THE HIGH COURT

[2024] IEHC 597

Record No. 2020/4357P

BETWEEN

FRANK REIDY

PLAINTIFF

AND

TOM RYAN AND SABLE CROSS LIMITED T/A FRONTLINE SECURITIES

DEFENDANTS

JUDGMENT *ex temp* of Ms. Justice Denise Brett delivered on the 11th day of July 2024

1. By Order dated 13th February 2023, the High Court (Coffey J.) granted judgment to the Plaintiff against the Second Defendant in default of Appearance, unless an Appearance was entered on its behalf within four weeks thereafter. No Appearance was entered and the judgment therefore took effect on 13th March 2023, with damages to be assessed by a judge at a future date.

2. This is an application brought by the Second Defendant, pursuant to O.13 r.13 of the Rules of the Superior Court ("RSC"), seeking to set aside that judgment. The Court has had the benefit of both written and oral submissions by the parties.

3. The underlying action, commenced by plenary summons dated 18th June 2020, is a claim by the Plaintiff of assault and false imprisonment said to have occurred at the end the All Ireland Hurling final in August 2018. The First Defendant is the nominee of Cumann Lúthchleas Gael ("the GAA") and the Second Defendant is the company which provided stewarding and security services on the day.

4. Limerick won the final. The Plaintiff entered on the pitch after the match and the events surrounding that entry are hotly disputed. There are dramatically contradictory views of what occurred.

5. In his Statement of Claim, the Plaintiff asserts that, on the 19th August, 2018 at the conclusion of the All-Ireland Hurling Final in Croke Park, he, being "heavily involved in the GAA", "was asked by management to collect the jerseys and bibs from the pitch". The Plaintiff informed 'a member of the security personnel and/or stewards of his function and was granted access to the pitch'. He pleads he then saw the wife and father of one of the players having difficulty attempting to gain access to the pitch and he went to their assistance, whereafter he says he was suddenly and unexpectedly set upon by the Second Defendant's personnel. He asserts he was assaulted, had his arms twisted behind him and was thereafter forcefully ejected from the pitch.

6. In contrast, the Second Defendant, in an affidavit sworn by a Director, Allan Gannon, in this application, asserts *inter alia*, that when the Plaintiff encountered its operation manager present on the day, he indicated that he was a member of the Limerick County Hurling Board, which, if true, would have permitted him access to the pitch. However, it is claimed that, upon enquiries with the Limerick management team, the operations manager discovered this not to be true. Thereafter, having asked the Plaintiff to leave the pitch and return to his seat, it is asserted the Plaintiff became abusive and aggressive to the extent of causing injury to the operations manager and ultimately involving Garda intervention. The Gardaí, together with the operations manager and another operative of the Second Defendant then removed the Plaintiff from the grounds, with the gates closed to prevent his re-entry.

7. According to communications exhibited in the proceedings, the incident has been captured on CCTV footage by the First Defendant.

8. It is common case that the main physical injury claimed by the Plaintiff was an exacerbation of a pre-existing injury to his left shoulder.

9. The claim is by way of a plenary action, the essence of which intends a full *viva voce* hearing in due course. The proceedings have progressed as normal against the First Defendant who have filed a full Defence. It has been set down for trial in Limerick and is awaiting a date for hearing in due course.

10. Before considering the position of the Second Defendant, it is incumbent to indicate that the solicitors for the Plaintiff, Houlihan Solicitors, are blameless, not only in their efforts to progress the proceedings on the Plaintiff's behalf but also in their warnings to the Second Defendant of the impending motion, directly and also interacting with who he believed to have been the Second Defendant's insurers at the time. Insofar as there was originally any suggestion of irregularity in obtaining the judgment now sought to be set aside (a ground on which it could be set aside pursuant to O.13(a) RSC), it is accepted by the Second Defendant that there is no such irregularity. This application proceeded solely on the basis that the judgment in default of Appearance was obtained in a regular manner.

