

THE HIGH COURT

[2014 No. 443 S]

BETWEEN

O'DONOVAN DAIRY SERVICES LIMITED

PLAINTIFF

AND

MICHAEL CASHIN

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 20th day of July, 2016.

1. This judgment is given in an application by the defendant for an order setting aside a judgment obtained in default of Appearance on 7th July, 2014 in the sum of more than a €153,000.00. The claim arose in the context of the supply by the plaintiff, a specialist provider and installer of specialist equipment, to the defendant who is a dairy farmer. Since judgment was obtained, the plaintiff has on 1st August, 2014 registered a judgment mortgage against the interest of the defendant in certain folio lands in Co. Wexford, and obtained on 4th April, 2016 a garnishee order, made absolute on 25th April, 2016, in respect of certain payments due to the defendant from the Department of Agriculture.

2. On 29th June, 2015 an order was made for the cross-examination of the defendant in aid of execution and on diverse days since then the defendant has appeared before the Master of the High Court to be cross-examined pursuant to that order. The plaintiff has also caused the issue of an Order for Execution – *feri facias* on 7th July, 2014 in respect of its judgment.

3. This judgment is given on a motion issued on 9th June, 2016 by which the defendant seeks relief pursuant to O. 13, r. 11 of the Rules of the Superior Courts setting aside that judgment, and an ancillary order vacating the order of garnishee.

The substantive facts grounding the application

4. The defendant in his grounding affidavits acknowledges that the plaintiff sold and he bought the milking equipment and that it was installed in his farm between May and December, 2011. He says however that from the outset he experienced "significant problems" with the machinery and that he communicated this to the local agent of the plaintiff. He says that in or around the month of October, 2013 he informed the plaintiff that they should "take it out or put it right". Some months later on 4th February, 2014 the plaintiff issued the summary summons seeking judgment of the balance claimed on foot of the contract for the supply of the goods in the sum of €153,215.00 and the defendant accepts that the Summons was served on him.

5. The defendant says that immediately after he received the Summons he spoke to the solicitor for the plaintiff on the 10th February, 2014 and explained to him the difficulty he was having with the machinery. He says that solicitor Mr. O'Connell told him he was unaware of any difficulties with the machine but advised him to obtain an expert report and that he, Mr. O'Connell, would "hold off taking further action while I was getting this report organised".

6. Mr. O'Connell has a contemporaneous note of this conversation which does reflect a conversation with regard to the quality of the machine but does not contain any reference to an assurance or agreement on his behalf that no proceedings would be instituted or that they would be kept "on hold". The memorandum suggests that Mr. O'Connell advised the defendant to instruct his solicitors to write to him and that he would put that letter to his clients, but he goes on to say that he advised the defendant that he "would have to pay for the machine at the agreed price" notwithstanding any issue that might arise with regard to the quality of the machine or any difficulty that the defendant was incurring with it.

7. The contents of that memorandum are borne out by a letter sent on 18th September, 2014 from Mr. O'Connell in reply to a letter of 17th September, 2014, from Messrs. Ensor O'Connor Solicitors then acting for the defendant in which it was said that that firm had been instructed to apply to set aside the judgment and asked that further action by way of enforcement or execution would be stayed. It is, in my view, noteworthy that that firm of solicitors did not demur from the contents of the letter, or indeed in that correspondence was any surprise or complaint made that the plaintiff had moved to attain judgment in default in the light of any express assurance that this would not happen.

8. On 1st October, 2014 a copy of a report obtained by the defendant from Teagasc was furnished and that sets out a number of issues with regard to the machinery. That report has been exhibited but does not contain, as one would expect in an expert report prepared for the purposes of court proceedings, details of the experience or qualifications of Mr. Ryan, the writer of the report. The plaintiff implicitly accepts that of itself the Teagasc report would not have grounded proceedings for breach of contract and/or negligence arising out of any defects in the machines and he says in his grounding affidavit that he has instructed a consulting engineer to provide a further report "on these issues". To date, no report has come to light. I was not informed whether one had been obtained.

