THE COURT OF APPEAL

Appeal No. 2014/633

Peart J.
Irvine J.
Mahon J.

EMO Oil Limited

Respondent

- and –

Willowrock Limited t/a McCormack Fuels

Appellant

Judgment of Ms. Justice Irvine delivered on the 6th day of July 2016

1. What are the principles to be applied by a High Court judge when faced with an application to set aside a summary judgment obtained in the Central Office of the High Court and were those principles properly applied by Hedigan J. in the present case when he made his Order on 27th July, 2012? These are the questions at the core of this appeal

Background

2. By summary summons dated 19th October, 2009, the plaintiff instituted proceedings seeking to recover a sum of €693,243.03 together with interest in respect of the supply of oil to the defendant ("Willowrock") over the previous six year period.

3. The summons was served on 23rd October, 2009. In circumstances where Willowrock failed to enter an appearance, the plaintiff obtained judgment ("the judgment") in the Central Office for the sum of €688,242.98 on 11th January 2010. A letter notifying Willowrock of that fact was sent by the plaintiff's solicitors on 27th January, 2010. That letter evoked an immediate written response from Willowrock's then solicitors, Cathal L. Flynn and Co. It is clear from the tone of their letter dated 29th January, 2010, that they were convinced that their client had not been served with the proceedings. The letter also expressed surprise that their firm had not been served with a courtesy copy of the proceedings. Finally, they advised that, having spoken to counsel, they were satisfied that their client had a good defence to the proceedings.

4. On 14th May, 2010, the solicitors on record for the plaintiff registered a judgment mortgage against the defendant's interest in Folio 13057F of the Registrar of Freeholders County Galway.

5. By notice of motion dated 23rd July, 2010, Willowrock issued a motion seeking to set aside the judgment. That application was grounded upon the affidavit of Mr. Anthony McCormack who set out in some detail the basis upon which the defendant would, if permitted, defend the proceedings. He disputed the delivery of oil to the value of €693,243.03. He complained that he had made numerous unsuccessful requests, prior to the institution of the proceedings, that the plaintiff vouch the delivery of the goods the subject matter of the claim. Further, in support of his claim that the failure of Willowrock to enter an appearance was a *bona fide* mistake, he referred to the fact that two other sets of proceedings relevant to the dealings between the parties were in being and that an appearance had been entered to each of these.

6. Apart from maintaining that the defendant had a bona fide defence to the proceedings, Mr. McCormack also asserted that the plaintiff had breached its contractual obligations in that Willowrock had been overcharged for the oil supplied as a result of which it had been undermined in the market place. Its position had been exacerbated by the fact that it was contractually committed to purchasing all of its oil from the plaintiff. He further claimed an entitlement to a set off against the plaintiff's claim in the sum of €282,974.94 which he maintained reflected an overcharge by the plaintiff. The plaintiff had applied charges which were only applicable when the oil was delivered whereas in the present case Willowrock had collected the oil from the plaintiff.

7. In her affidavit of 26th October, 2010, Ms. Deegan, on behalf of the plaintiff, challenged the assertions made by Mr. McCormack in his affidavit. She referred to the affidavit of service to establish that proper service had been effected on Willowrock. As to Mr. McCormack's reliance upon the fact that appearances had been entered to other proceedings involving the same parties, she referred to the fact such appearances had only been entered after judgment had been obtained in the instant case. She further relied upon the delay of Willowrock in seeking to set aside the judgment as further evidence of its lack of *bona fides*.

8. As to Willowrock's purported defence, Ms. Deegan maintained that the plaintiff had replied to all of the queries which had been raised concerning the invoices. She denied the representations relied upon by Mr. McCormack and his assertion that Willowrock was tied to selling its products. She further maintained that the sums claimed had been adjusted to reflect the fact that Willowrock collected its product. She denied any breach on the part of the plaintiff concerning what Mr. McCormack maintained was an "advertisement agreement" pointing to the fact that he had not identified the agreement or how it had been allegedly breached.