11. As against the Second Defendant then, according to the affidavit of the Plaintiff's solicitor, Donal Houlihan, sworn on the 20th February 2024 in response to the motion, two letters, dated the 13th and 27th April 2022 enclosing the plenary summons, statement of claim and an affidavit of verification were sent by him to the Second Defendant. These letters advised the Second Defendant "*to forward [that] correspondence to your insurers or solicitors so that they can enter an Appearance on your behalf*". This invitation appears to acknowledge, quite properly, the need for an insurer or solicitor to be alerted in order to enter the Appearance on behalf of the Second Defendant, being a company.

12. Documentation, including the Personal Injuries Assessment Board claim, had originally been served in 2020 but to what turned out to be an old address, as the Second Defendant had

moved premises in March 2020. Its new registered address was only updated on the Companies Registration Office in September 2020. Once discovered, this had necessitated formal renewal of the summons by the Plaintiff in March 2022 in order to re-serve the Second Defendant.

13. The Plaintiff's solicitor then received initial email correspondence from Marsh Ireland Insurance Brokers ("Marsh") as the Second Defendant's insurance brokers, dated 20th May 2022. Despite further communications by the Plaintiff's solicitors on 21st and 24th May 2022 and 8th July 2022, nothing further was heard from Marsh. The Plaintiff's solicitors again therefore emailed correspondence to the Second Defendant directly on 8th August 2022. The Second Defendant responded to the Plaintiff's solicitors on 18th August 2022 (an email attributed to the insurers in Donal Houlihan's affidavit) indicating a need to interview people who were then on holidays before reverting.

14. A subsequent email, again directly to the Second Defendant (again erroneously attributed in the affidavit to its insurer) in September 2022 gave a final warning of an intended motion for judgment in default of Appearance if such action was not taken imminently. In the absence of a response, the motion was issued and served on the Second Defendant directly by way of letter dated 9th December 2022. Judgment was obtained when the motion came before the Court on 13th February 2023 as no Appearance was entered and there was no appearance to the motion in court.

15. The High Court Order was perfected on the 1st of March 2023. Mr. Houlihan avers it was served on the Second Defendant under cover of letter of the 3rd of March 2023 but without proof of such service. The Order was again served by way of letter dated the 13th July 2023, with service proved. By this time however, the judgment had come into effect in March.

16. The first communication by a solicitor on behalf of the Second Defendant to the Plaintiff's solicitor arose on the 11th October 2023.

17. Allan Gannon, Director of the Second Defendant, has sworn two affidavits, the first on 29th November 2023 grounding this motion and the second on 26th April 2024, in reply to that of Donal Houlihan. The chronology outlined above is generally common case, subject to some variations in dates, according to when some communications were received. The first affidavit sets out the Second Defendant's intended defence to the claim and the circumstances in which the judgment in default of Appearance was granted. Both affidavits set out the series of errors which arose in this case and highlight the actions and the ongoing belief of Mr. Gannon that the Second Defendant's insurers were attending to the litigation on its behalf as he had forwarded all correspondence to them.

18. Mr. Gannon explains a change of premises by the company in March 2020 and the impact of the COVID-19 pandemic from that time and acknowledged that the Personal Injuries Assessment Board ("PIAB") documentation from the Plaintiff was not processed by the Second Defendant nor notified to their insurer at that time. The company's change of address was notified to the Companies Registration Office ("CRO") only in October 2020. The Plenary Summons issued in June 2020 however had been served to the previous address.

19. It is unfortunate that the initial communications were not received and addressed promptly by the Second Defendant, but I accept as reasonable the explanation of the impact of the COVID-19 pandemic in this regard.

20. The Second Defendant acknowledges it was aware of the Plaintiff's claim from 8th July 2021 by way of the PIAB application documents, which were reported on that day to its believed insurance brokers, Marsh.. The proceedings themselves were received by the Second Defendant on 6th May 2022 and again forwarded on that day to Marsh. However, Marsh were not the correct brokers to deal with the Plaintiff's claim, as it had occurred in 2018 when previous brokers (now known as Aston Mark) were the Second Defendant's brokers for the insurer indemnifying the Plaintiff's claim. This confusion was compounded somewhat by the

fact that the Second Defendant's insurance company had been changed by its broker in November 2019.

