THE HIGH COURT

[2015 No. 1812 S.]

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF

AND

JOHN ROARTY AND PAULA ROARTY (OTHERWISE BONNER)

DEFENDANT

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 2nd day of October, 2017

1. This matter comes before the court by way of motion of the second defendant seeking to set aside judgment marked in the Central Office on 13th January, 2016 for alleged failure to enter an appearance. The judgment was for the sum of €898,981.13 together with the sum of €508 in respect of costs. This motion was filed on the 24th February, 2016 in the following circumstances.

Background & Relevant Facts

The entry of judgment in the Central Office

2. A summary summons was issued by the plaintiff on 23rd September, 2015 in which the claim was for an amount of €898,981.13. This sum was made up of the following sums. First, a sum of €117,981.13 being the balance including interest in respect of a bridging term loan maintained by the defendant at the plaintiff's Letterkenny branch office on foot of monies advanced under a credit agreement dated 8th February, 2008 for a term of twelve months. Secondly, a sum of €781,000 in respect of monies lent and advanced by the plaintiff to the company John Roarty Quarries Limited on the accounts maintained by the company at the plaintiff's Letterkenny branch office which monies were covered and secured by three letters of guarantee and indemnity executed by the defendants on 1st September, 2006 in the amount of €31,000, on the 31st October 2006 in the amount of €550,000, and on 26th September, 2007 in the amount of €200,000.

3. The defendants by letter dated 27th November, 2015 wrote to the Central Office stating that they were enclosing a copy of their "conditional appearance" and a fee for the conditional appearance. The "conditional appearance" stated that the defendants "vigorously contested" the summary summons and that "consenting jurisdiction are withheld" until certain conditions were fulfilled. They then set out thirteen "conditions", which included matters such as a request that the plaintiff provide copies of all documented evidence upon which they would rely, and that they would furnish a set of accounts relating to the bridging loan and associated account "for forensic examination". The Central Office replied by letter dated 2nd December,2015 acknowledging receipt of the letter but indicating that there was no basis under the Rules of the Superior Courts for the entry of a conditional appearance, and that the only instance in which it was envisaged that a conditional appearance could be entered was under Article 24 of Council Regulation (EC) No. 44/2001, where jurisdiction, in the sense of the country in which legal proceedings should be heard, was disputed. The letter went on to say that it was not possible for the Central Office to accept documents which are not specifically allowed for under the Rules of the Superior Courts, and that there was no document known to the Rules called a conditional appearance.

4. By letter dated 14th December, 2015, the defendants wrote again to the Central Office, saying that it was their clear understanding that conditional appearances had been accepted in a number of other High Court cases, and certain record numbers were then given so that the office might identify those cases. The letter went on to say that as the above conditional appearances had been accepted, their own conditional appearance should also be accepted. The letter concluded by saying that they would await the reply from the Central Office before resubmitting the documentation.

5. On the 13th January, 2016, the solicitors on behalf of the bank, Harrison O'Dowd, obtained judgment in the office in the amount of the sum claimed by the bank on the basis that no appearance had been entered. By letter dated 10th February, 2016, they informed the defendants of this fact. By letter dated 18th February, 2016 the two defendants acknowledged this letter and said that they were unhappy with these events and were reviewing their options.

The issue of the present motion to set aside the judgment

6. As noted above the motion to set aside judgment was issued on the 24th February, 2016, with a return date of 14th March, 2016. A grounding affidavit sworn by Mrs. Roarty indicated that they were "taken by surprise" when they were informed by Harrison O'Dowd of judgment having been entered, because "it was our understanding that our conditional appearance was still being considered, as we had no correspondence refuting it". A number of other matters were raised in the affidavit, but I think it is fair to say that the matter on which there was concentration by Mrs. Roarty during the oral hearing before me was the matter set out in para. 18 of this affidavit. Paragraph 18 alleged that they were "fraudulently induced to sign the alleged personal guarantees on the 1st September 2006 as we were notified by email on 18th July 2006 and on 21st August 2006 by Mr. Seamus Ferry Business Bank Manager in the Letterkenny Branch that the security taken would be in the form of director's guarantee". She then exhibited an email dated 18th July, 2006 from Mr. Ferry in which Mr. Ferry referred to "director's guarantees". A second email dated 21st August, 2006 referred *inter alia* to guarantee of directors of Paula and John Roarty. Thus, a main pillar of Mrs. Roarty's case is that they had not signed personal guarantees but rather director's guarantees. Paragraph 19 of Mrs. Roarty's affidavit also contended that the three letters of guarantee were not enforceable as the plaintiffs did "duly influence the defendants in signing a declaration that had been drafted, dated and marked for signing by an official from the Bank of Ireland". This part of Mrs. Roarty's case was that the bank official had arrived with a pre-prepared sheet for signing in respect of the guarantee.