9. Mr. McCormack, in a lengthy supplemental affidavit sworn on 12th November, 2010, expanded upon the grounds of defence raised in his earlier affidavit. He explained that he has no records or bill of lading to match invoices to the total sum of €250,360.55. A bill of lading was a computerised document which existed in relation to every other invoice. He further explained why Willowrock was entitled to an additional rebate or discount to the extent of €168,382 for collecting the product supplied by the plaintiff rather than having them delivered. Thus he claimed that Willowrock had a defence to the extent of approximately €415,000.

10. Mr. McCormack also reiterated that, contrary to representations which had been made by the plaintiff, Willowrock had been charged prices above those it had afforded to its competitors and that this entitled Willowrock to a rebate of €631,688. He summarised the defendant's position at paras. 28 and 29 of his affidavit as follows:-

> "28. At present the plaintiff's claim is in the sum of €693,243.03. Under the first two categories I state that the defendant has a defence in the sum of €418,742.55 which reduces the plaintiff's claim to the amount of €274,500.48.
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> 29. I state in addition there is a full dispute as to the amount of the schedule price and the amount of rebate due on foot

thereof. That dispute is in the sum of €631,688. I state that when same is deducted from the remainder of the plaintiff's claim the plaintiff may very well end up be[ing] indebted to the defendant in the sum of €357,187.52."

11. It should be said that Mr. McCormack's affidavit is supported by an affidavit of Ms. Irene Donegan, Willowrock's accountant, who with greater particularity dealt with the invoices in dispute between the parties and the repercussions for Willowrock of the breaches of contract alleged by Mr. McCormack.

12. Willowrock's motion, which was initially listed for hearing on 17th November, 2011, was adjourned and there followed yet further affidavits from Ms. Deegan and Mr. McCormack concerning Willowrock's alleged defence to the proceedings.

13. Based upon these affidavits and the submissions of the parties, on 3rd July, 2012, Hedigan J. ruled that the judgment obtained by the plaintiff should be set aside. However, he indicated that he would only do so "on terms". To see if agreement could be reached between the parties as to the terms which might be imposed, the application was further adjourned. In circumstances where the parties could not reach agreement further affidavits were sworn to enable the Court adjudicate upon the matter.

14. The position adopted by Willowrock, as advised by Mr. McCormack, was that he personally owned lands contained in Folio 14632F County Galway. They had a value, according to Sherry Fitzgerald Mannion, Auctioneers, of approximately €300,000 but were already charged to secure his obligations to the plaintiff on foot of a letter of guarantee dated 12th April, 2006.

15. Willowrock owned the property comprised in Folio 13057F County Galway. Those lands, which had been valued by Sherry FitzGerald Mannion in the approximate sum of €1.2m, were subject to a charge in favour of Bank of Ireland. This was also the folio against which the plaintiff's judgment had been registered on 14th May, 2010. However, Willowrock's potential liability to Bank of Ireland, according to Mr. McCormack, could never exceed €364,455.35. Thus, he maintained that the combined value of the aforementioned lands, less any potential liability to Bank of Ireland, was €1,135,544 and would be more than sufficient to meet any potential liability on the part of Willowrock and he invited the Court to set aside the judgment on condition that Willowrock granted the plaintiff a charge to the value of its claim over the lands contained in Folio 13057F County Galway.

16. In reply, the plaintiff's solicitor, Mr. O'Donovan, advised that his client had already, in July, 2010, obtained an order for possession of the lands in Folio 14632F although that order was under appeal. He further exhibited a report valuing those lands at €75,000. He also reminded the Court that these lands were owned by Mr. McCormack personally. Thus there was no reality in the assertion that they might be available to secure any judgment obtained by the plaintiff against Willowrock.

17. As to the lands in Folio 13057F, these had been valued at €500,000 by Paddy Keane Properties. Mr. O'Donovan challenged Mr. McCormack's assertion that Willowrock's liability to Bank of Ireland under its charge might not exceed €364,455.35 given that the charge was an "all sums due charge" in respect of its present and future advances. Further, other creditors might, during the currency of the proceedings, secure themselves against that folio.

18. Finally, Mr. O'Donovan exhibited a report from his legal cost accountant concerning the costs which had already and would be incurred by the plaintiff if the judgment were to be set aside. These were as follows -

(i) To the costs incurred in obtaining judgment and registering the same, (€2,000 to €3,000 including Vat);

(ii) To the costs incurred in dealing with the motion to set aside the judgment (€15,000 to €17,500 including Vat), and

(iii) To the costs to be incurred in the course of a plenary hearing (€50,000 to €75,000 including Vat).

