 2005, while the plaintiff was working at the premises, he was directed to move some items from the back store of the licensed premises to a small store at the rear. This task involved small drums of chemicals and while doing so it is contended that liquid from one of the drums spilled onto his foot. It is said that this accident resulted in chemical burning which required surgery and hospitalisation.

5. The plaintiff brought a motion on 20th April 2009 for judgment in default of defence. A defence dated the 19th March, 2009, was delivered by Henry Arigho, solicitors, then solicitors for the defendant. Paragraph 1 of that defence puts the plaintiff's solicitors on notice that at the time of the accident complained the plaintiff was not employed by the defendant. The defence contends that the accident occurred on premises known as the "Auld Shebeen Public House" owned by one Liam Claffey. Mr. Liam Claffey is the brother of the principal of the defendant company, Mr. John Joe Claffey. It is further pleaded that the defendant does not own any interest in the said premises and has no legal connection of any kind whatsoever with the premises. The defendant objects that the plaintiff is estopped from continuing the proceedings against the defendant.

6. By motion dated the 12th March, 2010, the plaintiff sought an order for discovery from the Master of the High Court. The motion was returnable to the 8th June, 2010. What was sought was documentation in relation to the plaintiff's employment record with the defendant, all supporting documentation and all or any documentation relating to the accident. The grounding affidavit from the plaintiff's solicitor refers to efforts to advance the issue in relation to discovery through correspondence and, in particular, refers to the fact that a number of reminder letters issued. Some of those reminder letters refer to the fact that it is the plaintiff's case that he had a contract of employment with the Old Shebeen Ltd. and that while employed by that company was sent on a casual basis to do occasional work in the public house premises known as The Auld Shebeen. The comments is made in the correspondence that the recipient knows there is a close relationship between the two businesses and the confusion arises because of the use of the same name for both the company and the licensed premises.

7. On the 6th July, 2010, an order for discovery was made by the Master. The defendant was given six weeks to make discovery and the affidavit was to be sworn by Mr. John Joe Claffey. Discovery was not in fact made and a motion was brought dated the 15th June 2011, returnable for the 2nd December 2011, to strike out the defence by reason of the failure to make discovery. The motion was eventually dealt with by the Master of the High Court on the 20th January 2012.

8. On that occasion the Master made an order extending by eight weeks the period within which discovery was to be made and he adjourned the motion to the 9th March, 2012. It seems beyond doubt or controversy at this stage that the defendant was legally

represented in the Master's court on the 20th January 2012. There was, however, no appearance on the 9th March 2012 and on that occasion the defence was struck out and there was an order for costs in favour of the plaintiff.

9. The next event of significance was the service of a notice of intention to proceed by the plaintiff dated the 20th November, 2013. The notice of trial for Galway was then served dated the 8th April 2014. On the 12th May 2014, a new firm of solicitors, Byrne Carolan Cunningham, came on record on behalf of the defendant.

10. The matter was listed for hearing during the October 2014 High Court sittings in Galway. The defendant contends that it was only then that it first became aware of the fact that the defence had been previously struck out. A motion issued dated the 4th December 2014, returnable for the 12th January 2015 by which the defendant sought to set aside the order of the Master striking out the defence. The defendant also sought an order extending the time within which that application to re-instate the defence could be brought.

11. The defendant's new solicitor, Mr. Niall Cunningham, set out the company's position in an affidavit grounding that motion. He explained that the defendant is a limited company operating a hotel in Moate, Co. Westmeath, called the Grand Hotel. Mr. Cunningham also stated that the defendant accepts that it previously employed the plaintiff in 2004 as a maintenance man/handyman for a period of approximately 34 weeks from May 2004 until January 2005 when that employment ceased and that the employment did not recommence. In that regard the appropriate documentation is exhibited.

12. Mr. Cunningham also contends that the plaintiff was employed by Liam Claffey Ltd. from January 2015 until the date of the alleged incident on 15th March 2005. Mr. Cunningham maintains that this was an unrelated limited liability company which then operated a public house and nightclub in Moate called The Auld Shebeen. Liam Claffey Ltd. subsequently went into liquidation in or around the 20th January, 2012, *i.e.*, approximately seven years after the accident, the subject matter of the proceedings.