7. In a replying affidavit sworn by Mr. Brian Feehily on behalf of the plaintiff, he referred to the three cases referred to by Mrs. Roarty in her affidavit in which conditional appearances were alleged to have been accepted by the Central Office. He noted that they had not been exhibited. He said that the plaintiff's solicitors had performed a search on the High Court website in relation to the reference numbers provided and were able to determine that the reference numbers related to particular High Court cases to which the plaintiff was not a party, and it was therefore not privy to any of the documents. All that he could say was that a common feature of the three cases was that they were summary summons proceedings in which the plaintiff was a bank and the defendants were litigants in person.

8. At para. 40 of this affidavit, he rejected the averment that the defendants were induced fraudulently or otherwise to sign personal guarantees. He said that, as is apparent from the guarantees exhibited by the second defendant, the signature page of each

guarantee had written on it in capital letters a recommendation that they obtain independent legal advice. Each of them wrote out a declaration that they understood the nature of the liability incurred and did not wish to be independently advised. He said that he believed that it was normal practice that when executing a guarantee, the plaintiff provided the guarantor with the wording of such a declaration.

The defendants' motions become separated

9. The motion of the two defendants to set aside judgment came before Twomey J. on 23rd January, 2017. On that day, he adjourned the motion of the second defendant and struck out that of the first defendant. The order recites as follows:-

> "Upon motion of the defendants in person pursuant to notice of motion hearing dated 24th February 2016 for an order setting aside the judgment marked in the Central Officein default of appearance on 13th day of January 2016 against the defendants and on reading the said notice and on hearing Counsel for the plaintiff and there being no attendance in court by or on behalf of the first named defendant and on hearing Counsel for the plaintiff and there being no attendance in court by or on behalf of the second named defendant (a solicitor not on record) the court doth direct that the solicitor for the second named defendant do have until the 26th day of January 2017 to come on record and the court does adjourn the motion in relation to the second named defendant to the common list on Monday 30th January 2017 and it is ordered that the said motion be struck out in relation to the first named defendant in that the first named defendant do pay to the plaintiff the costs of this motion and order when taxed and ascertained." The said order was perfected on 25th January 2017."

10. The striking out of the motion insofar as it concerned the first defendant, Mr. , is currently under appeal to the Court of Appeal. When the matter of the second defendant's motion first came before me, there was an application by Mrs. Roarty for a stay on the hearing of her motion until the outcome of that appeal. This was refused by me on a subsequent date, after I had an opportunity to review the papers.

11. A supplemental affidavit was sworn by Mrs. Roarty on 16th February, 2017. Again, she referred to the emails from Mr. Ferry which referred to directors'guarantees. She averred that the letter of offer dated 29th August, 2006 did not state anywhere on it that the guarantees were personal guarantees and "therefore we rightly inferred that the loan was guaranteed by the directors" as stated in the previous emails of 18th July, 2006 and 21st August, 2006. The loan offer was signed by the directors of the company, namely herself and her husband. She averred that on 31st October, 2006, the bank incorrectly prepared and marked for their signature personal guarantees to sign. She says that prior to signing, they were given no consideration of the incorrect guarantees having been drafted in advance and pre-marked with adhesive dots for signature. The guarantee was signed on 31st October, 2006 and witnessed by two bank officials who had no legal expertise to her knowledge. She said that while the guarantee wording may state "you are strongly recommended to take independent legal advice about its terms and effects", that the bank official "exerted undue influence by handing us a card that was pre-printed with the wording "I understand the nature of the liability incurred and I have no wish to be independently advised by a solicitor". She said that they would never have signed these guarantees if they had been made fully aware that they were guarantees of a personal nature. She says that on 31st October, 2006 she did not sign under the certificate concerning independent legal advice on the personal guarantee page when signing the pre-printed wording waiving independent legal advice. She says that this was signed on a blank piece of paper. She says that the address on the guarantee signed on 26thSeptember, 2007 was not her personal address. She says that the guarantee signed on 26th September, 2007 was a date six days prior to the date of the signing of the waiver of independent legal advice, the date of which is 5th October, 2007. She said that at no stage were they informed as to what they were signing on 31st October, 2006, 1st September, 2006, and 26th, September 2007. She also refers to the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 implementing Council Directive 93/13 of 5 April 1993. She argued that by reason of these matters the case should be remitted to plenary hearing.