21. That the Second Defendant had notified Marsh upon receipt of the pleadings in 2022 is acknowledged by the Plaintiff's solicitors, as the affidavit of Donal Houlihan avers that he was in communication with Marsh over 2022. However, Marsh had failed to realise that the date of the Plaintiff's claim was not covered by the insurance policy it had provided for the Second Defendant.

22. Mr. Gannon avers in his second affidavit that on realising the error in notification, he forwarded the relevant correspondence by way of email of 5th September 2022 to Aston Lark advising it of the proceedings. Confirmation of notification to the Second Defendant insurers by Aston Lark was received by e-mail dated the 9th of September 2022.

23. Mr. Gannon further avers that the motion warning received from the Plaintiff's solicitors by email of the 22nd September, 2022 was forwarded that day to Aston Lark, as was the notice of motion and grounding affidavit for the motion once received on the 15th December 2022.

24. Ultimately, at paragraph 22 of the grounding affidavit on behalf of the Second Defendant, Allan Gannon avers: "*I say that through inadvertence my insurer did not instruct solicitors to enter an Appearance on behalf of the Second Named Defendant prior to the Plaintiff entering Judgment in Default of Appearance. I say that at all times I followed claim notification protocols directed by my insurers and I had understood that my insurer was dealing with the Plaintiff's case on behalf of the Second Named Defendant*."

25. Mr. Gannon's position is therefore that, at all times, he believed that his insurance company was taking care of the litigation. He avers that he had fully complied with the notification and protocol provisions that are required under the Second Defendant's insurance policy. Further, he accepts the Second Defendant did receive the direct communications from

Mr. Houlihan's firm and was on notice of the motion to seek judgment in default of Appearance. However, he avers he did not understand the legal consequences of this, but that having forwarded it on to his insurer that he believed all appropriate steps would have been taken on the company's behalf by its insurer. This was a continuing belief, and the company took no further action on the motion.

The law:

26. The relevant law is not in dispute. The motion was brought pursuant to O.13 r.13 which relates to setting aside a *final* judgment but is perhaps more appropriate to O.27 r.15(2), which deals with setting aside a judgment obtained in default. No issue was taken with the Order relied on however and authorities covering applications to set aside judgments arising under both O.13 r.13 and O.27 r.15(2) of the RSC (as they are now) were relied upon. In order to set aside the judgment obtained by the Plaintiff against it, the Second Defendant accepted it must establish:

(i) special circumstances existing at the time of the judgment (i.e. March 2022) that justify the setting aside of the judgment and which must be stated in the Order (*Fabri-Clad Engineering Ltd v Stuart* [2020] IECA 247; *McGuinn v Commissioner of An Garda Siochana* [2011] IESC 33); *De Souza v Liffey Meats Cavan Unlimited Company & Ors* [2023] IEHC 402; *Costern Unlimited Company v. Fenton* [2023] IEHC 552. Special circumstances, which are more than just a good reason and connotes something that is beyond the ordinary but is not required to reach a threshold of extraordinary (*Murphy v The HSE* [2021] IECA 3) must be established before the question of justification arises (*Nolan v BOM of St Mary's Diocesan School* [2022] IECA 10).

(ii) that it has a good defence to the Plaintiff's claim on the merits that has '*a real prospect of success*' (*O Callaghan v O Donovan* (unreported, Supreme Court 13th May 1997); *AIB v Lyons* [2004] IEHC 129; *O Tuama v Casey* [2008] IEHC 49; *O Donovan Dairy Services Ltd c Cashin* [2016] IEHC 476; *Slattery v McCoy* [2021] IEHC 9;

(iii) that the interests of justice favours setting aside the judgment and allowing the defendant defend the proceedings. A court has an "untrammelled discretion" in such consideration (*Maher v Dixon* [1995] 1 ILRM 218). Prejudice can impact on the exercise of such discretion.

