THE HIGH COURT

[2013 No. 957 S.]

BETWEEN

ICS BUILDING SOCIETY

PLAINTIFF

AND

PATRICK O'BRIEN

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 7th day of December , 2018

1. This is an application made by notice of motion issued on 20th December, 2017 and originally returnable for 12th February, 2018 for an order pursuant to O. 13, r. 11 and/or the inherent jurisdiction of the High Court to set aside a judgment entered in default of appearance in the Central Office on 10th June, 2013.

2. Between 4th April, 2001 and 1st September, 2008 the defendant took out six loans with the plaintiff. Those loans went into arrears and on 12th March, 2013 the plaintiff's then solicitors issued six separate demands for payment, warning that failing payment in full within seven days High Court proceedings would be issued for the recovery of the full balance together with interest. The sums demanded were not paid and on 26th March, 2013 a summary summons was issued claiming payment of a total sum of €1,373,676.11. The summons was duly served on the defendant on 3rd April, 2013.

3. By email dated 10th April, 2013 the defendant acknowledged receipt of the summons. In the affidavit grounding this application he says that his understanding of the summons was that "*… it had something to do with the appointment of a receiver*". The defendant does not give any basis for that misunderstanding. The summons plainly claimed judgment for €1,373,696.11.

4. In his email of 10th April, 2013 the defendant said "*I have an appointment this coming Friday with a solicitor. Can you refrain from any actions until I have had time to meet my solicitor? Thank you."*

5. The plaintiff complains that without further warning or any further correspondence, judgment in default of appearance was marked against him on 10th June, 2013. In his grounding affidavit he suggests that this was unfair and unjust, and in a second affidavit sworn on 4th April, 2018 he suggests that this amounted to sharp practice.

6. The evidence of the plaintiff is, variously, that at the time the judgment was marked against him he was not mentally capable of defending the proceedings; and that he was in the process of seeking legal advice; and that he was in negotiations with the plaintiff, which negotiations were ultimately successful. He says that he had assumed that the plaintiff was not progressing the proceedings but does not suggest that that assumption was based on anything done or said by or on behalf of the plaintiff.

7. The defendant's case is that at the time the judgment was entered against him he was in negotiations with the plaintiff and that those negotiations were ultimately successful. He exhibits a copy of a letter from the plaintiff of 5th July, 2013. That letter references the six mortgage accounts which were then in arrears and three security addresses. It referred to the defendant's "*… recent proposals requesting discharge of receiver on the above listed properties*" and notified the defendant of a decision by the plaintiff's credit committee that one of the properties should be sold, and the receiver on the other two discharged upon terms that fixed repayments of €2,200 per month between the accounts referable to those securities would be made for a period of five years. The defendant was advised that further paperwork would issue under separate cover outlining the repayment arrangement on those two accounts, and that paperwork was duly issued on the same day.

8. The defendant's case is that he only became aware of the judgment by letter dated 10th July, 2017. He says that he was never served with an affidavit of debt by the plaintiff which affidavit, he correctly says, is required to be filed under the rules of court before judgment is entered in default of appearance.

9. I was referred by counsel to O. 13, r. 11 and O. 27. r. 14(2) of the Rules of Superior Courts and to the commentary on those rules in the 4th edition of *Delaney and McGrath on Civil Procedure* which, it was agreed at the bar, correctly sets out the law.

10. At paras. 4-38 to 4-42 of that edition of this very valuable work, the authors observe:

"4-38 Order 13, rule 11 provides that where final judgment is entered pursuant to any of the rules of that order, the court may set aside or vary such judgment upon such terms as may be just.

4-39 In *Allied Irish Banks plc v. Lyons* [2004] IEHC 129 Peart J. emphasised the breath of the discretion conferred by the rule and the necessity to achieve justice for both the plaintiff and the defendant;

> '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, …'

4-40 Rule 11 does not give any indication of the grounds upon which this discretion may be exercised but the authorities disclose two distinct categories of case: (i) where there was some irregularity in the proceedings or the procedure by which the judgment which it is sought to set aside or vary was obtained in which the case the defendant will be entitled to have that judgment set aside *ex debito justitiae*, and (ii) where the judgment was obtained in a regular manner but the defendant may have a good defence to the claim and the interests of justice require that he should be given an opportunity to defend the proceedings. As Clarke J. explained in *O'Tuama v. Casey* [2008] IEHC 49:

> '[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.'

4–41 Thus, the main difference between the two categories is that, in the case of an irregular judgment, an affidavit of merits is not required but in the case of a regular judgment, it is essential. In addition, the court is unlikely to impose terms for the setting aside of an irregular judgment but may well do so, depending on the circumstances, where its sets aside a regular judgment.

4– 42 It should be noted that all Order 27, rule 14(2) provides that any judgment by default, whether under Order 27, or any other of the Rules, may be set aside by the court upon such terms as to costs or otherwise as the court may think fit, if the court is satisfied that, at the time of the default, special circumstances (to be recited in the order) existed which explain and justify the failure. It is not clear whether this rule, which was introduced to confine the discretion of the court when dealing with an application to set aside a default judgment, applies to a judgment obtained in default of appearance so as to modify Order 13, rule 11. However, even if the requirements of Order 27, rule 14(2) are imported, it is doubtful that they would lead to any significant alteration of the principles that had been developed in relation to applications to set aside such default judgments.