9. It is quite clear, however, that the defendant well knew in late 2014 that the plaintiff was not prepared to stay any enforcement or execution on foot of its judgment, and he himself attended before the Master of the High Court on 18th November, 2015, 9th February, 2016, 10th February, 2016, and 11th February, 2016 when he was cross examined in aid of execution in relation to his means. No evidence is available as to any objection voiced by the defendant to the cross-examination on foot of the judgment during those hearings.

10. It seems that the defendant did, however, when he appeared in April, 2016 on the return of the application to make the garnishee order absolute, make representations to the court with regard to the defects in the machinery, and he says he was informed by the judge hearing that application that the correct approach was to bring these matters before the court to have the judgment set aside.

11. It was not until 10th May, 2016 that an Appearance was entered, almost two years after the judgment was obtained in the

Central Office. The solicitors now acting for the defendant wrote on the same day expressing the view that Mr. Cashin had "formed the intention to appeal the minute he knew of the judgment" and that he "has a substantive and real defence to the proceedings which were taken against him".

12. The plaintiff defends this application on the basis that the defendant has no grounds for seeking to set aside the judgment and that he has delayed in making the application.

13. The fact that the defendant has said through his solicitor that he intended to appeal the order is not the test relevant to the application before me and what is relevant is whether the applicant can meet the test identified in the case law in order that I might exercise my jurisdiction to set aside the judgment. I turn now to examine those principles.

14. The principles grounding the exercise of the jurisdiction to set aside a judgment were explained by the House of Lords in *Alpine Bulk Transport Company Inc. v. Saudi Eagle Shipping Company Inc. (The "Saudi Eagle")* [1986] 2 Lloyd's Rep 221, and have been accepted in a number of judgments of the Superior Courts in Ireland. The House of Lords set out a number of tests, said to be extracted from the speeches of the Lords in *Evans v. Bartlam* [1937] A.C. 473. The court in both cases stressed that there was discretion whether to exercise the jurisdiction, and that while discretion was a matter in which "no one case can be authority for another", certain principles must guide that exercise. The principles identified in the *Saudi Eagle* case are as follows:

- (1) A plaintiff derives rights of property in a judgment.
- (2) A jurisdiction lies in the discretion of the court to set aside its judgment.
- (3) The purpose of the discretionary powers is to avoid injustice "if judgment followed automatically in default".
- (4) The primary consideration is whether the defendant has merits to which the court should pay heed, as a matter of common sense "since there is no point setting aside a judgment if the defendant has no defence".
- (5) The court will take into account how a defendant found himself bound by a judgment of which he had no knowledge.

15. The Supreme Court considered the jurisdiction in the case of *McGuinn v. Commissioner of An Garda Síochána & Ors.* [2011] IESC 33 and Murray J. giving the majority judgment with which Fennelly J. agreed, Kearns P. dissenting, stressed that the interests of justice must guide the court's discretion. At p. 10 of his judgment, Murray said the following:

"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."

16. The Court in that case set aside the judgment in default of defence, notwithstanding what it regarded as significant delay in bringing the motion.

17. The Supreme Court also considered that delay would:

"...always be a material factor in deciding whether or not to grant the party guilty of delay discretionary relief, particularly if that relief would cause further undue delay to the other party" (p. 9)

18. The Court of Appeal recently considered the question, albeit in the context of an application to permit an appeal against a decision of the Master of the High Court, in the case of *Mooney v. The Old Shebeen Limited* [2016] IECA 151. Hogan J., giving the judgment of the Court, accepted that one requirement that a court would impose on a party seeking to set aside a default judgment was that that party would show that he or she "has reasonable prospects of defending the action" before the discretion was favourably exercised. Hogan J. quoted from a judgment of Costello P. in *Fox v. Taher* (Unreported, High Court, 24th January, 1996) and said the following:

"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."

19. Hogan J. also followed the decision of the Supreme Court in *O'Callaghan Limited v. O'Donovan* (Unreported, Supreme Court, 13th May, 1997) that the defendant had to show a reasonable prospect of defending the proceedings.

20. Peart J. considered the applicable principles in his judgment in *Monaghan v. United Drug Plc.* [2014] IEHC 183, and also stressed the "interests of justice" that must engage the court in exercising its jurisdiction to set aside.

Does this defendant have a real defence?

