

THE HIGH COURT

[2016 No. 1740 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

NICHOLAS O'HARA AND NOLEEN O'HARA

DEFENDANTS

EX TEMPORE JUDGMENT of Mr. Justice Tony O'Connor delivered on the 25th day of November, 2019

1. The defendants applied pursuant to Order 13, rule 11 of the Rules of the Superior Courts ("RSC") to set aside the judgment in default of entering an appearance marked by the registrar on 23rd August, 2017, for €613,445.74 and costs of €508.

The law

2. Lord Russell of Killowen, at the very beginning of his judgment in *Evans v. Bartlam* [1937] AC 473, [1937] 2 All ER 646, explained in relation to a similar rule, O. 13, r. 10, that it is "*unfettered by any conditions, and purports to confer upon the court or a judge full power to set aside a judgment signed in default of appearance, and, if thought fit, to impose such terms, as a condition of the setting aside, as may be just*" (p. 481, p. 651).
3. Peart J. in *AIB v. Lyons* [2004] IEHC 129 (unreported, High Court, 21st July, 2004), set aside a judgment obtained in default of appearance against the second named defendant on 16th December, 2003. There the defendant's solicitor conceded his mistaken impression that a motion was required to obtain judgment. Therefore that was a case where judgment in default of appearance was obtained by virtue of a mistake by an agent of the second named defendant. The second named defendant submitted that the relevant facilities letter was only addressed to her husband, the first named defendant. A judgment mortgage on foot of the default judgment was registered against her interest in a property. It was accepted by Peart J. that she had a possible defence which had a reasonable prospect of success. The second named defendant offered undertakings to leave the judgment mortgage in place and not to dispose of the relevant property. Peart J. in those circumstances set aside the judgment on condition that the second named defendant comply with the said undertaking.
4. Mr. Rowan, counsel for the plaintiff in these proceedings, stressed that the setting aside of the entire judgment may affect the status of the judgment mortgage if further judgment mortgages are registered before a determination of a plenary trial. Mr. Pidgeon, counsel for the defendants, pointed to the wide discretion given to the court to do justice between the parties.

Mistake

5. The solicitor for the defendant swore three affidavits and the first named defendant swore an affidavit subsequently. The said solicitor averred in his first affidavit that his instructions were that if his clients "*had been aware that the Plaintiff would, in spite of their engagement, [i.e. of his firm] proceed to Judgment in default they would of course have instructed his office to enter an Appearance*". Counsel for the plaintiff submitted

that this does not square with the failure or omission of the defendants' solicitor to confirm, as requested by the plaintiff's solicitor in a letter dated 5th October, 2016, that the defendants' solicitors had authority to accept service of the proceedings. Further, it was contended for the plaintiff that the first named defendant did not in his one and only affidavit confirm the thrust of the averments made by the plaintiff's solicitor.

6. Counsel for the plaintiff then focused on the elapse of time from the service of the summary summons on the defendants on 4th October, 2016, and the date of judgment one year later on 23rd August, 2017, to the issue of the motion herein on 20th October, 2017. It was suggested that this did not amount to a mistake like that found by Peart J. in *AIB v. Lyons*. This Court recognises the officer of court status of a solicitor; it would be unfair, if not invidious, for this Court to impugn the integrity of such a solicitor by finding effectively that his averments were untrue or disingenuous. The solicitor for the defendants explained at para. 8 of his third affidavit his expectation from more than 30 years of practice that a copy of the proceedings would have been sent to his firm given the exchange of communications which had preceded the issue of the summary summons. I am satisfied that the failure to enter an appearance was the result of "*a simple lack of communication*" in the words of the solicitor for the defendants.

The defences

7. The proposed defence relates to:-
 - (i) The payment in cash around February 1998 of some IRE23,600 to an officer of the plaintiff;
 - (ii) The incorrect application of the interest rate to the relevant account for:-
 - (a) Much of the loan period or;
 - (b) From 2008 to 2012 when an undisputed refinancing arrangement was completed;
 - (iii) A counterclaim for the effects of applying the allegedly incorrect interest rates to the loan.
8. The first named defendant in his affidavit explained the overcharging allegations which were the subject of correspondence between the solicitors for the parties prior to the issue of the summary summons. He exhibited an account which confirmed a statement of an actuary (who he had engaged) that the plaintiff had overcharged €369,985. The defendants have also offered an undertaking not to dispose of the property which is the subject of a judgment mortgage based on the summary judgment. Further, they have also, through counsel, indicated that they will deliver a defence soon if the matter is sent forward for plenary hearing. No effort was made on behalf of the defendants to issue a claim for the effects of a counterclaim of the alleged overcharging. The claim for accommodating the cash sum of IRE23,600 has not been articulated other than in correspondence which predated the summary summons. It appears that this is a claim which can be the subject of a separate claim or a counterclaim in these proceedings.

9. If this Court had been tasked in 2017 to determine whether the plaintiff bank was entitled to judgment for the undisputed interest, it would probably have sent that part of the claim to plenary hearing. There is a realistic dispute about the applicable interest rates.
10. The Court will therefore:-
- (i) Make an order varying the summary judgment to the sum of, and subject to correction by counsel, €243,460.74 (being €613,445.74 less €369,985) plus the costs at summary judgement level relevant to that sum;
 - (ii) Note the undertaking of the defendants not to dispose of the property (which is not registered in the land registry), which is the subject of the judgment mortgage, until the expiration of two calendar months following delivery of judgment in the plenary trial of these proceedings;
 - (iii) Order that the defendants be restrained from seeking to vacate the said judgment mortgage;
 - (iv) Order that the plaintiff be restrained from seeking to act further on the said judgment mortgage for the sooner of (a) the period of one calendar year from today's date or (b) the determination or compromise of the plenary proceedings including any counterclaim to be pursued;
 - (v) Direct the defendants to deliver a defence in any counterclaim, subject to what counsel might submit, by 16.00 on 19th December, 2019, and the plaintiff to deliver any reply or defence, if necessary, by 16.00 on 20th January, 2020;
 - (vi) Give liberty to the parties to apply for further directions to this Court on Tuesday 28th January, 2020, at 10.30 provided two clear days' notice by letter is delivered by a firm of solicitors to the other firm on record.

Application for costs

11. This is now an application for the costs of the motion seeking to set aside summary judgment. Counsel for the plaintiff submits that this is a mistake on the part of the defendants. Order 99 RSC requires me where possible to determine the issue of any interlocutory costs motion. I cannot determine the issue of the costs for this motion because it may emerge at the trial of these proceedings that the correspondence which predated the issue of the summary summons is relevant. At the moment, the Court only has an interpretation as proposed by counsel. It is preferable for the trial judge to consider the relevance and context of that correspondence. I reserve the issue of costs to the trial judge for determination.
12. As requested I also grant liberty to the plaintiff to apply within seven days of the perfection of this order for a stay on any part of the order made today which the plaintiff may wish to appeal to the Court of Appeal.

Postscript

13. On 4th December, 2019, the application by the plaintiff for a stay on the directions for closing the pleadings was refused.