27. These principles have most recently been considered by the High Court in two cases: *De Souza v Liffey Meats Cavan Unlimited Company & Ors*. [2023] IEHC 402 (Ferriter J.) and *Costern Unlimited Company v. Fenton* [2023] IEHC 552 (O'Donnell J.) to which I will return.

Special Circumstances:

28. Haughton J. in *Murphy* (relied upon in *De Souza*) notes, "*whether special circumstances arise must be decided on the facts of a particular case, and it would be unwise to lay down any hard and fast rule*".

29. *Murphy* concerned the renewal of a summons under O.8 RSC in which the Court of Appeal distinguished between inadvertence by a Plaintiff and inadvertence by a solicitor, as legal advisors who must be taken to be aware of relevant legal requirements. It indicated, at [7]:

> *"At the level of principle a question also arises as to whether inadvertence on the part of a Plaintiff or their solicitors can ever amount to, or be relied upon as a special circumstance. As far as a Plaintiff is concerned this is very fact dependent and it is*

probably not helpful to speculate in a vacuum. As far as legal advisers are concerned, in my view inadvertence or inattention …. will rarely constitute special circumstances.

30. Generally speaking therefore, mere inadvertence or mistake on the part of a solicitor would not be sufficient to amount to special circumstances, this being "*as part of a general tightening of approach compliance with deadlines and expedition of litigation in light of the constitution and convention imperatives of ensuring that justice is administered efficiently and expeditiously*" (*De Souza v Liffey Meats Cavan Unlimited Company & Ors* [2023] IEHC 402).

Arguments:

31. Counsel for the Second Defendant argued that inadvertence by a solicitor is not at issue in this case, such that the particular facts must be considered. The knowledge of litigation expected of legal advisors placed solicitors in a qualitatively different position to other persons, particularly so since the coming into effect of the stricter rules governing default of pleading effected by SI 454/2022 and their implications. The standard that should be applied to a broker should not be the same as that for a solicitor but rather more akin to that of a Plaintiff in the litigation. Looking at the particular facts of the case, Counsel argued that the Second Defendant had done what was to be expected of it and complied with all of its notification obligations under the terms of its insurance policy, albeit to the incorrect insurer in the first instance. That mistake was rectified once discovered.

32. Any inadvertence was by its insurer(s) in circumstances where the Second Defendant believed that the Plaintiff's claim was being taken care of by his insurers. In this regard Counsel drew the court's attention to the case of *McDermott Hawking v McNeive* [2017] IEHC 17, where that third defendant successfully set aside the judgment obtained against it in somewhat similar circumstances of "*acknowledged administrative error, oversight and inadvertence arising from an incorrect assumption that insurers were dealing with the Plaintiff's claim*

*which was a mistaken belief that led to the Plaintiff obtaining a regular judgment against the third named defendant, but the third named defendant at no time deliberately decided to ignore the proceedin*gs" and it had established a good defence.

33. Counsel also highlighted the difficulties created by the Second Defendant's change of address which occurred at the earlier outset and affected those notifications.

34. In response, Counsel for the Plaintiff highlighted firstly the steps which the Plaintiff's solicitor took to ensure that both the proceedings and the motion were brought to the attention of the Second Defendant and its insurers and progressed, highlighting the amount of correspondence by the Plaintiff's solicitor in that regard. The Second Defendant could not but have known of the intention to obtain judgment on foot of the motion. Secondly Counsel emphasised the absence of any averment from the Second Defendant's insurers as to the reason for why no nomination of solicitors to file an Appearance was made at any stage. She highlighted the activity of the Plaintiff's solicitor as against the inactivity of the Second Defendant's insurers such that special circumstances were not established.

Decision on special circumstances existing:

35. This is a case in which inadvertence of a solicitor is not in issue, but rather an intermediary between the Second Defendant and a solicitor. Entry of an Appearance is a necessary administrative step in the proceedings however can only be entered on behalf of a company by a solicitor. The failure to nominate solicitors for such service resulted in no Appearance being entered on behalf of the Second Defendant company.