Judgment of the High Court

19. The parties have agreed a note of the ex tempore rulings of Hedigan J. given on 3rd July and 26th July, 2012. Given that this is not a rehearing of the application heard by the High Court, I think it would be helpful to refer to the paragraphs in that note which record the critical aspects of the High Court judge's decision:-

"10. Mr. Justice Hedigan stated that there had been some apparent mistake on the part of the defendant / appellant or its then solicitor and, accordingly, he was minded to set judgment aside. However, given the delay coupled with the mistake, there must be conditions on any order the Court may make.

11. Mr. Justice Hedigan stated that the Court must give considerable latitude to a defendant who wishes to defend proceedings. There could be a full defence here. The accountancy errors in the invoices, if proven, could enable the defendant / appellant to successfully defend these proceedings.

12. Mr. Justice Hedigan stated that the judgment mortgage over the defendant / appellant's property offered the plaintiff / respondent no security. He considered that other security over other property might provide this but he needed to be assured of that. He noted that the plaintiff / respondent was entirely innocent and its position must be as secure as possible. He commented that the position was normally that the defendant / appellant would have to lodge the full amount. While he did not want that to happen here, he wanted the plaintiff / respondent's position to be secured.

13. Mr. Justice Hedigan adjourned the motion for one week, indicating that he would allow the defendant / appellant to defend the proceedings but that, unless the plaintiff / respondent's position was secured, a very substantial lodgement would have to be made. Mr. Justice Hedigan indicated that he would deal with costs on the adjourned date."

20. As to the ruling of Hedigan J. given on 27th July, 2012, and the terms and conditions upon which he ordered that the judgment might be set aside, the following is the relevant extract from counsels' agreed note:–

"23. Mr. Justice Hedigan stated that he was prepared to set aside the judgment but only on terms that protected the plaintiff / respondent's position in circumstances where the solicitor for the plaintiff / respondent had obtained a perfectly good judgment. He stated further that the defendant / appellant's achievement in having the judgment set aside had been "against the odds." The normal position would be for a defendant to lodge the full amount in court but this was a very substantial amount of money. In all the circumstances, he considered the sum of €400,000 should be lodged in court. If it was correct that there was equity of €850,000 in the lands, it must be possible for the defendant / appellant to arrange for the lodgement of that sum."

Appeal
21. For the purposes of considering the matters raised by Willowrock in its notice of appeal, the Court has had the benefit of extremely helpful written and oral submissions from the parties. This being so, I will do no more than summarise in skeletal form the principal submissions advanced by counsel in the course of this appeal.

22. On Willowrock's behalf, Mr. Molloy S.C. submitted:-

> (i) That having decided that the judgment should be set aside to allow the defendant defend the proceedings and in fixing the terms and conditions of that order in the manner in which he did the High Court judge penalised or punished the defendant for the fact that the plaintiff had obtained judgment against it. He relied upon the decision of Murray J. in *McGuinn v. Commissioner of An Garda Síochána* [2011] IESC 33 to argue that this was an inappropriate approach.
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> (ii) That the sum which he directed be lodged in court could not be considered fair or proportionate in circumstances where he accepted that the defendant might have a full defence to the proceedings.
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> (iii) That the terms imposed were so erroneous that they constituted a bar to the defendant's access to justice.
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> (iv) That the High Court judge erred in law in including within his consideration, the costs that would likely be incurred by the plaintiff in the event of the judgment being set aside and the action referred for a plenary hearing.

23. Apart from his legal submissions, Mr. Molloy S.C. advised the Court that as a result of recent events his client was now in a position to lodge a sum of €100,000 in court to the credit of the action in addition to the security which he had already offered in the course of the High Court hearing.

