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IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

Southern Health and Social Care Trust

Plaintiff

and

Paula Tennyson

Defendant

Master Harvey

Introduction

[1] This is an application by the defendant seeking an Order pursuant to Order 13 rule 8 of the Rules of the Court of Judicature (Northern Ireland) 1980, ("the Rules") to set aside a judgment entered against the defendant by the plaintiff on 26 March 2018, where the defendant failed to enter an appearance.

[2] In this application the plaintiff was represented by Mr Montgomery and the defendant by Mr Fee. I am grateful to them for their oral and written submissions and to the defendant's solicitor for preparing a helpful hearing bundle as well as the plaintiff's solicitor for the booklet of authorities.

[3] The plaintiff's cause of action, as set out in the statement of claim endorsed on the writ of summons, dated 21 November 2017, relates to;

> "(a) £78,821.07 being monies due and owing to the plaintiff by the defendant as appointee of her late mother…and pursuant to an agreement to pay

contract dated 21 September 2009 whereby the defendant agreed to pay the assessed means-tested charges for accommodation for the deceased in residential care, such charges being due and owing to the plaintiff pursuant to the Health and Personal Social Services (Assessment of Resources) Regulations (NI) 1993 and as set out in the attached schedule 1.

(b) Further in the alternative, £78,821.07 being monies due and owing by the plaintiff by the defendant for the above-mentioned charges in her capacity as Executrix of the estate of late Mrs Margaret McGuinness.

(c) Further pursuant to section 33A of the Judicature (NI) Act 1978 the plaintiff is entitled to and claims interest on the amounts due at 8% from the date of debt to the issue of the writ, or at such rate and for such period as the court shall think fit.

Particulars of Interest

£26252.22 for a period of 1694 days at a daily rate of £15.50 and continuing at a daily rate of £15.50 per day

AND the plaintiff claims; £105073.29 made up as follows;

(i) Principal sum £78,821.07

(ii) Interest of £26,252.22 and continuing at a daily rate of £15.50 per day

(d) Costs

(e) And £289.25 (or such as may be allowed on taxation) for costs, and also, if the plaintiff obtains an order for substituted service, the further sum of £ (blank) (or such sum as may be allowed on taxation)…"

[4] No appearance having been entered by the defendant, judgment was obtained by the plaintiff on 26 March 2018 in the sum of £107,207.29 which included the principal sum, costs, and interest.

The legal principles

[5] The power to set aside a judgment is contained within Order 13 rule 8 of the Rules which is in the following terms;

"Default of appearance to writ

Setting aside Judgments

8. Without prejudice to rule 7(3) and (4) the court may, on such terms as it thinks just, set aside of vary any judgment entered in pursuance of this Order."

[6] Counsel referred me to several authorities in relation to the legal test. I have considered all of these and will refer to some of them in this judgment.

[7] At paragraphs 33-34 of his judgment in *Bank of Ireland v Mervyn Coulson* [2009] NIQB 96, Gillen J stated that in order to set aside a default judgment, the defendant must show that he has a "meritorious defence" and, referring to a number of authorities, set out the legal principles in relation to the meaning of that expression;

> "[34] The principles to be derived from these authorities are these. First, the procedure for marking judgment in default is not designed to punish the defendant by destroying his right to a fair and full hearing in relation to the plaintiff's claim but rather as part of the disciplinary framework established by the rules of the court which are designed to ensure proper and timeous conduct of litigation (see McCullough's case at p. 584a)
>
> [35] Courts must be wary to form provisional views of probable outcomes which experience has shown can readily be shown to be fallacious when the matter is tried out. In essence I think that Lord Wright at p. 489 in Day's case captured the approach that the courts should adopt when he said: "In a case like the present there is a judgment which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in its favour. The primary consideration is whether he has merits to which the court should pay heed; if merits are shown the court will not … desire to let judgment pass and which there has been no proper adjudication …"

[8] In *McCullough v BBC* - NILR [1996] NI p584 Girvan J highlighted the danger of forming views at an interlocutory stage of the case, stating;

> "If, on the other hand, there is a real triable issue between the parties justice will normally require that the matter should be allowed to go to trial. In determining whether if there is a real triable issue between the parties … I do not see in justice why a defendant should be deprived of the opportunity of presenting his defence merely because the court on the limited material available to it at that stage and on the inevitably somewhat superficial interpretation of that material concludes that the defendant will probably fail. Experience shows that provisional views of probable outcomes can readily be shown to be fallacious when a matter is tried out."