36. I accept that there is a qualitative difference between a solicitor and others involved in the litigation process. The authorities opened to the court lay heavy emphasis on the expert knowledge expected of legal advisors. While insurers cannot be said to be unfamiliar with the litigation process, they are not solicitors. No authority involving insurers was opened to the

court other than *McDermott Hawking* (above), in which the order granting judgment was successfully set aside.

37. This however should not be considered a *'get out of jail free card'* (to use the expression of Counsel for the Second Defendant) for insurers or insurance brokers but rather '*an opportunity to give a timely warning… that proper attention must be given'* to the necessary requirements of litigation (to import the words of Haughton J. in *Murphy*, citing Peart J. in *Moynihan v Dairygold Cooperative Society Limited [2006] IEHC 318).*

38. Ultimately, following clarification of the correct insurer and having been notified of the claim by the Second Defendant, action should have been taken and solicitors nominated by the relevant insurer to enter an Appearance. This did not happen. As to the effect of such omission – as Peart J opined in *AIB v Lyons* (above):

> "*one could say that the consequences of this error might be capable of giving rise to a cause of action against the solicitor, and that such be the remedy in the present case, rather than requiring that the judgment be set aside so that the mistake can be nullified and the parties or at least the second named defendant be returned to the situation which would have pertained had the error not occurred. The question which the court must consider in the face of such an argument is whether that meets the justice of the case. In such a situation the second named defendant would be put to the hazard of suing her solicitor and discharging the burden of proof which would rest with her in succeeding in an action against her professional adviser, and to the appropriate standard. That would take a considerable length of time and of course there is no guarantee of success*".

While this may be more pertinent to a consideration of the interests of justice below, it is also of assistance, by way of analogy, to the consideration of special circumstances which rely upon

the default of intermediary insurers who would normally nominate solicitors to enter an Appearance.

39. The relationship between an insured and its insurance company is governed by the terms of relevant insurance policy. It differs from the relationship between a client and a solicitor. I accept the averment of Mr. Gannon that the Second Defendant notified who it believed was the correct insurers (even if erroneously), in accordance with such requirements at each step. Part of the difficulty arising was due to the confusion over which insurer was the relevant insurer covering the date of the incident, to deal with the Plaintiff's claim. I accept that Marsh was notified on 8th July 2021 and 6th May 2022 (as evidenced from the subsequent interaction with the Plaintiff's solicitors) and Aston Lark later in 2022, particularly on 5th September 2022; 22nd September 2022 and ultimately on 15th December 2022 forwarding the Plaintiff's motion for judgment.

40. Such error did however contribute to a series of errors over a period of time: first as to the delay in receipt of the proceedings due to the Second Defendant's change of address, which itself was aggravated by COVID such that the Second Defendant only received the proceedings in September 2022. Secondly, the confusion over which insurer covered the date of the claim in circumstances where, independently of any claim, the Second Defendant had changed insurance brokers after the date of the incident and one broker had changed the underlying insurer in November 2019. Thirdly, the Second Defendant's ongoing belief that in notifying its insurers of each communication received from the Plaintiff's solicitor, the Second Defendant was fulfilling its obligations under its insurance policy and was sufficient to progress matters such that its insurers would take care of the required step(s) to deal with the motion and the litigation.

41. I therefore accept that there are special circumstances existing at the time the judgment crystallised in March 2023 in this case satisfying that first step required to set aside a judgment, namely:

(i) A belief by the Second Defendant that, by complying with the expectations of its insurance policy, and notifying its insurers of all communications received from the Plaintiff's solicitors, including both the warning of and motion itself, which it did, its insurers would take the necessary steps required in the litigation to protect the interests of the Second Defendant, including nomination of solicitors to act on its behalf and enter an Appearance to the litigation as solicitor for the Second Defendant company.

(ii) The omission to enter an Appearance on behalf of the Second Defendant was not an omission made by legal advisors and, in the particular circumstances of this case, arose in circumstances which included confusion in respect of the precise insurer cover relevant to the date of the Plaintiff's claim due to change in both insurance broker and insurer at different times between the incident and receipt of the proceedings.