24. Ms. O'Brien S.C. on behalf of the plaintiff submitted: –

> (i) That in considering the terms to be attached to the setting aside of the judgment, the Court was entitled to have regard to the defendant's failure to provide any credible evidence as to how the mistake which had led to the judgment being obtained had occurred. It was noteworthy that insofar as blame was laid at the doorstep of Willowrock's former solicitor, unlike what had happened in many other reported cases, no affidavit from the relevant solicitor had been forthcoming. Here Mr. McCormack's explanations were contradictory, confusing and lacking in candour. No explanation whatsoever had been advanced as to what had happened the summons between the date upon which it was served by ordinary pre paid post and the date of the motion to set aside the judgment. She relied upon the decision of Peart J. in *Allied Irish Banks Plc v. Lyons* [2004] IEHC 129 to urge the Court that where an applicant sought to rely upon the mistake of their solicitor it was to be expected that the applicant would be in a position to file an affidavit sworn by their solicitor to explain what had occurred.
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> (ii) That the High Court judge was entitled to factor into his consideration, when seeking to balance the interests of the parties, the fact that the defendant's five month delay in seeking to set aside the judgment had still not been explained.
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> (iii) While accepting that it was not, as advised by the High Court judge, the default position that a defendant would be required to lodge the full amount of the claim as a term of having judgment set aside the Court had, she submitted, a relatively free discretion and might do so if the conduct on the part of the defendant warranted such an approach. In that regard she relied upon the decision of Costello J. in *Petronelli v. Collins* (High Court, Costello P. 19th July, 1996).
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> (iv) The Court correctly viewed the defendant's offer of a charge against Folio 13057F as one which could not provide any realistic security for the plaintiff's claim.
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> (v) That the defendant had been afforded every opportunity to make a proposal to secure the plaintiff's claim and had abjectly failed in this regard. It was only on the day of this appeal that Willowrock, for the first time, identified the cash sum it could provide by way of security.
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> (vi) Having regard to the quantum of the plaintiff's claim, the fact that it had obtained a regular judgment and registered it as a judgment mortgage against the defendant's lands, that it had and would incur significant legal costs if the judgment were to be set aside, the terms imposed by the High Court judge were just and proportionate and amounted to the proper exercise by the High Court judge of his discretion.

Discussion
25. The jurisdiction of the Court to set aside a judgment obtained in default of appearance is contained in O. 13, r. 11 of the Rules of the Superior Courts, 1986. It provides as follows:–

> "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."

26. 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. Some assistance, however, is to be found in the decision of Peart J. in *Allied Irish Banks Plc v. Lyons* where he emphasised the breadth of the discretion conferred by the rule and the necessity for the court to seek to achieve justice for both the plaintiff and the defendant. This is what he said at p. 4 of his judgment:-

> "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"

27. 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. If it can establish such an irregularity, the court will

normally set aside the judgment without enquiring into the merits of the applicant's proposed defence. The logic which underpins this approach is that if the judgment should never have been obtained in the first place the parties should rightly be returned to the position they enjoyed prior to judgment having been obtained. This is what Clarke J. stated at para. 2.1 of his judgment in *O'Tuama v. Casey* [2008] IEHC 49 concerning the jurisdiction of the court in such circumstances:-

> "[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 a 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."

28. 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.

29. The most frequent example of this type of application is one brought by a defendant who seeks to rely upon some error on the part of their solicitor as a result of which judgment was obtained against them. *Allied Irish Banks Plc v. Lyons*, to which I have already referred, is one such case. There, the defendants' solicitors mistakenly believed that for the plaintiff to obtain judgment in summary summons proceedings where no appearance had been entered, it would be necessary for the bank to issue and serve a motion for judgment. While the defendants' solicitors were labouring under this mistaken belief, the plaintiff obtained judgment and registered that judgment as a mortgage against the property of the second named defendant. Having regard to the evidence before him Peart J. expressed himself satisfied that the judgment had been obtained in a regular manner and as a result of a mistake made by the defendant's solicitor.

30. This decision is one which is of significant assistance to the Court in the present case. First, because it clearly establishes the nature and extent of the burden of proof which is on a defendant who seeks to set aside a judgment regularly obtained. In this regard Peart J. adopted the standard of proof applied by Sir Roger Ormrod in T*he Saudi Eagle* [1986] 2 Lloyd's Reports 221, a case in which it was successfully argued that the defendant needed to demonstrate more than an "arguable case" and had to show that the proposed defence had "a real chance of success". Secondly, the judgment makes clear that the Court, in order to come to a fair and just conclusion, must weigh the consequences for both parties of granting or refusing the relief sought.