21. The core of the jurisprudence with regard to the exercise by the court of its jurisdiction to set aside a judgment obtained in default is that the defendant be permitted to defend the proceedings and the judgment be set aside if it can be shown that he has a real or reasonable prospect of success. The test is more than that which is required for a defendant to be permitted to defend proceedings brought by way of summary summons, which requires that a defendant show an arguable defence. That this is so is clear from the judgment of the House of Lords in the *Saudi Eagle* case and as explained and followed by the Supreme Court in *O'Callaghan Limited v. O'Donovan* where Lynch J. delivering the judgment of the Supreme Court approved the test as explained in the *Saudi Eagle* case.

22. The defendant must show on evidence that the defence proffered has a reasonable or real prospect of success, and to borrow the language used by the courts in applications for summary judgment, a mere assertion of such defence could not be sufficient at an application to set aside a judgment. The reason for this is clear, and while the court does prefer that liability between parties be determined at trial and if necessary on oral evidence capable of being tested by cross examination, the court will not make a futile order, and will not permit what would amount to an abuse of process or the waste of court time by permitting a defendant to defend proceedings when he or she has not shown such a reasonable prospect on affidavit, at the point at which that defendant is seeking to put his or her best foot forward and explain the nature of a defence with a view to persuading a court to set aside something that

has already been done.

23. The defence proffered by this defendant is that the machinery that he bought from the plaintiff has not functioned to his satisfaction. No evidence has been put before me to suggest that the consideration for the contract has wholly failed, i.e. that there is any basis on which the defendant might have sought to rescind the contract for fundamental breach. Quite apart from the fact that no such evidence has been put before me, the defendant has had the use of this machinery for five years and he has not said on affidavit that the machinery is useless or that he was unable to ever use it for the purposes of his dairy farming activity. At best he can say that the machinery has been less satisfactory than he had hoped, and that some adjustments may be needed, some significant faults have been isolated, and that the quality of the machines is inferior.

24. The matters raised by the defendant in two affidavits, it seems to me, are matters of counterclaim. They do not offer him a defence to the claim in debt, nor do they offer him a basis on which he can say that the consideration for the contract has failed, nor does he argue that they do.

25. I accept too what has been said by counsel for the plaintiff, namely that the expert evidence produced by the defendant in support of his assertion that the machinery is faulty is not of a type to which much weight ought to be given at this juncture. The evidence may well be the evidence of an expert who understands the machinery in question, but it is not evidence on foot of which I could determine whether the defence for which the defendant argues has a reasonable prospect of success. Engineering evidence would be required for that purpose, and the defendant has implicitly acknowledged this fact.

26. Legal principle and common sense, both called in aid by the House of Lords in the *Saudi Eagle* case, dictate that the defendant should not have this judgment set aside if the consequence would be that he would find himself defending an action that even now he cannot show he may reasonably hope to defend.

A counterclaim?

27. The defendant may however have a counterclaim. A counterclaim may, under O.21 r. 16, operate as a set off and counsel for the defendant points me to the judgment of Clarke J. in *McGrath v. O'Driscoll* [2007] 1 I.L.R.M. 203 where he pointed to the fact that if a counterclaim would give rise to a set off in equity then the court has to exercise a discretion whether judgment should be stayed pending the trial of the counterclaim. He gave that judgment in an application by a defendant to be permitted to defend summary proceedings and he considered, having regard to the "sufficient connection" between the claim and the counterclaim, that it would be inequitable to allow the claim to be disposed of without taking into account the counterclaim. As he put it, "*the whole series of transactions entered into were part of a package*" and that it was possible that the counterclaim would have the effect that a set off in equity would be sufficient to extinguish the plaintiff's claim.

28. That judgment was given by Clarke J. in the context of an application by a defendant for leave to defend summary proceedings. I am not persuaded that a similar consideration applies in a case such as the present case where what is sought is that a judgment already obtained would be set aside in order to permit a defendant to counterclaim, and in the hope that that counterclaim would be sufficient to act as a set off in equity against the amount of the claim.