Existence of a good defence to the Plaintiff's claim:

42. The intended defence of the Second Defendant's to the Plaintiff's claim is briefly set out above. It is clear that there is a significant factual dispute between the Plaintiff and both of the defendants, the case being described by the Plaintiff's Counsel as a swearing match. It is the very nature of plenary proceedings however that they are envisaged to be determined by a *viva voce* hearing where oral evidence is given in court and subject to cross-examination in normal course.

43. In this regard, Counsel for the Plaintiff argued for greater weight to be placed on the account of the Plaintiff set out in the Statement of Claim as it is verified by his Affidavit of Verification whereas the account set out in Mr Gannon's affidavit is hearsay relating to actions of a third party employee. I do not accept such a difference in weight. Had a Defence been delivered in which the account set out in Mr Gannon's affidavit had been pleaded, in all likelihood only one affidavit of verification would have been sworn as to its contents notwithstanding the pleas arise from the evidence of a number of witnesses. It is common case that the Plaintiff was ejected from the playing pitch at the time, but it is the circumstances of that ejection which are in dispute. The only real evidence of significant weight will be that given orally in court and tested by way of cross examination.

44. I am satisfied, without seeking in any way to determine on any issue on the merits, as it would be improper for me to do at this very preliminary stage, that there is a good defence with a real prospect of success demonstrated in respect of the facts of the case. If the Second Defendant successfully establishes the version of events which is set out in the affidavit of Mr. Gannon at trial, that is capable of being a full answer to defeat the Plaintiff's claim.

45. While the Court queried if there was any difference in nature and extent of defence to be demonstrated to set aside a motion for final judgment entered in summary rather than plenary proceedings, given the purpose and intent of the summary summons procedure, as this was not argued in full, I make no further comment.

46. In addition, the Second Defendant raises a second limb to its intended defence to the proceedings, namely, causation. The Plaintiff fully accepts that he had a pre-existing injury to his left shoulder such that the extent of his claim relates to an exacerbation of that shoulder injury when he was escorted - to use a neutral term - from the pitch out of the park. The Second Defendant intends to argue that any injuries which the Plaintiff continues to suffer is related to that pre-existing injury and not related to any injury arising out of the incident. This too

amounts to a good defence with a real prospect of success in reducing if not eliminating any damages which may be awarded.

47. I find that the Second Defendant has satisfied the second requirement as to the existence of a good defence for both of these reasons.

The interests of justice:

48. Special circumstances must *justify* the setting aside of the judgment.

49. A number of factors contribute to my consideration of the balance of justice. I first look at the likely prejudice, if any, that may be suffered by the Plaintiff if the judgment, regularly obtained, is set aside as against the Second Defendant, if it is not.

50. The Plaintiff did not advance specific prejudice as justification against setting aside the judgment.

51. The issue of delay over a number of points in proceedings was however argued by Counsel. Firstly, delay at the outset due to the Second Defendant moving premises in early 2020 but not changing its registered address until October 2020, necessitated renewal of the Summons as against the Second Defendant, pushing back the early stages of proceedings to 2022. Secondly, the delay created by the notification to and engagement with the incorrect insurers. Thirdly, the delay in respect of the motion itself. Fourthly, delay in having the Second Defendant's current solicitors becoming involved in the proceedings, once judgment had been obtained in February, which only occurred in October 2023 and, once involved, in their instructions as to the awareness of the Second Defendant of the proceedings; and lastly, now, the delay in seeking to have the judgment set aside when the full action as against the First Defendant has been set down for hearing. Particular emphasis was laid on the last 2 periods.

52. The Second Defendant denied any delay but further argued, if there was delay, it was not prejudicial or irredeemable by way of Court imposed terms.

53. The confusion in respect of the original understanding of the Second Defendant's solicitor as to the Second Defendant's awareness of the proceedings was clarified, on instructions, as being an absence of awareness by the insurance company instructing the solicitor. The Second Defendant accepts it was aware of the proceedings and of the motion.