31. In carrying out that exercise Peart J. referred in some detail to the consequences for the second named defendant of refusing to set aside the judgment. He described how she would be put to the hazard of suing her solicitor with all of the consequential burdens that such an approach would have for her in terms of time, expense, and the stress and uncertainty attendant upon that litigation. He surmised that while all of this was happening the plaintiff might seek to execute its judgment, presumably by availing of a well charging order and order for sale of her house. On the other hand he was conscious of the obvious prejudice to the plaintiff if he were to set aside the judgment. The judgment mortgage would be undermined and the plaintiff would lose the comfort of that security.

32. Having taken all of these factors into account and having earlier concluded that the second named defendant had indeed established a potential defence which had a real chance of success, Peart J. concluded that justice favoured setting aside the judgment but he did so on the basis that the second named defendant would undertake not to take any steps to dispose of her property pending the determination of the proceedings.

33. It is perhaps worthwhile noting, given that the point was relied upon by Ms. O'Brien S.C. in the course of her submissions, that in the *Lyons* case an affidavit had been sworn by the second named defendant's solicitor accepting that it was he who made the mistake which was relied upon to ground the O. 13, r. 11 application.

34. It is not necessary for the purposes of this appeal to deal to any great extent with the other authorities concerning the courts discretion when considering an application under O. 13. It is clear that each case is decided upon its own facts and that the court has a relatively unfettered discretion as to the terms upon which it will set aside any judgment obtained regularly.

35. There is perhaps one decision worthy of note at this juncture and that is the case of *Petronelli .v Collins* which Ms. O'Brien S.C. referred to in the course of her submissions. That decision is material insofar as it demonstrates that the court may, in certain circumstances, require a defendant to lodge the entirety of the sum claimed by a plaintiff as a term and condition of setting aside a judgment. However, the facts of that case are really quite unique insofar as Mr. Collins, who sought to set aside the judgment obtained against him, first challenged the validity of the service of the proceedings upon him such as would have entitled him to have the judgment set aside without establishing any mistake or that he had a defence which had a real chance of success. Costello J. concluded that his evidence was less than credible concerning the circumstances relating to service. He expressed himself satisfied that Mr. Collins had deliberately decided to ignore the proceedings thus allowing judgment to be obtained in default. These are clearly facts which are very different from those which present on this appeal. Further, the High Court judge expressed himself satisfied that Mr. Collins' claim for relief had been highly unsatisfactory in relation to certain important details and further that he had deliberately sought to mislead the Court as to his place of residence. These were all factors that were weighed in the balance by Costello J. when he set aside the judgment but only on terms that Mr. Collins would lodge the full amount of the judgment earlier obtained.

Decision

36. As was advised by Ms. O'Brien S.C. in the course of her submissions, while an appellate court clearly enjoys the jurisdiction to overturn an order made by a High Court judge in the exercise of his/her discretion, it should nonetheless attach significant weight to the conclusions reached by the judge at first instance. (See the decision of this Court in *Collins v. Minister for Justice* [2015] IECA 27 and that of MacMenamin J. in *Lismore Builders Ltd (in receivership) v. Bank of Ireland Finance limited* [2013] IESC 6). It would be an incorrect approach for this Court to engage in a full reconsideration of the matters heard in the Court below and then substitute its own views for those of the High Court judge. Accordingly, the approach on this appeal is to assess whether or not the approach and conclusions of Hedigan J. were reasonable in all of the circumstances.

37. For my part, I am satisfied that the trial judge fell into error in a number of respects in the manner in which he approached the exercise of his discretion, particularly in relation to the terms which he imposed on the defendant as a condition of agreeing to set aside the judgment.

38. The High Court judge was, I believe, bound to approach his consideration as to what terms might fairly be imposed upon

Willowrock, as a condition of setting aside the judgment, by reference to the findings and conclusions he reached in the course of the hearing. That being so, I believe it would be helpful to summarise his principal findings. These were as follows:-

> (i) that there had been a mistake on the part of Willowrock or its solicitor as a result of which an appearance had not been entered and judgment had been obtained;
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> (ii) that there had been an unsatisfactory delay of five months on the part of Willowrock in bringing forward its application to set aside the judgment;
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> (iii) that Willowrock had met the threshold of establishing that it had a real chance of successfully defending the claim;
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> (iv) that there was residual equity to the approximate value of €850,000 in Folio 13057F County Galway owned by Willowrock, and
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> (v) that the plaintiff's costs of the proceedings would be those advised by Mr. O'Donovan in his affidavit of 17th July, 2012.