Authorities

12. The parties were not in agreement as to the appropriate test for setting aside a judgment in default. Accordingly, it is necessary to examine the authorities in this regard.

13. In *Fox v. Taher*, (Unreported, High Court, Costello P., 24th January 1996), a dispute arose as between a solicitor and his former client in relation to the payment of fees. The plaintiff solicitor issued a summons on 20th July, 1995 and, after a number of events, on the 18th August, 1995, judgment was marked in the central office on foot of a certificate of non-appearance and a statement of claim filed in accordance with the rules in the amount for the sum of $600,000. The defendant was apparently not aware of the entry of this judgment until the 11th October, 1995. A motion seeking to set aside the order issued on 16th October, 1995. In the course of his judgment Costello P. said:-

> "What the defendants claim is that they were taken by surprise by the judgment and did not consider that a judgment in default of appearance could be obtained in the central office on foot of the statement of claim (a copy which was given to them) because the statement of claim was, it was believed, in such terms that a liquidated sum had not properly been claimed in it and that only by leave of the court could judgment be obtained. As I have said, the defendants were not aware of this judgment until 11th October and I am sure that they were much taken by surprise in that they did not expect a judgment to be registered against them. Although I do not think the distinction is of significance, it may be more accurate to say that the judgment was obtained against the defendants by virtue of a mistake on their part … 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. However, I think the court should give the defendants, on terms, an opportunity to make their case …"

14. In *O'Callaghan v. O'Donovan*, (Unreported, Supreme Court, , Lynch J., 13th May 1997), proceedings concerning a sum of money allegedly due for work done by the plaintiff in connection with the building of a new stadium for Cork City Football Club, an application had been brought by the defendant pursuant to O. 13, r. 11 of the Rules of the Superior Courts in circumstances where judgment had been entered in default of appearance. The High Court rejected his application. On appeal to the Supreme Court, the appeal was dismissed. In the course of his *ex tempore* judgment, Lynch J. said as follows:-

> "It seems to me that the test is correctly and perhaps most clearly set out as stated in the case of "*The Saudi Eagle*" which was reported in Lloyds Law Reports 1986 Volume 2 and I quote from page 23 as follows: "in the course of his argument Mr. Clarke Q.C. used the phrase 'an arguable case' and it or an equivalent occurs in the some of the reported cases … this phrase is commonly used in relation to Rules of the Supreme Court O. 14 to indicate the standard to be met by a defendant who is seeking leave to defend. If it used in the same sense in relation to setting aside a default judgment

> it does not accord in our judgment with the standard indicated by each of the Lordships in *Evans v. Bartham*. All of them clearly contemplated that a defendant who is asking the court to exercise its discretion in its favour should show that he has **a** *defence which has a real prospect of success* …(emphasis added)

Thus, the Irish Supreme Court, albeit in an ex tempore judgment, has clearly approved the "*Saudi Eagle*" test.

15. In *Stafford v. J.V. Cummins (Supermarkets) Limited*, [2014] IEHC 10, the issue arose in a somewhat unusual procedural context. On a motion for summary judgment, the Master ordered that the claim should be remitted to plenary hearing and that the plaintiff file a statement of claim within four weeks and that a defence be filed within a further four weeks. The plaintiff filed a statement of claim on 15th May, 2012. No defence was immediately filed on behalf of the defendant despite warning letters being issued by the solicitor. By further motion filed on 11th September, 2012 the plaintiff sought judgment in default, together with an order that the action be set down for an assessment of damages as against the defendant. That motion was returnable the 3rd September, 2012. The parties had agreed to a further extension of time for the delivery of the defence. On that date Moriarty J. made an order by consent extending time for the delivery of a defence within four weeks. This was filed together with a counterclaim on 21st December, 2012. Meanwhile, however, the plaintiff had independently sought judgment in the Central Office in respect of the liquidated claim. In an affidavit filed in support of that application, the liquidator Mr. Stafford had waived all claims for interest and all unliquidated claims. On the 30th November, 2012, judgment was marked in the Central Office. By letter dated 16th November 2012 the plaintiff solicitor had in fact warned the defendant solicitor that it proposed to make such an application to mark judgment in the Central Office, but this was overlooked at the time. This meant that the parties were at cross purposes when it came to the motion returnable for the 3rd December. Hogan J. said that the question which presented against that background was essentially whether the court should allow the judgment to stand in circumstances where it was claimed that the defendant was taken by surprise. He said that it was true that the defendant's solicitor was objectively at fault in failing to digest the implications of the letter of 12th November 2012, but the error was pardonable in the circumstances, since his focus was principally on the plaintiff's other motion for judgment in default and delivery of a defence. Hogan J. referred to the case of *Fox v. Taher*, *supra*, and quoted from the judgment of Costello P. He went on to say that:-