[9] In *Tracy v O'Dowd and others* [2002} NIJB Higgins J also pointed to the limits of affidavit evidence in interlocutory proceedings and stated;

> "If it cannot be said that there is no defence to the plaintiff's claim then the court must consider whether to set aside judgment or not and a major factor in that decision will be whether or not to do so would be unjust in that a defendant would be deprived of the opportunity to present his side of a triable issue between the parties. In that context art 6 of the European Convention on Human Rights as enacted by the Human Rights Act 1998 must be relevant…A litigant is entitled to a fair hearing and an important element in that must be, in appropriate cases, to have witnesses examined orally in a properly constituted court. Where it has not been demonstrated that there is no possible defence, the determination of a litigant's rights should not depend on limited affidavit and documentary material filed on an interlocutory issue."

[10] In *Day v Royal Automobile Club Motoring Services Limited* [1999] 1 W.L.R 2150 the English Court of Appeal (p2157) stated, that in exercising its discretion to set aside a default judgment and assessing the merits of a defence;

> "The approach is distorted if one uses "real prospects of success" as a positive test. That wrongly encourages a test of judging fact on affidavit and then coming to a provisional view of the probable outcome. I agree, however, that the arguable case must carry some degree of conviction but judges should be very wary of trying issues of fact on evidence where the facts are apparently credible and are to be set aside against the facts being advanced by the other side. Choosing between them is the function of the trial judge, not the judge on the interlocutory application, unless there is some inherent improbability in what is being asserted or some extraneous evidence which would contradict it. I would therefore be a little hesitant to elevate the test into, as it is advanced in The Supreme Court Practice, "a real likelihood that a defendant will succeed."

[11] In *American Cynamid v Ethicon Ltd 1975* Lord Diplock at 407 gave his interpretation of the appropriate legal test in such cases;

> "The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried."

[12] In *Bank of Ireland (uk) plc v Eugene Jones and Eamon Jones 2014* J Weatherup helpfully set out the merits threshold for a defendant;

> "(i) In order to set aside a judgment it is necessary that a defendant establishes that there is an arguable defence.
>
> (ii) It is not necessary that a defendant establishes that the defence has a real prospect of success.

(iii) It is not necessary for the court to form a provisional view of the probable outcome of the case.

(iv) The court will not set aside a judgment if there is no defence to the claim apparent from the materials before the court. The merits threshold will require the defendant to establish an arguable defence. This has also been expressed as a prima facie defence, a serious defence, a real triable issue, a defence with merits to which the Court should pay heed."

[13] It is apparent from the decisions of various courts on this subject, that in order to exercise my discretion to set aside the default judgment, the defendant must establish an arguable, serious or prima facie defence with merits to which the court should pay heed.

[14] While the defendant's application is under Order 13 rule 8, counsel for the plaintiff referred me to Order 2 rule 2 on the basis that in the context of the court exercising its discretion it should consider the issue of delay.

[15] Order 2 rule 2 (1) of the Rules provides;

"Applications to set aside for irregularity

2. – (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before any party applying has taken any fresh step after becoming aware of the irregularity."

Counsel for plaintiff referred me to a number of authorities including *Quinn v McAleenan and McConville* [2010] NIQB 31, in which the then Gillen J took into account the "subsequent delay in attempting to set the decree aside."

[16] In *Gentry v Miller* [2016] EWCA Civ 141 a delay of 4 months was in itself deemed sufficient for dismissing application.

[17] In *Mountain Ashe Portfolio Ltd (as Trustee of CF Structured Products BV) v Vasilyev* [2021] EWHC 1853 (comm) the court set aside a judgment despite a 15 ½ week delay, albeit indicating this was "right on the line."

