Neutral Citation: [2014] IEHC 299

**HIGH COURT**

**[2006 No. 332 S.]**

**BETWEEN**

**ULSTER BANK IRELAND LIMITED**

**PLAINTIFF**

**AND**

**BRID KAVANAGH TRADING AS BARONY B&B**

**DEFENDANT**

**JUDGMENT of Ms. Justice Baker delivered on the 9th day of May, 2014**

1. The defendant has brought a motion to set aside a judgment in default of appearance entered in the Central Office in accordance with O. 13, r. 3 of the Rules of the Superior Courts on the 27th July, 2007 in the amount of €97,195.96 together with ongoing interest. The defendant argues that the judgment was obtained by surprise in that she was not served with the proceedings. The defendant also claims that this Court should set aside the judgment in its inherent jurisdiction in that the judgment is inherently flawed in the light of recent jurisprudence as to the evidential difficulties identified in affidavits of debt sworn with the benefit of the provisions of the Bankers Books Evidence Acts 1849-1959.

**Facts**

2. Tony McDonald, a professional summons server, avers in an affidavit of service, dated the 7th April, 2006, that he personally on the 29th March, 2006, at 7.30 pm, served a copy of the original summary summons on a person whom he believed was the defendant at 16 Mount Prospect Avenue, Clontarf, Dublin 3. In this 2006 affidavit he avers that he was acquainted with the person on whom he effected service. He states a somewhat different basis of knowledge in an affidavit sworn on the 3rd day of September, 2013, for the purpose of this motion, namely that the person on whom he served identified herself to him as Brid Kavanagh. Both affidavits are consistent in stating that the summons was served at a premises at which the defendant says she then resided.

3. The defendant asserts in her affidavit sworn on the 22nd March, 2013, and in her supplemental affidavit of 25th March, 2014, that the affidavit of service was untrue and that she had no recollection of being served a copy of the summary summons at 16 Mount Prospect Avenue, and that the date in question is one she would remember in detail as it was her late father's twentieth anniversary. She says she was not at these premises on that day but adds no concrete fact to support this averment. She says she did become aware of the judgment in October 2007, when her then husband was informed of that fact at a meeting in Ulster Bank. She also states that she never received statements, correspondence or a demand letter in relation to the debt from Ulster Bank, despite the fact that she believes her home address at 16 Mount Prospect Avenue, Clontarf was known to the bank at all material times. Exhibits before this Court show that up to 2002 at least she used an address at Fairview Avenue to which bank correspondence was sent. The evidence also points to the fact that her then husband resided or at least carried on business at the Fairview Avenue premises. She applied for planning permission in 2008 for a site at the rear of Fairview Avenue, and although this is a separate premises from the business premises, it was a vacant site with no separate postal address at the date of the planning application. I am satisfied on the evidence that the defendant had sufficient connection with the Fairview Avenue premises and that she did operate an account with that postal address such that statements and correspondence posted to her at that address were likely to have reached her.

4. The defendant also claims in her affidavit that she did not have a bank loan or overdraft facilities with Ulster Bank Ireland Ltd, that she has no recollection of requesting larger overdraft facilities and that the plaintiff has failed to provide her with statements or loan documentation to show how the loan increased to €83,489.96 in 2007. The evidence before me suggests that she did apply for an overdraft, albeit for a small sum and on a short term basis, but she does not state that she ceased using her cheque book, or that she moved her banking facilities to another bank thereafter. It seems unlikely that the defendant did not have banking facilities during the relevant years, and more likely than not that she banked with the plaintiff bank.

**The law**

5. Order 13, rule 11 of the Rules of the Superior Courts provides that:-

> *"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. "*

The breadth of the discretion conferred by the rule was explained by Peart J. in *Allied Irish Bank plc. v. Lyons* (Unreported, High Court, Peart J., 21st July, 2004) where he stated:-

> *"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 ... "*

**Irregular Judgment**

6. When judgment is obtained irregularly the Court will set aside the judgment without enquiring into the merits of the proposed defence. This is clear from the judgment of Clarke J. in *Ó Tuama v. Casey* [2008] IEHC 49, where he stated:

> *"... where 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."*

7. The irregularity claimed by the defendant is that service was not properly effected on her and that it was effected at an address at which she no longer lived. I have noted above that the defendant says she has "no recollection" of being served and makes a positive averment that she was not in the house on the day in question. She undoubtedly resided at the address at which service was effected. She nowhere states that the letter containing the court documents did not come to her attention or was not in the house when she returned. She does not offer any explanation as to who might have accepted service and, as she asserts, wrongly identified herself to the summons server. Undoubtedly some person accepted the documents from Mr McDonald, the summons server. This gap in the evidence is resolved in my view by made several attempts at service and who was careful to describe these attempts. I am not satisfied that the defendant was not served nor that the summons was not left at the dwelling of the defendant. Accordingly I take the view that the judgment was not obtained irregularly and that the defendant is not entitled to have the judgment set aside as irregular.

