Neutral Citation: [2014] IEHC 183

**THE HIGH COURT**

**[2013 No. 239 C.A.]**

**BETWEEN**

**MICHAEL MONAGHAN**

**PLAINTIFF**

**AND**

**UNITED DRUG PUBLIC LIMITED COMPANY**

**DEFENDANT**

**JUDGMENT of Mr. Justice Barrett delivered on the 1st day of April, 2014**

1. This case raises the issue of whether a party can seek to have a regular judgment that is obtained in default of defence set aside for surprise in circumstances where its opponent has complied with every rule of procedure and extended every professional courtesy. The case is an appeal from a judgment of the Circuit Court.

**Facts**

2. Mr. Monaghan has sought damages for injuries he claims to have suffered on various dates in 2010 and 2011 during the course of his employment with United Drug. On 7th July, 2010, Mr. Monaghan's solicitor, Mr. O'Connell, wrote an initiating letter to United Drug requesting that it admit liability in respect of the injuries that had allegedly been suffered by his client to that time. On 28th October, 2010, the in-house solicitors of Royal Sun Alliance, the defendant's insurers, issued a letter denying liability. Royal Sun Alliance thereafter raised a notice of particulars on 17th August, 2012 and entered an appearance on 23rd August, 2012. On 13th November, 2012, replies to the particulars were furnished by Mr. O'Connell's office. Along with those replies, Mr. O'Connell asked that the defendant's defence be forwarded to him. There was some delay in supplying this defence and on 10th January, 2013, Mr. O'Connell again requested the defence. Notwithstanding that the defendant at this juncture was already in contravention of the Circuit Court Rules as to the timing for the delivery of a defence, it appears that no reply was forthcoming to his letter. At this point, Mr. O'Connell arranged for a motion for judgment in default of defence to be issued and served under cover letter of 19th April, 2013, returnable on 29th May, 2013. Belatedly, contact was made by Royal Sun Alliance and, by consent of both parties, a Circuit Court order was sought and made striking out the motion, awarding costs to Mr. Monaghan and extending the time for delivery of a defence by three weeks.

3. Perhaps the greatest surprise in this case is that even at this late stage Royal Sun Alliance continued to dally. On 13th and 20th June, 2013, Mr. O'Connell wrote again to Royal Sun Alliance as no defence had yet been forthcoming. No reply issued to these letters or to a separate letter that Mr. O'Connell had sent on 30th May. Mr. O'Connell arranged for a second motion for judgment in default of defence to be issued and served on Royal Sun Alliance under cover letter of 9th July, 2013. It is worth noting that by this date Royal Sun Alliance was not only in breach of the Circuit Court Rules as to the submission of its defence but also in continuing breach of the Circuit Court order in May. It is agreed by all the parties that the second motion was duly served on Royal Sun Alliance. However, despite having been duly served, it was lost within Royal Sun Alliance and neither motion nor the accompanying grounding affidavit has ever been located. On the motion return date, 30th July, 2013, the County Registrar was satisfied that the motion had been duly served and ordered that judgment be given to Mr. Monaghan in default of defence. Despite every rule of procedure having been observed by Mr. O'Connell on behalf of his client, despite every forbearance and professional courtesy having been extended by Mr. O'Connell to Royal Sun Alliance, despite the fact that Royal Sun Alliance repeatedly dallied in this matter and ultimately lost the papers that were duly served upon it, Royal Sun Alliance has nonetheless argued before this Court that the interests of justice require that the judgment in default of defence obtained on 30th July, 2013, should be set aside in order that there might be a full hearing of the defence in these proceedings.

**Applicable principles**

4. The discretion of the court to set aside a regular judgment obtained in default of defence appears to derive ultimately from the principle identified by Lord Atkins in *Evans v. Bartlam* [1937] A.C. 473 at 480, a case which concerned a judgment obtained following the non-payment of certain betting debts, that :-

> "[U]nless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

Notably, there has been no procedural lapse that resulted in improper advantage in this case.

5. In *Fox v. Taher* (Unreported, High Court, January 24th, 1996), Costello P. was confronted with a case in which there had been mistake on the part of the defendants, rather than surprise. Costello P. noted that:-

> "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 need to do justice to the parties on the particular facts of each case was also emphasised by Murray J in the decision of the Supreme Court in *McGuinn v. The Commissioner of An Garda Siochana* [2011] IESC 33 at 10, albeit coupled with the statement that the courts in the interests of justice generally lean in favour of a determination of litigation on the merits of the issues.

6. In *Fox*, Costello P. was satisfied that, at all times, the defendants in that case wished to contest the jurisdiction of the Irish courts in the matter arising and was of the view that the defendants should be allowed to make their case. In the case before this Court, Royal Sun Alliance has indicated that at all times it wished to argue its defence. Even if the court accepts that this is so, it might perhaps be contended that Royal Sun Alliance had a curious way of achieving its objective in this regard, engaging in protracted delay, contravening the rules as to the timing of a defence, not observing a court order as to when a defence was to be submitted, and ultimately losing documents that were duly served upon it. Certainly it appears to this Court that it would be a most curious

notion of justice that would require the court to conclude that when one party to proceedings appears to behave much as it wants while the other behaves exactly as is required, justice nonetheless favours the former over the latter.

7. *In Allied Irish Banks plc v. Lyons* [2004] IEHC 129 (Unreported, High Court, July 21st, 2004), a case concerning a mistake by a solicitor rather than surprise, Peart J. concluded that the interests of justice required that a summary judgment against the solicitor's client ought to be set aside, rather than leaving the client to a possible remedy against her solicitor in negligence. The court has had close regard to whether the interests of justice might similarly require in this case that the judgment in default of defence ought to be set aside on the basis that United Drug should not suffer for its insurer's actions. However, it appears to the court that in all the circumstances of the case, this is a matter that falls to be resolved between United Drug and Royal Sun Alliance, two sophisticated commercial institutions that are capable of defending their respective interests. The interests of justice do not appear to the court to require that the consequences of Royal Sun Alliance's actions or inactions ought to be visited on Mr. Monaghan whose advisors have at all times acted in compliance with the applicable rules of court and principles of professional courtesy.

8. For the reasons stated above, the court concludes that neither the interests of justice nor other special circumstances require that the Circuit Court judgment in default of defence, as obtained by Mr. Monaghan on 30th July, 2013, be set aside.