Neutral Citation: [2014] IEHC 10

THE HIGH COURT

[2011 No. 1423S]

BETWEEN/

JAMES STAFFORD (AS LIQUIDATOR SUING IN THE NAME OF AND ON BEHALF OF ROBE CONSTRUCTION LIMITED (IN LIQUIDATION)

PLAINTIFF

AND

JV CUMMINS (SUPERMARKETS) LTD.

DEFENDANT

JUDGMENT of Mr. Justice Hogan delivered on 13th January, 2014

1. This is an application by the defendant ("JV Cummins") to set aside a judgment obtained by the plaintiff in the Central Office of the High Court on 30th November, 2012, in the sum of €469,702. The issue arises in the following way.

2. The plaintiff is a limited company which, by resolution of its members, was wound up on 2nd July, 2009. Mr. James Stafford was appointed the liquidator and he sues in the name of the plaintiff in these proceedings. In the pleadings filed by the plaintiff it claims that it entered into an agreement with JV Cummins in March, 2008 to construct a mixed use commercial development at Ballinrobe, Co. Mayo.

3. Some difficulties appear to have been encountered in the course of the building contract, resulting in delays and variations to the contract. While JV Cummins paid the sum of almost €2,268,000, the plaintiff claims that a further €469,702 is still outstanding in respect of these contractual works. It also claims €41,144 by way of what is termed an omission allowance.

4. By motion dated 7th October, 2011, the plaintiff claimed the sum of €469,702 and sought summary judgment before the Master of the High Court pursuant to O. 37, r.1. On 14th November, 2011, the Master ordered that the claim stand adjourned to plenary hearing. He ordered that the plaintiff file a statement of claim within four weeks and that the defence be filed within a further four weeks. The plaintiff filed a statement of claim on 15th May, 2012. No defence was immediately filed by JV Cummins. Various warning letters had been issued by the plaintiff's solicitor and yet the defendant still had not filed a defence. The defendant's solicitor has contended that given the complex calculations contained in the statement of claim it was necessary to obtain further instructions from their engineering expert witness.

5. By a further motion which was filed on 11th September, 2012, the plaintiff sought judgment in default in terms of the statement of claim. It further sought an order that the action be set down for an assessment of damages as against the defendant. That motion was returnable to the 3rd December, 2012. The parties had agreed to a further extension of time for the delivery of the defence. On that day Moriarty J. made an order by consent extending time for the delivery of a defence within four weeks. JV Cummins duly filed its defence and counterclaim on 21st December, 2012. The question of obtaining judgment in the Central Office in respect of the unliquidated amount was not canvassed in the affidavits grounding the motion.

6. At the same time the plaintiff had, however, independently sought judgment in the Central Office in respect of the liquidated claim. In his affidavit of 30th November, 2012, filed in support of that particular application Mr. Stafford had waived all claims for interest and all unliquidated claims. On the same day judgment was marked in the Central Office in the sum of €469,702. By letter dated the 16th November, 2012, the plaintiff's solicitor had, in fact, warned the defendant's solicitor that it was proposed to make such an application to mark judgment in the Central Office, but this was overlooked by him at the time. All of this meant that the parties were really at cross purposes when it came to the motion which was returnable to Monday 3rd December. It is absolutely clear that the defendant would never have consented to this had it been realised (as, admittedly, it ought to have been) that the plaintiff was independently seeking judgment in the Central Office. It is also clear that the defendant intended to contest the proceedings and it has not been suggested that the defence and counterclaim which was subsequently filed is anything other than *bona fide*.

7. Against that background, the question which is presented is essentially whether this Court should allow that judgment to stand in circumstances where it is plain that the defendant was taken by surprise. It is true that the defendant's solicitor was objectively at fault in failing to digest the true implications of the letter of 12th November, 2012. Yet the error must be adjudged to be pardonable in the circumstances, since his focus was principally on the plaintiff's other motion for judgment in default and the delivery of a defence.

8. A not dissimilar issue arose in *Fox v. Taher*, High Court, 24th January, 1996. In that case the plaintiff 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 defendant were not aware that such a judgment had been marked in the Central Office and they were at all times labouring under the impression, given the nature of the proceedings, they would had to have notice of the application before judgment could be obtained. Costello P. nonetheless found that the defendants were genuinely shocked that a default judgment had been entered against them in this manner.

9. 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."

10. Judged by these standards, it is plain that the default judgment cannot in justice be allowed to stand. Just as in *Fox*, the defendant always fully intended to contest the proceedings and it was taken by surprise by the course of events in late November/early December, 2012. It is nevertheless clear that it took immediate steps to have the default judgment set aside once the matter came to its attention. Nor will any specific prejudice be suffered by the plaintiff over and above the vacation of the default order.

Conclusions

11. In conclusion, therefore, I would set aside the default judgment. Normally in a case of this kind where such a judgment has been entered in default of pleading, it would be a condition of vacating the judgment that a defence was filed within a very short period. This, however, has already been done by the JV Cummins. It is nevertheless to be hoped that there will be no further delays on the part of the defendant and that the proceedings will proceed swiftly to trial.