39. As to the manner in which he might exercise his discretion, the High Court judge expressed himself satisfied that the usual practice was to require the party who sought to set aside a judgment obtained by mistake to lodge the full amount of the judgment as a term and condition of granting the relief sought.

40. While it is true to say that in exceptional circumstances, such as those advised by Costello J. in *Petronelli*, a court might demand the full sum of the judgment to be lodged as a term and condition of granting the relief sought, such an approach is rare. The reason for this is obvious. Depending upon the amount of the judgment, for many defendants the imposition of such a term would prove fatal to their ability to defend the proceedings. I fear that the High Court judge's error in concluding that it was standard practice to direct the lodgement of the entire judgment was one of the reasons why he ultimately set aside the judgment on terms and conditions that I consider were disproportionate having regard to the findings which he made and the interests of the parties.

41. As already stated Hedigan J. was not overly critical of the conduct of Willowrock in the present case and by no stretch of the imagination could its conduct be equated to that of the defendant in *Petronelli*. There was no suggestion that Willowrock had sought to mislead the Court or had deliberately decided to ignore the proceedings. The judge clearly concluded that the judgment had been obtained by reason of the mistake made by Willowrock or its solicitor.

42. In my view the High Court judge made a further error when he concluded that, in light of Willowrock's assertion that there was residual equity of approximately €800,000 in Folio 13057F to meet the plaintiff's claim if successful, it followed that Willowrock could raise a loan of €400,000 from some financial institution by offering that property as security. I am not satisfied that there was evidence before him to justify that conclusion particularly in light of the existing "all sums due" charge in favour of Bank of Ireland and the judgment that had earlier been obtained by the plaintiff and registered against that folio. The concept of Willowrock being in a position to raise a loan of €400,000 to permit it defend a claim against it for €693,243.03 in respect of its alleged non-payment for oil products to that value would hardly encourage even the most enthusiastic lender particularly given that at the time the monies were required that judgment was charged against the property as a judgment mortgage. Regardless of the fact that Willowrock did not specifically file any further affidavit to advise the Court that it had been unable to raise a loan of €400,000 based upon whatever residual equity was left in Folio 13057F, I am quite satisfied that the High Court judge could not reasonably have come to the conclusion in all of the circumstances that Willowrock could raise the sum of €400,000 in the manner proposed. Once again, this error led ultimately to the imposition of terms which I believe were not proportionate in all of the circumstances. Further, as a result of this error, having decided that Willowrock had a realistic chance of successfully defending this claim, the High Court judge fixed the conditions upon which he would allow it advance that defence on an incorrect premise with the effect that it was to be denied that opportunity.

43. Regrettably, I fear the High Court judge made one further error in the manner in which he approached the exercise of his discretion. He included within his consideration the likely costs to be incurred by the plaintiff on a plenary hearing and accepted Mr. O'Donovan's figure of €50,000 as being a reasonable estimate of these costs.

44. The High Court judge was quite correct to include within his consideration the costs which had been incurred by the plaintiff as a result of Willowrock's failure to enter an appearance. But for that failure it would not have incurred the costs of obtaining judgment nor of having that judgment registered as a mortgage. Likewise, it would not have incurred legal costs in relation to the motion to set aside that judgment. However, in my view Hedigan J. fell into error when urged by the plaintiff to factor into his consideration the costs of €50,000 likely to be incurred by it in the course of the plenary hearing. Those are costs which it would have incurred in any event even if it had not obtained judgment against the defendant and do not arise as a result of the defendant's default. They are costs which the plaintiff well knew, at the time it commenced the proceedings, it would have to bear as a consequence of the litigation.

45. While it is undoubtedly the case that Hedigan J. had a wide discretion as to the terms he might impose on the defendant as a condition of setting aside the judgment, including terms concerning costs incurred by the plaintiff arising from the defendants wrongdoing I regret to say that there was no legal basis upon which he was entitled to take into account, the costs likely to be incurred by the plaintiff at a plenary hearing.