[18] The court must also consider the overriding objective under Order 1 rule 1a of the Rules ;

"1A. – (1) The overriding objective of these rules is to enable the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;
(c) dealing with the case in ways which are proportionate to –
    (i) the amount of money involved;
    (ii) the importance of the case;
    (iii) the complexity of the issues; and
    (iv) the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

(3) The Court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by the Rules; or
(b) interprets any rule."

Chronology

[19] The background to the application is as follows;

- The Writ of Summons was issued on the 22 November 2017 and served on the 23 November 2017.
- On the 4 January 2018 the defendant's solicitor telephoned the plaintiff solicitors office stating that the "writ will be defended."
- There appears to have been no further contact from the defendant or her solicitor. A default decree is obtained by the plaintiff and served on the defendant on the 18 April 2018.
- The defendant's solicitors telephone the plaintiff's solicitor on the 23 April 2018 to advise of their intention to lodge an application to set aside.
- The plaintiff's solicitor refers the matter to the Enforcement of judgments Office in November 2018.
- Further documents are sought by the defendant and provided by plaintiff's solicitors on 8 November 2018 and 13 February 2019.
- The defendant lodges an application to set aside on 4 April 2019.

[20] Various affidavits have been provided to the Court in relation to the present application. They are the defendant's grounding affidavits of 4 April 2019, 24 November 2019 and plaintiff's affidavits of 27 June 2019 and 13 March 2020.

The dispute between the parties

[21] The action relates an alleged outstanding debt owed by the defendant to the plaintiff in respect of outstanding residential charges for accommodation in respect of her late mother.

[22] The defendant signed an "agreement to pay" document on the 21 September 2009. This two-page document, at the top of the first page, states;

> "This is your signed agreement that you are willing to pay (*on behalf of your relative) the weekly charge for accommodation in a residential/nursing home."

[23] At para 2, the defendant has then applied her signature and address after which it states;

> "I…agree to pay from the date of admission a weekly charge to be notified to me when all relevant information is available to the Trust.'

[24] At page 2 it states;

> "By signing this form, I acknowledge that the contents of the agreement have been fully explained to me and I am signing in full knowledge of the implications of my agreement to pay the charges as set out in the agreement."

[25] The defendant asserts in her affidavit of 14 November 2019;

> "At no time were the implications of the signing of this agreement to pay explained to me."

[26] The defendant was an appointee for her late mother and in receipt of her benefit monies. At para 9 of the defendant's affidavit of 3 April 2019, she states that the weekly charge was £104-£116 per week. The payments were initially taken from the defendant's deceased mother's pension income "at no cost" to the defendant. Subsequently, in or around February 2016, the plaintiff conducted a reassessment meaning the weekly costs increased in "the region of £390-£410 per week."

[27] The plaintiff states that the reason for the reassessment was because a probate search had been carried out which revealed the deceased had net assets of £71,000 in her account meaning it appeared she had more assets than originally declared.

[28] The plaintiff wrote to the defendant on 25 August 2015 seeking confirmation as to the source of this £71,000. No reply was received. A further letter was sent on 4 January 2016 indicating a reassessment was being carried out, to include the £71,000. The plaintiff wrote again on 2 March 2016 to advise reassessment had been completed and advised of the new figure. The plaintiff states that there was no contact from the defendant to provide a reason as to why the £71,000 should be excluded from financial assessment. The plaintiff further asserts that no contact was made following the reassessment to challenge the invoices or outstanding balance.

[29] The defendant stated that she did not have sight of the schedule to the writ of summons. In response, the plaintiff indicated that a statement of account and invoice was posted to the defendant on a monthly basis.

[30] The defendant, at para 4 in her affidavit of 14 November 2019 states;

> "...I was in receipt of benefit monies…I had been paying off the amounts owing as per the agreement up until the significant increase based on what I say is the Trust's miscalculation."

[31] The plaintiff's solicitor indicated that, for first time, in an affidavit of 14 November 2019, the defendant clarified the inheritance of the late Mrs McGuinness and states;

> "The recalculation arises due to the previous failure by the defendant to properly and fully disclose the details of the inheritance received by the late Mrs McGuinness."

