[2019] IEHC 697

THE HIGH COURT

[2018 No. 743 S]

BETWEEN

CECILIA ONYENMEZU (TRADING AS NORLIA RECRUITMENT SERVICE)

PLAINTIFF

AND

FIRSTCARE IRELAND LIMITED, FIRSTCARE IRELAND (BLAINROE) LIMITED, FIRSTCARE (EARLSBROOK) LIMITED, FIRSTCARE IRELAND KILCOCK LIMITED, BENEAVIN HOUSE LIMITED, AND BENEAVIN LODGE LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 25th day of September, 2019

1. The defendants' solicitor attended the proceedings in this case in the Master's Court on a number of occasions but through inadvertence failed to attend when the matter came before the High Court. That solicitor has said on affidavit that this was the first time in 32 years of practice that he had overlooked a date and failed to attend.

2. On 1st July, 2019, in the defendants' absence, O'Hanlon J. granted summary judgment in favour of the plaintiff. Order 36, r. 33 allows six days to apply to set aside a judgment in a plenary action that was obtained in the absence of a party.

3. The defendants' solicitor became aware of the judgment only when a writ of *fieri facias* was served, which was in late July. He sought agreement to a stay for a limited period of time but that was rejected. He then wrote to the plaintiff's solicitor, expressly drawing attention to the fact that he was on a family holiday in Spain.

4. The plaintiff's solicitor, Mr. John Branigan of Branigan Feddis Solicitors, replied rejecting a postponement of execution even until the defendants' solicitor was back in the country. Mr. Branigan's response should more properly have been to endeavour to prevail on his client to extend the absolute minimum human courtesy, let alone professional courtesy, to allow the defendants' solicitor to enjoy his holiday. He does not appear to have done so but merely took instructions and then wrote a belligerent letter of rejection based on those instructions. It was extremely uncollegiate not to have endeavoured to persuade his client to agree to even a temporary postponement. That extremely unhelpful attitude can't have improved the defendants' solicitor's holiday. The latter returned on 7th August, 2019 and then moved promptly to rectify the position.

5. What is now before the court is a notice of motion seeking either an order under O. 122, r. 7 extending the time to make an application under O. 36, r. 33 and an order setting aside the judgment and order of O'Hanlon J., or an order to the same effect under the court's inherent jurisdiction.

6. The defendants' solicitor's affidavit avers to there being a *bona fide* defence to the proceedings, and that seems to me to well surmount the test for a *bona fide* defence based on credible evidence as set out in the caselaw e.g. *AIB Plc v. Stack* [2018] IECA 128 (Unreported, Court of Appeal, 10th May, 2018).

7. Pilkington J. gave liberty for short service of the present motion by order of 9th August, 2019 and stayed the execution of the order in the meantime. Stewart J. continued the stay on execution on 15th August, 2019, as did O'Connor J. on 12th September, 2019. I have now received helpful submissions from Mr. Patrick Fitzgerald B.L. for the defendants and Mr. Barney Quirke S.C. (with Mr. John F. Quirke B.L.) for the plaintiff.

The Law

8. As Leggatt L.J. for the English Court of Appeal emphasised in *Shocked v. Goldschmidt* [1998] 1 All E.R. 372, there is a significant difference between a tactical decision not to attend court compared with failure to attend that is down to mere inadvertence. While Mr. Quirke's submission majored on what he portentously called "*the fundamental principle of finality*", that is much more relevant to the first type of failure to attend, namely the tactical one, which was the factual context of *Nolan v. Carrick* [2013] IEHC 523 (Unreported, Dunne, J., 25th October, 2015). This is a case of the latter, the inadvertent failure, and in that regard it appears that much more relevant is the judgment of Denning L.J. (as he then was) in *Hayman v. Rowlands* [1957] 1 All E.R. 321 at 323 *"I have always understood that, if by some oversight or mistake a party does not appear at the court on the day fixed for the hearing, and judgment goes against him but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but, so long as he does so, the strength or weakness of it does not matter. I think it plain in this case that the tenant had a defence on the merits. He had a defence on the question whether it was reasonable to make on order for possession against him."*