> "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."

16. Hogan J. then proceeded set aside the default judgment. In neither *Fox* nor *Stafford* was there a consideration of the extent to which the defendant had a defence or what the precise test might be in that regard.

17. In *Allied Irish Banks Plc v. Lyons & Anor* [2004] IEHC 129a bank obtained judgment against the second defendant in circumstances where the defendant's solicitor had mistakenly thought that he should seek an extension of time from the plaintiff solicitors within which to enter an appearance to the summary summons. This was the only reason an appearance was not entered. On an application to set aside the judgment, Peart J. said, having referred to O. 13, r. 11 Rules of the Superior Courts, as follows:-

> "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. In some cases where judgment has been obtained in default of appearance, there has later been found to have been some irregularity in the manner in which judgment was obtained, such as where service was not properly effected on the defendant. In such a case of an irregular judgment, it has been held that it is not necessary for the defendant to make out a good defence to the plaintiffs claim in order to seek to have it set aside. In the present case, such a situation does not exist. The plaintiff's judgment is not irregular in any way, and in fact the application is not moved on that basis. It is accepted that the plaintiff was entitled to obtain the judgment in question.
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> In the present case where it is simply being asserted that the judgment was obtained by surprise or perhaps more correctly, by mistake on the part of the applicant's solicitor, it is necessary that the Court be satisfied, before it will order that the judgment be set aside, that there is at the least *a possible defence to the claim which has a reasonable prospect of success. In my view the Court does not need to be satisfied that the defendant will succeed, but that there is a point which has area prospect of success*. Counsel for the plaintiff has referred the Court to the decision in *The Saudi Eagle* [1986] 2 Lloyd's Rep 221 where it was held that in an application to set aside a judgment, the standard to be applied to a defendant's alleged defence is that it should be more than an 'arguable case', and that it is necessary to show that the alleged defence has "a real chance of success". *I adopt that standard for the purpose of this case*. I will deal with that aspect of the case in due course." (emphasis added)

18. In the present case, Mrs. Roarty argued that the test to be applied with regard to whether she had a defence was not the *Saudi Eagle* test but rather the ordinary test applied on a motion for summary judgment. In this regard, she drew the Court's attention to two Northern Ireland cases in which the view was taken that the *Saudi Eagle* test was too high and that the test of 'arguable defence' was sufficient: *Tracy v. O'Dowd and Others* (2002) NIQB 48 and *Bank of Ireland(UK) Plc v. Jones* [2014] NIQB 93. However, this Court is bound by the previous Irish High Court and Supreme Court authority in this regard, although in reality, I do not think it makes any difference in the present case.

Application to Facts

19. In the present case, there is little doubt but that Mrs. Roarty was mistaken when she thought she could enter a conditional appearance in the Central Office. It is most peculiar that the Central Office appears to have accepted conditional appearances in some other cases, but the Rules do not provide for this procedure and therefore Mrs. Roarty was mistaken that she was entitled to do so as a matter of law. She was taken by surprise when the judgment was entered in default of appearance. However, it could not be said that there was any 'irregularity' in the process by which the judgment was entered. In those circumstances, the key issue is the extent to which she has a real chance of success in her defence to the bank's claim.