13. Mr. Cunningham sought to explain why no appeal had been taken from the order of the Master lodged by the defendant's then solicitor. It appears that his then solicitors, Henry Arigho and Co., had ceased to operate from in or about September 2011. It would seem that Mr. Arigho is no longer a practicing solicitor and that when he ceased practise, this did not occur in an organised way. According to Mr. Cunningham this came to the company's attention on the 6th December, 2013, when the plaintiff's solicitor wrote to the defendant directly enclosing the notice of intention to proceed. It would seem that it was at that time that the defendant was prompted to seek legal advice from his new firm of solicitors.

14. While the plaintiff says that both local businesses (*i.e.*, the hotel business and the public house/nightclub business) were run by the collective Claffey family, the defendant riposted by maintaining that both businesses were operated by separate legal liability companies which did not share common directors. If the defendant is correct, then the factual position would seem to be that Mr. John Joe Claffey was the manager of the Grand Hotel and his brother, Mr. Liam Claffey, operated the Auld Shebeen public house and nightclub through the company known as Liam Claffey Ltd.

The judgment of the High Court

15. In ruling on this matter the High Court judge indicated that the application was presented on the basis that some form of injustice was done to the defendant in the circumstances in which the defence came to be struck out in the Master's Court. O'Malley J. observed that she did not agree with that suggestion. She noted that there was no evidence at all from Mr. Claffey that he did not know what had happened in the Master's Court or that he did not know that there had been an extension of time to make discovery or that his solicitor did not tell him about the strike out application.

16. O'Malley J. stated that if she had considered that there was a real risk of an injustice happening in the case, despite all that had happened, she would have been inclined to exercise her discretion to permit the defence of the proceedings. It nonetheless seemed to her that the defence being put forward in this personal injuries case was a highly technical one where there was no real injustice to be done in permitting the plaintiff to proceed as things stand. She concluded by saying that if in fact the defendant had been so poorly served by its legal representatives that it was unaware of all the foregoing matters - and she had no evidence of that - then the defendant had a remedy.

17. In the wake of the decision of the High Court, Mr. John Joe Claffey swore an affidavit dated the 4th August, 2015. No leave had been granted either by the High Court or this Court for the filing of such an affidavit.

18. At the hearing of this appeal an issue arose as to whether the order made by the High Court judge was a final order such that leave to file an additional affidavit dealing with matters which took place prior to the decision of the High Court was required by the terms of Ord. 86A, r. 4(b). Given that I consider that the appeal should be allowed for reasons which I will shortly set out, it is not necessary to express a view on this matter or, for that matter, to have regard to the terms of this subsequent affidavit.

Jurisdiction to set aside a judgment obtained in default

19. It is clear from the authorities that the courts' jurisdiction to set aside a default judgment of this kind is, generally speaking, a free one: see generally Delany & McGrath, *Civil Procedure in the Superior Courts* (Dublin, 2012) at paras. 4.42-4.56. The courts have nevertheless traditionally required evidence that the default judgment was obtained by surprise or mistake and that the defendant has reasonable prospects of defending the action before that judicial discretion is favourably exercised.

20. The leading contemporary authority on this point is probably that of Costello P. in *Fox v. Taher*, High Court, 24th January 1996. In that case the plaintiff's solicitor sued his erstwhile clients for professional fees due in respect of complex commercial litigation. The plaintiff then obtained judgment in the Central Office for a specific sum (namely, US$600,000) on foot of a certificate of no appearance coupled with the filing of a statement of claim. The defendants were not aware that such a judgment had been marked in the Central Office and they were at all times labouring under the impression that they would had to have notice of the application before judgment could be obtained given the nature of the proceedings. Costello P. nonetheless found that the defendants were genuinely shocked that a default judgment had been entered against them in this manner.

21. In these circumstances Costello P. held that he should set aside that default judgment. He stated:

> "I do not think it matters very much whether I come to the view that the judgment was obtained by mistake or by surprise because the court has to do justice in this situation. The court has a very wide discretion in setting aside judgments and I think that an injustice would be done to the defendants by allowing the judgment to stand. I am quite satisfied that at all times the defendants wished to contest the jurisdiction of the Irish courts to hear the plaintiff's claim and that they were waiting for some procedural step to be taken by the plaintiff to enable the situation to be brought to the notice of the court."