[32] The debt reduced to £27,877.06 due to this reassessment.

[33] Prior to this, the plaintiff included a figure in respect of inheritance monies in the assets of Mrs McGuinness, backdated to the date when she became a permanent resident in the home.

[34] Mr Fee asserted there is no money owing. His client did not know what she was signing and not aware of its legal effect. On the failure to lodge a memorandum of appearance, she states that "by reason of an oversight on his behalf my solicitor failed to enter an appearance."

[35] Mr Fee contended that this was an irregular judgment for the incorrect amount and should, therefore, be set aside. The parties, he said, "don't know as of today what the varied sum is." There was delay by the plaintiff in progressing the matter and that the defendant agrees to pay the costs of marking judgment but that the costs of the set aside application should be met by the plaintiff.

[36] Mr Fee further stated this is an "unjust enrichment" case, and the plaintiff has a judgment far in excess of the amount to which it is entitled. He pointed out that the only application before the court was a "set aside" by his client. There was no attempt by the plaintiff to vary the judgment obtained.

[37] He admitted delay by the defendant but "this was not fatal in circumstances where the figure was incorrect." Mr Fee asked me to consider that any delay was on the part of the defendant's solicitor and not the defendant herself and she should not be "punished" for this, albeit conceding the defendant could potentially pursue a remedy against her solicitor.

[38] The defendant's position is that there is clearly a defence to the amount set out in the decree. It is, Mr Fee claimed, a "low bar in terms of the test for set aside." and that the plaintiff is "suing for a debt.. and must provide what the debt is.. we still don't know what the actual figure is." He asserts that any money owing has been paid and "the plaintiff moved the goal posts."

[39] Mr Fee conceded that quantum was his client's stronger argument and the main triable issue. He noted the difficulty with mounting a defence that there is nothing owed at all. If the judgment is set aside, he argued there could be a "tight direction for service of a defence and allow the case to be pleaded in the normal way."

[40] Mr Montgomery, on behalf of the plaintiff, responded that the agreement is in plain english and the defendant knew she was bound to pay. There was an agreement in principle to pay the amount and she was paying for a period until the recalculation. She accepts in her affidavit that she was "paying off the amounts owing as per the agreement." Mr Montgomery argued that essentially the defendant is "not objecting to liability but quantum."

[41] He stated that the defendant stopped being paid benefit monies in 2012 and was, therefore, paying the charges until the recalculation in 2016 and highlighted that the defendant is sued in her personal capacity and as executrix of her late mother's estate.

[42] On the issue of delay by the defendant, Mr Montgomery asserted that any application to set aside for irregularity shall not be allowed unless it is made within a reasonable time. Even if there was a reasonable prospect of success, he argues, it could not satisfy the first condition in Order 2, rule 2 which makes clear the application may only be granted if the applicant has acted promptly when it found out about the order.

[43] Mr Montgomery further asserted that if the defendant application is granted;

> "there will be less likelihood of recovering from the estate and/or recovering monies which have been paid out to beneficiaries."

[44] In response, Mr Fee stated there is "no suggestion the estate has whittled down over time, though that can happen."

[45] Mr Montgomery argued the defendant was "nonresponsive, non-compliant" and caused ongoing delay. The court should not accept a bland assertion "it is her solicitor's fault." The issues with the figures are of the defendant's own making and "she has withheld information"

[46] He further stated that;

> "The sum for which judgment was obtained was correctly calculated based upon the information which the defendant chose to share but the amount sought to be enforced has been substantially reduced on foot of information very belatedly provided

Applying the legal test;

[47] I must assess whether the defendant has established an arguable, serious or prima facie defence and as per Gillen J in *Bank of Ireland v Coulson,* whether there are merits in the defendant's case to which this court should pay heed.

The 'agreement to pay'

[48] The defendant argues that the agreement to pay form, which she admits signing, is not enforceable. In short, she did not understand the purpose of the agreement. She does not believe she is indebted at all and has a prima facie defence to the claim.

[49] Counsel for the defendant candidly conceded that this limb of their defence i.e that the defendant is not liable to pay anything as she was not aware of the import of what she signed up to is the weaker part of her case.