20. I note in the first instance that she has not offered any defence to the sum due under the term bridging loan. Instead, her arguments concern the signing of the guarantees of the company loans. In this regard, a key part of Mrs. Roarty's case appears to be that she should have been told that she was signing a personal guarantee and not a director's guarantee. I am of the view that this is a distinction without difference; when a director signs a guarantee in respect of company debts, it is in any event a guarantee that if the company defaults, the director will make good the default from his or her own resources. Further, I am not persuaded that there is any merit at all in the suggestion that there was something improper with regard to the bank officials giving her pre-prepared forms

to sign, particularly when the pre-prepared forms specifically advise that the proposed guarantor should seek legal advice before signing, and which forms specifically provide for the person signing a declaration that she is waiving her right to legal advice if that is what she chooses to do. Nor do I consider it relevant that the bank officials were not themselves qualified to give legal advice. Further, I have examined the guarantee documents furnished to the Court. In respect of the guarantee dated 1st September, 2006, Mrs. Roarty signed a document which clearly sets out that she was a "personal guarantor" for €31,000; the document is dated 1st September, 2006, and she signed the waiver of legal advice on the same page. The same is true for the guarantee of €550,000 dated 31st October, 2006 except that her waiver (unlike that of her husband) is signed on a separate page to the guarantee itself, but the guarantee signature page and the waiver page bear the same date and the amount guaranteed is clearly set out on the waiver page. The waiver signed by her is not a 'blank sheet'. I am satisfied that both the guarantee and the waiver documents were signed on the same date in relation to the same transaction. As regards the third guarantee, the guarantee itself is signed by Mrs. Roarty on the 26th September, 2007, while the waiver of legal advice is recorded as having been signed on the 5th October, 2007, some nine days later. However, both signatures are on the same page of the document, and even if the signatures were affixed on different dates, I am satisfied they relate to the same transaction and that as of 5th October, 2010 at the latest, Mrs. Roarty was indicating that she did not wish to seek independent legal advice in relation to this guarantee. On none of these grounds put forward is there in my view any level of defence, no matter how the test is formulated, whether in terms of *Saudi Eagle*, or otherwise.

21. As regards the unfair terms Unfair Terms Regulations/Directive issue, I note that Barrett J. in *Allied Irish Bank PLC v. Counihan & Anor* [2016] IEHC 752 said, *inter alia*, having considered the decision of the Court of Justice of the European Union in *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (case C-415/11, judgment of 14th March, 2013) , relating to the Directive:-

> "13. Fourth, given the low threshold identified, for example, in Aer Rianta (considered below) for sending matters to plenary hearing and the limited form and scope of summary proceedings generally, it seems to the court that to conform with, *inter alia* , the decisions in *Aer Rianta* and *Aziz*, a three-part version of the task identified in *Aziz* necessarily arises whereby (i) the court faced with the summary application should identify whether it sees any terms of the loan agreement which may be unfair for the purposes of the Regulations of 1995, as amended, and which were they to be proven unfair and so not binding would, to borrow from the phraseology of Aer Rianta, yield an arguable defence to the summary claim presenting, (ii) to the extent that the court identifies any potential arguable defence which has not been the subject of argument at the summary application, it should invite the parties to make any further submissions that they may have to make concerning same, and (iii) assuming that (a) the answer to (i) is that there are one or more such potential arguable defences and (b) after hearing any further submissions as are referred to at (ii) it appears to the court that such potential arguable defences as it has posited to arise do in truth present, the matter ought to go to plenary hearing, it then being for the court at plenary hearing to decide, *inter alia*, (I) whether such terms as are identified by the court at summary hearing or other terms ("or other terms" because the court at plenary hearing likewise operates in the shadow of *Aziz*) are unfair, and (II) what consequences, if any, such a finding has as regards the debt recovery application before it.

22. Having regard to the above, I should perhaps state for the record that I am not aware, nor has my attention been drawn to, any particular unfair term in the contracts between the parties. Mrs. Roarty's argument appeared to be that the provision of a pre-prepared waiver of legal advice for signing constituted an 'unfair term' for the purposes of the Regulations/Directive. However, I do not think that a waiver of legal advice before signing the contract could possibly be considered a term of the contract itself for the purposes of the Regulations or the Directive. Rather, it is a declaration that the consumer, having been offered the opportunity to seek legal advice in relation to the terms of the contract, has declined to do so. It *relates to* the contract but is not *a term of* the contract. Further, I would have doubts in any event as to whether Mrs. Roarty in signing these guarantees could be considered a 'consumer' for the purpose of the contracts with the Bank when the loans in question were in respect of business loans to a business of which she was a director. Article 2(b) of the Directive defines a 'consumer' as 'any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession', while the Regulations define 'consumer' as 'a natural person who is acting for purposes which are outside his business'.

23. Accordingly, I refuse the relief sought by the second defendant.