11. The application was moved on the basis that the judgment had been irregularly obtained. In his affidavits sworn on this application this defendant variously suggested that he had never been served with an affidavit of debt by the plaintiff, and that no affidavit of debt had been filed with the Central Office. The affidavits did not disclose the basis for the defendant's belief that no affidavit of debt had been filed and counsel was not able to say how it was the defendant had come to that belief.

12. The rather startling averment that judgment had been marked in the office without an affidavit of debt was not dealt with in the affidavits filed on behalf of the plaintiff but a search of the court file immediately showed that there was on the file an affidavit of debt of Lorcan McCluskey sworn on 10th June, 2013. Accordingly, the application falls to be determined as an application to set aside a judgment regularly obtained.

13. Counsel for the defendant argued that the defendant had sought time to take legal advice but that his request had been "*somewhat ignored*". I cannot accept that argument. On its face, the defendant's email of 10th April, 2013 asked the bank to refrain from taking any action until he had time to meet his solicitor, which he was to do on the coming Friday. On its face, the summary summons which had been served on the defendant on 3rd April, 2013 required that he should enter an appearance within eight days after service and warned that failing the entry of an appearance, the plaintiff might proceed and judgment be given in his absence, without further notice. I do not believe that the defendant was entitled to impose any additional obligation of notice on the plaintiff. In any event, I do not understand the email of 10th April, 2013 as asking the plaintiff to do any more than stay its hand until the following Friday or shortly thereafter. There is no evidence one way or the other whether the plaintiff met with his solicitor as planned but if he did, the solicitor never corresponded with the plaintiff's solicitors and the defendant himself never followed up on his email.

14. I do not accept either the argument that the plaintiff moved with "*lightning speed*" to mark judgment two months after the summons had been issued. It is perfectly proper in a case in which no appearance is entered, that the plaintiff may swiftly lodge his judgment papers, and that the application to mark judgment should be dealt with swiftly and efficiently by the office.

15. While there is no evidence of any engagement between the defendant and his solicitor, I am prepared to deal with this application on the basis that the judgment obtained by reason of mistake on the part of the defendant as to whether, in view of the ongoing negotiations, the plaintiff was entitled to, or would, mark judgment.

16. While the application was moved on the basis that the judgment had been irregularly obtained, it was urged nevertheless that the defendant had a good defence arising out of the restructuring of his loans in July, 2013. It was accepted that for the five years of the revised loan agreements the defendant had paid the agreed amounts.

17. I cannot accept that argument. The judgment against the defendant was marked on 10th June, 2013 but the revised loan agreements were not made until 5th July, 2013. Accordingly, at the date on which judgment was obtained the defendant had no defence.

18. I am satisfied that on an application such as this the relevant date is the date on which judgment was marked. That is to say, the issue is whether the defendant at that date could demonstrate that he had a defence to the plaintiff's claim which had a reasonable prospect of success. Since the alternative repayment arrangements post-dated the judgment by a number of weeks, they cannot form the basis of any defence that the defendant might have had.

19. The only other possible defence suggested was that the plaintiff had removed the defendant from his tracker interest rates and forced him onto a less favourable interest rate. This suggestion was comprehensively refuted in an affidavit of Sean Buckley filed on behalf of the plaintiff and the point was, quite properly, abandoned thereafter.

20. It was suggested in argument that if the defendant had been given further warning or notice that the plaintiff intended to mark judgment he would have entered an appearance, triggering the requirement that the plaintiff should bring a motion for liberty to enter final judgment, and that any such motion would not have been heard before the alternative repayment arrangement had been entered into, so that the defendant might have had a defence, or a partial defence by the time any such motion could have been heard. I think that might very well be so but as previously indicated, it seems to me that the relevant time is the date upon which judgment was marked.

21. On 23rd November, 2018 on the eve of hearing of this application, the defendant swore a third affidavit. The defendant exhibited an exchange of email correspondence between 21st June, 2018 and 22nd October, 2018 which is said to show that the plaintiff has refused to even assess his application for an extension of the alternative repayment arrangement. The defendant appealed to the court to take account of what he characterised as his efforts to sensibly and reasonably deal with his loans. He suggested that the plaintiff had breached its obligations under the Central Bank of Ireland Consumer Protection Code, 2012.

22. Although this third affidavit was filed on the Friday before the Monday on which the motion was heard, the argument by reference to the Consumer Protection Code was not pursued. This was not surprising. In the first place, it is well settled that non-compliance with a statutory code does not relieve the borrower of his obligation to repay the loan or deprive the lender of his rights and powers under the loan agreement. See for example *Freeman v. Bank of Scotland plc* [2015] IEHC 284, *Allied Irish Banks plc v. O'Brien* [2015] IEHC 260 and *Healy v. McGreal* [2018] IECA 78. Secondly, this is a case in which the plaintiff already has judgment. As the Consumer Protection Code does not alter the contractual rights and obligations of the parties, *a fortiori* it cannot fetter a judgment creditor in enforcing his judgment.

23. While the argument was not pursued, I have nevertheless read the exchange of emails. It does not, in my view, support the allegation that the plaintiff has failed to even assess the defendant's application for an extension of the alternative repayment arrangement or a new arrangement. Rather it conveys that the plaintiff concluded that the defendant had not made the full and clear financial disclosure he was asked to make, and that by reference to such disclosure as had been made, the plaintiff concluded that the defendant's current financial position was not sustainable and that there was no evident affordability for his proposal.

24. For these reasons I must refuse the application to set aside the judgment.