[50] The defendant was paying the charges raised by the Trust for a period. It would seem on balance that she accepted she was liable to pay the nursing home charges in question. To quote her own words;

> "I had been paying off the amounts owing as per the agreement up until the significant increase based on what I say is the Trust's miscalculation."

[51] On this point, I determine that there is no triable issue. The agreement to pay form is brief, in plain English, without legal jargon, in large font and signed twice by the defendant. The language could not be clearer; "I…agree to pay from the date of admission a weekly charge.' It states that the defendant is signing on the basis that she is "willing to pay (*on behalf of your relative)."

[52] The defendant suggests she merely thought this was a "procedural step" as opposed to "incurring any liability for the care provided to my late mother." Taking a commonsense approach to interpretation of this document and in all the circumstances of this case, on balance, I do not conclude that this is sufficient to mount a serious defence to which the court should pay heed.

The Trust's calculation

[53] The defendant's main argument is in relation to quantum. In short, the defendant contends the plaintiff obtained a judgment for an incorrect amount. However, I note the plaintiff concedes the error in the figure and has recalculated the amount owed. The dispute, according to the plaintiff, lies in the fact the original erroneous figure was arrived at due to what they claim was a lack of information from the defendant.

[54] While I note the defendant takes issue with the amount of the judgment, I also observe that at no time prior to November 2019, some 4 years, and 3 months after first being asked for further details to assist the Trust's calculation, did she cooperate. She failed to provide the necessary information and answers to

reasonable requests from the plaintiff which would have led to a different calculation.

[55] To date, there is no justifiable or reasonable explanation proffered as to why she did not assist in this process. This is inexplicable given she now disputes the figure arrived at in the Trust's calculations which were based on the information available to it. Put simply, if she had "played ball," the actual figure sought by the plaintiff would have been much lower and may well have been agreed, purely on quantum terms at least, leaving the dispute solely as to enforceability of the agreement.

[56] In fact, the amount owed has indeed now reduced considerably on foot of the updated information belatedly supplied by the defendant.

[57] On the balance of probabilities, I conclude there is no triable issue in relation to quantum.

[58] The Court has powers to not only set aside but also to vary judgments. The plaintiff's figures were erroneous at the time it sought judgment only insofar as the information underpinning the calculation was undermined due to the absence of a response from the defendant.

[59] While delay is not a determining factor, this issue is relevant when one considers the comments of the then Gillen J in *Bank of Ireland v Coulson*. He noted that the court rules are part of a disciplinary framework "designed to ensure proper and timeous conduct of litigation." It is noteworthy the plaintiff issued proceedings in late 2017 and was met with no meaningful response. They sought and obtained judgment in April 2018. It was a further year again before the defendant took proactive steps to deal with the matter and lodge an application to set aside in April 2019. I tend to favour the plaintiff's assertion that there has been exceptional delay on the part of the defendant "before, during and after the proceedings." The only attempt to explain this is that there was an apparent oversight by her solicitor and the need to obtain further information from the plaintiff at a late stage in the period from November 2018 to February 2019

[59] In light of the updated recalculation, the plaintiff now seeks the sum of £27,877.06, plus interest.

[60] Having determined that there is no triable issue in relation to the defendant's liability in principle to pay the relevant charges to the plaintiff, I do not consider, on the facts of this application, that quantum is of itself a triable issue in respect of which there could be an arguable defence which would require me to set aside the Judgment.

Conclusion

[61] The court has power under Order 13 rule 8 to set aside or vary a judgment. I have taken into account the legal principles relevant to applications of this nature and considered the overriding objective pursuant to Order 1, rule 1a.

[62] I refuse the defendant's application to set aside the judgment and award costs to the plaintiff.

[63] Further, I vary the judgment of the court dated 26 March 2018 and adjudge that the defendant do pay the plaintiff the sum of £27,877.06 plus interest at 8% from the date of issue of the writ. I direct that the plaintiff's solicitor shall within 14 days hereof set out in correspondence to the defendant a detailed breakdown of this figure, to include the interest calculation.