THE HIGH COURT

2017 No. 329CA

Between:

FINGAL COUNTY COUNCIL

PLAINTIFF/RESPONDENT

– AND –
ILG LIMITED

DEFENDANT/APPELLANT

JUDGMENT of Mr Justice Max Barrett delivered on 20th June, 2018.

1. Pursuant to O.26 of the Circuit Court Rules, Fingal County Council has obtained a Circuit Court judgment in default of defence against ILG Ltd in respect of unpaid rates in the amount of €49,440. That judgment was entered on 14th February, 2017. As can be seen from the brief chronology of events that follows, that judgment can have come as no surprise to ILG:

> 22/01/2016. Rates struck. Rates bill issued.
>
> 01/07/2016. Fingal's solicitors write to ILG indicating that if arrears not paid within seven days, the solicitors are instructed to take legal proceeding for recovery without further notice.
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> 23/11/2016. Summons/Ordinary Bill served on ILG. Bill states that if ILG (as defendant) intends to defend, it must enter an appearance and "*also within TEN days after Appearance deliver a statement in writing showing the nature and grounds of your Defence.*"
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> 08/12/2016. Solicitors for ILG write seeking consent for late entry of appearance.
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> 13/12/2016. Solicitor for Fingal writes consenting to late filing of appearance.
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> 19/12/2016. Defendants enter appearance.
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> 22/12/2016. Fingal's solicitor writes by email and letter seeking Defence and stating, inter alia, that "*if you fail to deliver Defence by close of business on Monday 16th January 2017 I am instructed and fully intend to proceed to Judgment against your client through the Circuit Court Office…without further notice to you.*"
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> 14/02/2017. Summary judgment obtained against Defendant in default of Defence.

2. No contention is made by ILG that the proofs for the Circuit Court judgment were not in order or that the judgment of 14th February should be set aside on such basis.

3. In a letter dated 20th February, 2017 – so six days after judgment was entered – ILG's solicitors wrote to Fingal's solicitors, raising for the first time a possible defence under European Union law, making reference to ILG's participation in separate proceedings in which Fingal is not a party (and which it could not be expected to know about) and indicating that ILG expected to deliver a similar defence to the debt that was the subject of the default judgment. Notably, the defence in those other proceedings is dated 13th June, 2013. Unexplained to this day is why (a) at no point prior to the judgment of 14th February, 2017, no mention of this defence was ever made by ILG, notwithstanding that ILG patently had formulated such a line of defence in the other proceedings by 13th June, 2013; (b) ILG failed to provide a timely defence despite warning from Fingal.

4. On 22nd February, 2017, ILG's solicitors, *inter alia*, requested of Fingal that it consent to the withdrawal of its judgment. By letter and email of 27th February, 2017, it was indicated to ILG that Fingal intended to enforce its judgment. ILG did not issue any motion to set aside judgment at this time but indicated an intention to bring a motion to set aside when the judgment was marked. On 27th July, 2017, a notice of motion to set aside the judgment of 14th February, 2017 issued. That motion proved successful, with the Circuit Court making order on 16th November 2017 that:

> *"…the Judgment by default of Defence herein obtained in the Circuit Court Civil Office, Dublin on the 14th day of February 2017 be and the same is hereby set aside on condition that the Defendant do lodge in the Circuit Court Civil Office the sum of €49,440.00 within 21 days of today's date and that the Defendant do lodge in the Circuit Court Civil Office any further liabilities in respect of rates due to the Plaintiff in relation to the Defendant's occupation of the premises at Westmanstown, Clonsilla, Dublin 15".*

5. The judgment of 16th November, 2017, is now the subject of appeal and cross-appeal. Fingal asks that this Court set aside the judgment of 16th November (or, if affirming, that the court order that the conditions for set-aside are affirmed). ILG is obviously satisfied with the judgment of 16th November. However, it is not satisfied with the conditions attached thereto, arguing, *inter alia*, that (a) the requirement to lodge the €49,440 is prejudicial to its right to defend, and (b) the unconstrained reference to "*further liabilities*" extends to any future rates (so, for example, any rates due in respect of the current year).