**Regular Judgment**

8. A regular judgment obtained by default of pleading may be set aside by a court where it is in the interests of justice to do so. Budd J. considered this discretion in *Maher v. Dixon* [1995] 1 ILRM 218, and quoted with approval the following passage from the House of Lords decision in *Evans v Bartlam* [1937] AC 473:-

> *"The discretion is in terms unconditional ....It was suggested in argument that ... the applicant must satisfy the court the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing the judgment, and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the ... rules would be deprived of most of their efficacy. "*

9. To set aside a judgment obtained by default the court must be satisfied that there is a good defence to the claim, and the basis of the court's jurisdiction is to ensure that an injustice does not result from the preclusion of a claim by a defendant who has a good defence on the merits. Peart J. in *AIB v. Lyons* and Clarke J. in *Tuama v. Casey* emphasised the need for a defendant to demonstrate a defence with a reasonable prospect of success, Peart J. stating "*the Court does not need to be satisfied that the defendant will succeed, but that there is a point which has a real prospect of success.* "

10. The defendant asserts that the special reason why that this Court should set aside the judgment is that it was obtained on foot of an affidavit of debt sworn on the 21st June 2007 by Christopher Benson who was not an officer of the Bank within the meaning of the Bankers Books Evidence Acts 1879-1955. Recent jurisprudence on the operation of that Act, and the way in which a bank could avail of the statutory exception to the hearsay rule by use of its provisions, has culminated in the judgment of O'Malley J. in *Ulster Bank Ireland Ltd v. Dermody* [2014] IEHC 140. In that case, O'Malley J. held that the evidence of the deponent was not admissible to prove the truth of the contents of the Bank records as the deponent of the affidavit was not an officer of the plaintiff Bank such that would allow the plaintiff to avail of the statutory exception. A similar conclusion was reached by Peart J. in *Bank of Scotland v. Stapleton,* [2012] IEHC 549, in regard to an employee of the debt collection agency of Bank of Scotland plc. which had taken on this function following the dissolution in Ireland of Bank of Scotland and the takeover of the banking business of the Irish bank by cross-Border merger order.

11. What is asserted in this case is that the affidavit grounding the application in this case was sworn, as that in *Ulster Bank v. Dermody*, by a person who was not an officer of the Bank and therefore the evidence was inadmissible as hearsay. What the defendant argues in effect is that she should be entitled to rely retrospectively on recent jurisprudence that would have offered her a substantive defence to an action commenced more than six years before that jurisprudence evolved.

**The common law development of the law**

12. It used to be said that judges did not make law but merely declared the law as it had always been. This proposition is now recognised as overly simplistic and as having evolved to explain the role of the judge who develops the law but yet does not displace the Oireachtas as law maker. The legal fiction developed to reconcile the interpretative interplay of the roles of *stare decisis* on the one hand and the fact that the court applies the law in an individual case and may in so doing have to explain or develop a principle only tangentially dealt with in other authorities, or may have to distinguish it by reference to some others.

13. In *A v Governor of Arbour Hill Prison* [2006] 4 I.R. 88 Murray C.J. gave a coherent explanation of the dilemma at p. 115 as follows:

> *"Thus, the conventional manner in which the law has been applied in a particular area for many decades may be greatly altered even turned on its head as a result of a particular issue being raised in a particular case at a particular point in time leading to an extension of the law by reference to general principles, the overriding of precedent or the specific interpretation. "*

What the defendant argues is that this Court should set aside the default judgment as having been obtained in breach of the rule against hearsay. But this is to argue that the recent jurisprudence has retrospective effect and as stated by Murray C.J at p. 117:

> *"Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law, such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position. "*

Accordingly I cannot set aside the judgment on the argument that the recent cases on the limitations of the exceptions to the hearsay rule have retrospective effect.

14. Further, the defendant was in a position to raise the procedural defences raised by the defendant in *Bank of Scotland v. Stapleton* and *Ulster Bank v. Dermody* in defence of the summary proceedings. In the circumstances, it seems to me that it would be contrary to the principles of justice and fairness to the plaintiff in this case, that a procedural matter which was not raised in defence seven years ago could be raised now. This arises from the case of *Henderson v. Henderson* (1843) 3 Hare 100, the purpose of which was explained by Kearns J. in *S.M v. Ireland* [2007] 3 I.R. 283 at 295:

*"The purpose of the rule is to uphold an important principle of public policy which demands, in the interests of justice, that defendants are not exposed to successive suits where one would do".*

Certainty and finality in litigation is an essential cornerstone of the rule of law and I cannot ignore the fact that to allow the defendant to reopen the matter at this stage some seven years after the proceedings for debt were commenced would offend against this principle.

**Summary**

15. In this case, judgment was entered in the Central Office of the High Court. I do not accept that there is a frailty in service. Accordingly, the defendant may set aside the judgment only if she can raise a defence on the merits. She has not averred that she was not indebted to the plaintiff, but rather raises the procedural argument that the means by which the plaintiff sought to establish indebtedness fell foul of the rule against hearsay. She now seeks to take advantage of litigation which occurred in 2013 and 2014 to challenge a judgment obtained seven years ago. In my view, she cannot do so. To allow the defendant to impugn the affidavit of debt would be to offend the rule against retrospectively, and the principles of certainty and finality in litigation. The rules of the Superior Courts permit the court to set aside a judgment in the interest of fairness, and this means fairness to both sides. In balancing the interests of the parties for this test of fairness I cannot accede now to the application by the defendant. The defendant could have, but did not raise the hearsay defence at the time when the affidavit of debt was filed. In addition, the defendant has not sought to show any arguable defence to this case on its merits.

16. Accordingly, I refuse the relief sought.