29. Certain factors would weigh against such a proposition. The test under which a defendant may defend is significantly different from that which is engaged by the court in setting aside a judgment already obtained. This is not a case where the defendant was not aware at all of the claim on the debt, nor where the summary summons was not served on him. At best he thought that the claim was "on hold", but taking his case at its height it seems to me that he believed that the claim of the plaintiff might be "on hold" conditionally, that is conditional upon him obtaining and furnishing to the solicitors for the plaintiff a report from an engineer which would substantiate or in some way bear out his argument that the machinery was faulty. He did not obtain that report until early October, 2014, eight months after the summary summons was issued and served on him. His then solicitor did write a letter on 17th September, 2014 indicating that it was his instructions and intention to seek to set aside the judgment obtained in default in July, 2014. Nothing happened until this motion issued some 20 months later. The plaintiff has acted in an open and irrevocable way in seeking to enforce its judgment, and the defendant has been well aware throughout of the attempts to execute.

30. I consider in this case that in the exercise of my discretion I cannot ignore a number of factors. The delay of the defendant in bringing this motion has been significant, and while the authorities do not bear out a view that the delay of itself will prevent the exercise of discretion, a delay which is prejudicial to the interests of the other party will always impact upon the exercise of its discretion by a court.

31. Further, the defendant has known since 1st October, 2014, at the latest, that he might have had a basis on which he could commence proceedings himself against this plaintiff on account of the faulty machinery. No explanation is given by him as to why such proceedings were not commenced. He would have had in the context of those proceedings, which by now one would have thought would be close to resolution, or at least close to being ready for trial, have sought that further execution on foot of the judgment obtained by the plaintiff be stayed pending the determination of the claim for breach of contract and/or negligence arising from the alleged faults in the machinery. At this juncture it is not sufficient for the defendant to merely say that he was awaiting the result of the present motion before making a decision whether he would counterclaim or bring separate proceedings. A draft and sufficiently particularised counterclaim is exhibited in his grounding affidavit but the draft would readily have been the basis of a draft plenary summons and statement of claim or civil bill, as the case may be.

32. Furthermore the interests of justice suggest that were I to now set aside the judgment, the plaintiff would lose the benefit of its judgment mortgage and the garnishee order already made absolute by the High Court.

33. In that regard I consider that the judgment of Kelly J in *Allied Irish Bank plc v. O'Reilly & Ors.* [2014] IEHC 326 is relevant and in the exercise of my discretion I cannot ignore the proprietary interest this plaintiff has in its judgment:

"The court should approach an application for a stay with caution. It should exercise the discretion judiciously since the grant of a stay is a serious curtailment of legal rights".

34. The defendant is admittedly to some extent impecunious, and he has offered a small percentage of the judgment debt by way of a lodgement should I be prepared to accede to his application on conditions. His impecuniosity however causes me an additional concern and that is other creditors might obtain judgment and register a judgment mortgage, and were I to set aside the present judgment, this plaintiff would lose the benefit of its priority, and that would occur some two years after judgment was entered and a judgment mortgage duly registered on foot of that judgment. The factor of delay is a significant factor in this case having regard to the fact that the plaintiff has acted upon the judgment, and that the benefit of its security will be lost were I to accede to the judgment.

Conditional order?

35. I have considered whether I may, under the rules of court, make an order staying any further execution of the judgment under O. 13, r. 11 or otherwise. It is clear that an order setting aside the judgment may be made "upon such terms as may be just" and this has been considered in a number of cases and has often led to an order that a defendant is required to lodge the judgment sum or a sum close to that in court pending the trial of the action. Such an order has the benefit of providing a degree of security to a plaintiff whose judgment is set aside. What is less clear to me is whether I may refuse the order setting aside the judgment, yet put a stay on the further execution by this plaintiff of the judgment, and I am not convinced that I have such a jurisdiction under O. 13, r. 11. Such a jurisdiction may well lie on an application by the defendant for a stay of further execution but would in my view be one more properly heard by a court after the commencement of proceedings by this plaintiff for damages for breach of contract and/or negligence arising out of the supply of the machinery. As I have said, such proceedings have not yet issued, and I consider that I would fail to do justice between the parties were I to now make an order setting aside the judgment and that making an order staying the judgment is not within my powers in the application as currently brought before me.

36. Accordingly, I propose refusing to make the order sought on the notice of motion but expressly do so without prejudice to any claim that the defendant may bring for a stay on any further execution of the judgment by the plaintiff should circumstances permit.