54. The relevant considerations have most recently been set out by O'Donnell J. in *Costern Unlimited Company v Susan Fenton* [2023] IEHC 552 in his consideration of the need for the special circumstances to explain and justify the failure" (at para. 33, p. 16).

> *"This engages questions of hardship, injustice or prejudice flowing from a decision to set aside or refuse to set aside a judgment. In this regard the court notes that in parallel with the growing reluctance to tolerate delays there is a further theme running through the case law concerning failures to comply with the rules of court. This theme was emphasised in the majority judgment of the Supreme Court in [McGinn v Commissioner for An Garda Síochána [2011 IESC 33] and explained in the following passage commencing on p. 28 of the unreported judgment of Murray J.:*
>
> > *'In Croke v. Waterford Crystal Ltd [2005] 2 I.R 383, Geoghegan J. endorsed as "pertinent and useful" a dictum of Bowen L.J. in Cropper v. Smith [1884] 26 Ch. D. 700 stated:-*
> >
> > > *"I think it is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. The courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of*

> *favour or of grace … It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right".*

Murray J. went on to observe: -

> *'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. This is not to say that the Courts would not be more stringent in requiring adherence to time limits in particular when set by an order of a court in a particular case, for the reasons outlined by Hardiman J. and referred to above'.*

34. The reference to Hardiman J. was in respect of the now well-known observations made by him in Gilroy v. Flynn [2005] 1 ILRM 290, at p. 293/294, which highlighted the growing cognisance of the unfairness that could arise from delay and cautioned that 'comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end'".

55. O'Donnell J. went on to find that the absence of specific prejudice arising for the Plaintiff and definite prejudice likely in a defendant being unable to defend a case made against him, the balance of justice lay in favour of setting aside the judgment. I agree with that analysis.

56. These proceedings are set down for trial as against the First Defendant, but are low in the Limerick list and await being reached. This in any event would not be before October at the earliest. Counsel for the Plaintiff very fairly acknowledged that in fact now discovery from the first defendant may be required. The existence of CCTV footage, only coming to the

attention of the Plaintiff in the course of this motion, might be sought from the First Defendant. In addition, although not requested as yet, Counsel acknowledged that discovery from the Plaintiff as to his medical records regarding his pre-existing injury may also arise.

57. I do not believe that that any delay identified by the Plaintiff is prejudicial to him on the balance of justice. The Plaintiff must undergo a full plenary hearing against the First Defendant in any event. In those circumstances, provided there is no culpable delay from this point, I do not see that the Plaintiff will be prejudiced if the judgment was to be set aside, and the Second Defendant brought to the same stage in the proceedings as the First Defendant. Any delay identified can be remediated. Strict conditions as to filing of pleadings, including over the imminent long vacation, and progression of the case can be directed.

58. However, in accordance with *McGinn* above, I do find that there would be prejudice for the Second Defendant if it was shut out from defending the claim against it. Evidence of the Second Defendant's witnesses, present on the day, is capable of establishing a successful defence, but all of those matters have to be played out in the normal course before the court of hearing.

Conclusion:

59. For the foregoing reasons, I find that special circumstances as set out above, and as will be set out in the Order of the Court, have been established. I am satisfied that a good defence has been made out by the Second Defendant and that in the interests of justice the judgment that was obtained in default of Appearance ought to be set aside, notwithstanding that the efforts on behalf of the Plaintiff's solicitor were at all times above reproach.

60. At the commencement of this motion, Counsel on behalf of the Second Defendant indicated to the court, quite properly, that costs are due to the Plaintiff in respect of this motion. I do not think there was ever any doubt but that costs would go to the Plaintiff in that respect.

However, the Second Defendant also offered costs of the proceedings to date in respect of the prosecution of the case by the Plaintiff as against the Second Defendant and has indicated that whatever terms the court is mindful to make will be adhered to. I therefore grant the costs of this motion and the costs of the proceedings to date as against the Second Defendant to the Plaintiff, in accordance with such offer.