22. While the specific facts of the present case are, of course, very different, it seems to me nevertheless that the underlying principles articulated by Costello P. in *Fox* are also highly relevant to the present case. There seems little doubt but that so far as this case is concerned the defendant company at all stages intended to defend the proceedings. It likewise depended on its former solicitors to take all appropriate steps to protect its position.

23. I do not overlook the fact that the defendant was legally represented at the hearing before the Master on 20th January 2012. It nevertheless seems clear that by this stage the defendant's former solicitors were in a wind-down mode and the extent to which proper instructions were obtained and given in respect of that hearing before the Master must be at least open to question. There is, indeed, much evidence to support the defendant's contention that the practice was wound down in a disorderly fashion. It may be noted, for example, that when the plaintiff's solicitors served a notice of intention to proceed in November 2013, they also ensured that the transferred practices section of the Law Society were formally notified, of this development the Law Society itself having assumed responsibility for the files of Arigho and Co. It is also striking that the Law Society indicated in subsequent correspondence with the plaintiff's solicitors that it could not locate the appropriate files from the Arigho and Co. office relevant to these present proceedings.

24. All of this tends to support the defendant's contention that it had it no knowledge of the manner in which its affairs were being represented by its former solicitors at the time. It is true that the exact details of what occurred during this period from late 2011 to early 2012 are, in some respects, unclear. Enough has been said on affidavit to demonstrate that this case comes squarely within the Fox principles on the basis that, through no personal fault of the defendant, it was not aware of the making of the order and that the fact that its defence had been struck out had come as a surprise.

Whether the defendant has a reasonable prospect of defending the proceedings

25. In exercising this jurisdiction to set aside this default judgment, the court will normally require evidence that the defendant has a reasonable prospect of defending the proceedings: see, *e.g., O'Callaghan Ltd. v. O'Donovan*, Supreme Court, 13th May 1997. It is, I think, clear that the defendant has such prospects: the case for the defence at all times has been that the plaintiff has elected to sue the wrong defendant and it has, moreover, sought to support its contention by pointing to the plaintiff's employment records for the period leading up to 15th March 2005. It would, of course, be inappropriate to express a view on the substantive merits on such a defence save to the extent that it is necessary to do so. It is sufficient for this purpose to say that the defendant has demonstrated that it has such a defence.

Imposition of terms

26. If this Court were to extend time and re-instate the defendant's defence, it should, of course, only do so on terms in the manner envisaged by Ord. 13, r. 11. What, therefore, are the terms which should be imposed upon the defendant such as would endeavour fairly to weigh the interests of the plaintiff as well as the defendant?

27. In the first place, the defendant should be required to file an affidavit of discovery within four weeks of the delivery of this judgment.

28. Second, the delays in this litigation to date have been quite unacceptable and it would be only appropriate that the defendant should be required to take steps as would ensure that this case came on for hearing as quickly as possible. To this end, I would require the defendant to issue a motion for direction in the High Court seeking an early date for the trial of the action. I appreciate that the plaintiff may wish to consider his position in relation to a speedy trial following receipt of the affidavit of discovery from the defendant, but given that eleven years have elapsed since the alleged incident, there is very little room for any further delay in the conduct of this litigation. If, however, any further latitude is to be given, it should be afforded to the plaintiff only, as there can be no room for any further delay on the part of the defendant.

29. Third, it is clear that the plaintiff has been put to further expense and delay by reason of the non-compliance by the defendant with the Master's order. I would accordingly direct that the defendant should bear the plaintiff's costs in this litigation from December 2011 to date, such costs to be taxed in default of agreement. I would also require the defendant to make a payment to the plaintiff of €7,500 on account of those costs within two months of the delivery of this judgment.

Conclusions

30. In summary, therefore, I would allow the appeal and re-instate the defendant's defence. I differ from the views expressed by the High Court in that I think it is clear that the defendant was taken by surprise by reason of the unusual sequence of events I have sought to describe in this judgment.

31. In these circumstances, I believe it would be unjust to the defendant not to re-instate the defence. I would, however, do so conditional only on strict compliance by the defendant on the terms imposed pursuant to Ord. 13, r. 11 which I have just indicated.