6. The Circuit Court's jurisdiction to set aside judgment in the circumstances presenting is contained in O.30 of the Circuit Court Rules which provides, inter alia, as follows:

> *"1. Any party against whom a judgment in default of appearance or defence has been given may, not later than ten days after he has knowledge thereof, serve a notice of motion in accordance with Form 13 of the Schedule of Forms annexed hereto to vary or set aside the said judgment, but service of the notice of motion shall not operate as a stay of proceedings in the action save with the leave of the Court and upon such directions as to the Court shall seem appropriate. In cases of urgency, applications for a stay may be made in accordance with the terms of Order 1 rule 5 of these Rules.*
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> *2. Every such notice shall set forth clearly and briefly [1] the reasons why the party applying [a] did not enter an appearance or [b] did not deliver a defence, as the case may be, [2] the nature of the fraud, misrepresentation, surprise or mistake relied upon, and [3] the grounds of defence to the action in which the said judgment was given…".*

7. A number of points might be noted at this juncture:

> – first, a couple of points of terminology: (a) O.30, r.2 is mandatory in its terms ("*Every such notice shall…*"); and (b) the detail specified in O.30, r.2 is required to be set forth in the notice itself, not just identifiable from a trawl of the pleadings (a point buttressed by a consideration of the prescribed form of the requisite notice);
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> – second, as the Circuit Court is a court of local and limited jurisdiction, without inherent jurisdiction, it follows that (a) it has no inherent jurisdiction to set aside and (b) it has no jurisdiction to set aside other than in accordance with the Circuit Court Rules.
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> – third, an order to set aside is not an order that falls lightly to be given. Rules of court matter; they fall particularly to be observed when parties are legally represented public/commercial entities and so can reasonably be expected to comply fully with the detail of such rules. Moreover, the seriousness of what is being sought of the Circuit Court in an application brought under O.30 ought not to be underestimated. Such an application seeks that a court order duly made be overturned. Courts will naturally treat such an application with a certain caution. After all, if set-aside orders were available for the asking, the overall effect of their thus being granted would be greatly to diminish the certainty which court orders are intended to bring. That would be inimical to the due administration of justice. So when courts look to see if there has been due compliance with O.30, that is not out of a desire to be excessively punctilious but stems from a proper appreciation of the significance of what is being sought.

8. Bearing in mind the foregoing, it is notable that:

> (a) the notice of motion of 27th July, 2017 gives no reason (none) as to why a defence was not lodged. It is therefore manifestly in breach of the mandatorily prescribed form of such notice.
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> (b) notwithstanding that ILG enjoys and has enjoyed the benefit of legal representation, (i) the grounding affidavit which accompanied the notice of motion of 27th July gives no reason (none) as to why a defence was not lodged, (ii) the further replying affidavit sworn for ILG also gives no such reason, despite the absence of such reason having expressly being flagged in the interim in an affidavit sworn for Fingal; and (iii) none of ILG's exhibits or correspondence provide such reason. Thus ILG has had time galore to mend its hand and has not done so.

9. Having regard to the facts identified at limbs (a) and (b) of the preceding paragraph, the suspicion arises that there is no reason why a timely defence was not delivered, that it just was not delivered. Ignoring completely that suspicion and dealing solely with the evidence at hand, it is patently clear from the evidence before this Court that there has been non-compliance by ILG in terms of setting forth clearly and briefly in its notice of motion the reasons why ILG did not deliver a defence. (Nor were such reasons otherwise identified, to the extent that the 'otherwise' counts, and in the face of the express wording of O.30 it does not seem to the court to count, certainly in circumstances where it is dealing with well-funded, legally-armed parties).

10. The court has been referred, *inter alia*, to *O'Callaghan v. Donovan* [1998] WJSC-SC 11079 and, in particular, to Lynch J.'s consideration therein of *The Saudi Eagle* [1986] 2 Lloyd's Rep 221, as well as to *AIB v. Lyons* [2004] IEHC 129. However, those are cases which are concerned with the need for a defendant to show that in its proposed defence it has a reasonable chance of success. Here, ILG does not even get to that stage of consideration because of its failure, as considered above, to comply with O.30, r.2 and explain why it did not deliver a defence. That rule sets an initial hurdle, in terms of compliance, which must be vaulted if an applicant is to stand any chance of progressing to its desired end of obtaining a set-aside order. ILG has failed to vault that hurdle.

11. Even were the foregoing not so, even if ILG had placed itself in a position where it was entitled to an appraisal of whether its defence stood a reasonable chance of success, its defence to the non-payment of rates is in any event doomed to fail on the facts presenting. ILG contends that rates constitute State aid which Fingal applies in providing sporting and leisure facilities similar to those provided by ILG. Thus ILG's defence is premised on the key factual claim that Fingal provides services which are similar to, and in competition with, ILG. Yet uncontroverted in the evidence before the court is the averment of an officer of Fingal that Fingal "d*oes not operate gyms analogous to those of the Defendant*". It may be that other local authorities do so, but Fingal does not. That is the death-knell to any chance of ILG succeeding in the defence it seeks to advance.

12. For the various reasons aforesaid the court will set aside the order of the Circuit Court of 16th November, 2017, setting aside the order of the Circuit Court of 14th February, 2017.