9. Applying such an approach here it is clear that the order should be set aside and indeed it would be unjust to make any other decision. While Denning L.J. went on to refer to the need for terms, such a need is considerably diluted in the present case given the attitude and conduct of the plaintiff and her solicitor. The plaintiff's solicitor's affidavit makes a number of pettifogging legalistic points, the most flawed of which is that it is claimed to be "*of particular relevance"* that the defendants did not seek promptly to appeal the order of O'Hanlon J. That is a misunderstanding of appellate procedure. The much quicker and more convenient method of addressing an order made in the absence of a party is to apply to the court of first instance to set aside that order or, where applicable, to apply to extend time to do so. It would add to the workload of the appellate courts for no good reason whatsoever to proceed by way of an appeal. Certainly an *ex parte* order cannot be appealed by the respondent, only by an unsuccessful applicant. The respondent's remedy is to apply to the trial court to set the *ex parte* order aside. A similar logic should apply to an order obtained in the absence of one side. The application should be made in the first instance to the court of trial.

10. The defendants have in fact applied to the Court of Appeal to extend time (Court of Appeal Record No. 2019/419), but that appeal is rendered moot if the order is set aside. Mr. Quirke also made the somewhat bizarre argument that, as the defendants' affidavits were before O'Hanlon J. the court had all the relevant information, even though the

defendants were not represented. That misses the point completely because it assumes that the defendants' presence or absence would not have made any difference. Contrary to Mr. Quirke's argument, there is no requirement for a defendant to present new evidence on the merits that was not before the court that granted a judgment in *abstentia.*

11. As to whether the set-aside order should be under the inherent jurisdiction or the rules of court, it is more appropriate to set aside the order under the court's inherent jurisdiction, seeing as the focus of O. 36 is in relation to a plenary hearing. However, one must recall the judgment of Geoghegan J. in *Croke v. Waterford Crystal Ltd*. [2004] IESC 97 [2005] 2 I.R. 383, citing the view of Lynch J. in *D.P.P. v. Corbett* [1992] I.L.R.M. 674 at 678, that *"the day is long past when justice could be defeated by mere technicalities which did not materially prejudice the other party*". The approach here is thus one of applying O. 36 r. 33 by analogy, and Mr. Quirke more or less accepted that. Such an approach is consistent with the approach of Barrett J. in *Bank of Scotland Plc v. McDermott* [2017] IEHC 77 (Unreported, High Court, 15th February, 2017) at para. 8. The question of extending time does not apply to the inherent jurisdiction because that jurisdiction does not have a specific time limit; but insofar as the court is concerned with the question of delay I am satisfied that the defendants acted with all reasonable speed in the circumstances. While Mr. Quirke majored on the extraordinary and unusual jurisdiction to set aside a final judgment as set out in *R. v. Bow Street Magistrates*, ex parte *Pinochet (No. 2)* [1999] 2 W.L.R. 272 and discussed in *Nolan v. Carrick* [2013] IEHC 523, that high threshold is more relevant to a different situation where the absence was as a result of a deliberate decision. A much lower threshold applies where the absence is inadvertent.

Order

12. The plaintiff's legal approach here is the undesirable and somewhat disreputable one of trying to take advantage of a *bona fide* mistake by the other side's solicitor. One can only imagine the reaction if the shoe was on the other foot. It will, on reflection, be interesting to see what happens the next time Mr. Branigan makes a mistake and has to ask for the indulgence of the other side or the court. Sure, the plaintiff's solicitor is bound by instructions; but he doesn't seem to have tried to influence those instructions in a reasonable direction. The tone of his correspondence was belligerent at all stages, even in the letter rejecting a temporary stay pending the defendant solicitor's return from his family holiday. That is certainly not how the game should be played. It is interesting on reflection to note that while the Shorter Oxford English Dictionary defines the mid-16th Century phrase "*To take* (a person) *s[hort]"* as "To take by surprise, at a disadvantage; to come suddenly upon … Often *Naut.* of wind or bad weather. 1553." (3rd Ed., C.T. Onions Ed., 1973), Murdoch and Hunt's *Dictionary of Irish Law* does not (as yet) include the specifically legal sense of the term, namely to take unfair or unsportsmanlike advantage of *bona fide* error by, or unavailability, difficulty or absence of, the other side. If the next edition of the latter dictionary rectifies the omission, which the present application has highlighted, then Mr. John Branigan of Branigan Feddis Solicitors can legitimately boast of having earned his place in the textbooks.

13. The appropriate order then is an order under the inherent jurisdiction of the court setting aside the judgment and order of O'Hanlon J. of 1st July, 2019, and an order re-listing the matter in the Chancery List in early course.