46. The extent of the discretion of the High Court judge in such circumstances is clear from cases such as *McGuinn v. Commissioner of An Garda Síochána* [2011] IESC 33 to which the Court was referred in the course of the hearing. However, even that decision would lend no support to the plaintiff's contention that the High Court judge was entitled to take into account the plaintiff's likely trial costs and any reliance upon that decision to support such a proposition is misplaced.

47. In *McGuinn* the Supreme Court set aside a judgment which had been obtained by the plaintiff in default of defence but only did so on terms that the defendant pay the costs which had been incurred by the plaintiff up to the date of trial. It did not, however, order the defendant to pay the plaintiff's costs of the trial itself. The Supreme Court made its order in circumstances where the plaintiff had obtained judgment in default of defence in March, 2007 at which stage the Court had made an order which provided that his claim would proceed as an assessment of damages only. When advised of that order, the defendant, in May, 2007, advised the plaintiff's solicitor that it would seek to set aside the judgment in order to put liability back in issue. However, it did not make that application until January, 2009 at which stage the plaintiff had advised the defendant of his intention to apply for a hearing date to assess the damages to which he was entitled on foot of the earlier court order. By its order the Supreme Court sought to ensure that the plaintiff would not be left exposed in respect of those legal costs which he had incurred over the period when he was entitled to

assume that his action would proceed as an assessment of damages only. However, there was no question of the Court seeking to secure the plaintiff's actual trial costs, as occurred in the present case.

48. Ms. O'Brien S.C. nonetheless submits that the terms and conditions imposed were proportionate having regard to:-

> (i) the weak and unmeritorious nature of Willowrock's application;
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> (ii) Mr. McCormack's contradictory and confusing evidence concerning the service of the summons;
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> (iii) his erroneous or alternatively misleading evidence concerning the other legal proceedings, and
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> (iv) his lack of candour in failing to explain what happened the summons from the date it was served by ordinary prepaid post on the company's offices until such time as it moved to set aside the judgment. In this regard she noted that unlike what had occurred in *Allied Irish Banks Plc v. Lyons* where the second named defendants' instructing solicitor had accepted responsibility for the fact that an appearance had not been entered no such affidavit had been sworn by Willowrock's solicitors accepting any responsibility for what had occurred.

49. From the evidence and the submissions made available to this Court, it is undoubtedly the case that the unsatisfactory nature of Willowrock's explanation for why it failed to enter an appearance was canvassed at length in the course of the High Court hearing. It follows that all of these matters were considered by Hedigan J. when he accepted, as he clearly did, that judgment had been obtained by the plaintiff as a result of a mistake on the part of Willowrock or its solicitor. He might well have decided, had he accepted Ms. O'Brien S.C. submissions, that there had been no mistake and that the reason no appearance was entered was because Willowrock had been reckless in the manner in which it had dealt with the plaintiff's various claims or that the matters deposed to by Mr. McCormack lacked candour or detail to the point that it would be unjust in all of the circumstances to set the judgment aside.

50. The High Court judge, however, made no such findings regardless of the force of submissions made on the plaintiff's behalf. He accepted that Willowrock or its solicitor made a mistake. He did not engage in any substantive criticism of Mr. McCormack's evidence. He did not condemn his testimony as unmeritorious or lacking in candour. Thus, these are not matters which the plaintiff can rely upon when seeking to argue that the terms and conditions imposed by the High Court judge were, in all of the circumstances, proportionate. There is nothing in counsel's agreed note of the ruling of Hedigan J. from which it can be inferred that he considered that the judgment had been obtained otherwise than as a result of an innocent albeit unfortunate mistake.

51. Counsel for the plaintiff is, however, correct that the trial judge viewed as unsatisfactory the delay on the part of Willowrock in moving to set aside the judgment, albeit that O. 13 does not impose any time limit within which such an application may be brought. It is clear that this was a factor he was entitled to take into account in exercising his discretion and in seeking to balance the rights of the parties, particularly in circumstances where during that period the plaintiff had converted its judgment into a judgment mortgage over the lands contained in Folio 13057F. However, that delay could not, in my view, have reasonably warranted the imposition of terms and conditions that required the defendant lodge in court a sum well in excess of half of the value of the plaintiff's claim. It is perhaps relevant to note that the sum of €400,000 was proposed by counsel for the plaintiff and was stated to reflect approximately half of the value of the plaintiff's claim together with the lower estimate in respect of the three categories of costs referred to at paras. 25 and 26 of Mr. O'Donovan's affidavit of 17th July, 2012.

52. Having regard to the fact that the only substantive adverse finding made by the High Court judge against Willowrock, apart from concluding that there had been a mistake as a result of which judgment had been obtained, was its five-month unexplained delay in seeking to set aside the judgment, the question is what terms or conditions might be deemed proportionate in such circumstances. In this regard some guidance is to be found in the decision of Geoghegan J. in *Croke v. Waterford Crystal Limited* [2005] 2 I.R. 383 in the course of which he endorsed as "pertinent and useful" the dictum of Bowen L.J. in *Cropper v. Smith* (1884) 26 Ch.D. 700 at pp. 710 and 711 where he stated as follows:-

> "[I]t is a well established principle that the object of the Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. ….I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace…. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right."

53. I accept, of course, that the aforementioned principles were enunciated in the context of a late application to amend a pleading, but the principles are in my view equally relevant to an application under O. 13, r. 11 particularly in circumstances where the Court did not find any conduct of a grossly culpable or fraudulent nature.

54. Some further guidance is to be found in the judgment of Murray J. in *McGuinn* where at p. 10 of his judgment he advised as follows:-

> "The Courts in the interests of justice, lean in favour of a determination of litigation on the merits of the issues between the parties rather than preventing a party from having access to the Courts, when his or her rights or obligations are being determined, for procedural reasons including culpable delay. That is not to say that the Courts would not be more stringent in requiring adherence to time limits in particular when set by an order of a court in a particular case, for the reasons outlined by Hardiman J. and referred to above."

55. What it is clear from the ruling of Hedigan J, is that he quite correctly sought to balance the interests of both parties in the present case. He was clearly mindful of the fact that not only had the plaintiff obtained judgment but it had secured that judgment by registering it as a mortgage against Willowrock's property, security that would be undone by setting aside the judgment. He was clearly conscious of the fact that if the plaintiff proved successful in the proceedings that the priority of that security might be lost in favour of other creditors.

56. On the other hand, the High Court judge had concluded that it was only because of a "mistake" that judgment had been obtained in the first place and that he was satisfied that Willowrock had a real prospect of successfully defending the action. He considered it just and fair that it should, notwithstanding its delay in seeking to set aside the judgment, be permitted to defend the action. Further, it is to be inferred from his ruling that he considered it more than likely that Willowrock would be in a position to comply with

those terms and conditions. However, as already stated that assumption was in my view misplaced on the evidence before him.

Conclusion
57. Having failed to make any finding of impropriety or wrongdoing on the part of Willowrock and having concluded that it had a real prospect of successfully defending the action, in my view it was not proportionate for him to have imposed, as a term and condition of setting aside the plaintiff's judgment, the lodgment by the defendant of a sum of €400,000. Further, as already stated I am quite satisfied that the High Court judge in fixing the said sum acted on an incorrect factual premise in addition to which he erred in law in including within his consideration the likely cost to be incurred by the plaintiff on a plenary hearing.

58. For the reasons already stated I would allow the appeal and would set aside the order of Hedigan J. made on 27th July, 2012. In its place I would propose the following order:-

(a) That the judgment obtained by the plaintiff on 11th January 2010 be set aside.

(b) That the defendant do pay to the plaintiff its costs of obtaining judgment, when taxed and ascertained.

(c) That the defendant do pay to the plaintiff the costs of the motion to set aside the judgment, when taxed and ascertained.

(d) That the defendant do pay forthwith to the plaintiff a sum €20,000 on account of the costs orders at (b) and (c) above.

(e) That the defendant do lodge in court to the credit of the action or place on joint deposit with the plaintiff's solicitors a sum of €100,000 to abide the outcome of the proceedings.

(f) That the defendant do grant to the plaintiff a charge, to the value of the plaintiffs claim, over the lands contained in Folio 13057F Co.Galway.

(g) That the defendant, save with the agreement of the plaintiff, or leave of the High Court, do strictly comply with all relevant time limits in and about its further defence of the within proceedings.