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Judgment: approved by the Court for handing down (subject to editorial corrections)*	***Delivered:*** *06.09.2019*

No. 17/52978

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

Between:

FIRST CENTRAL INSURANCE MANAGEMENT LIMITED

Plaintiff;

AND

WILLIAM SINGLETON

Defendant

Master McCorry

[1] By summons issued 13 September 2017 the defendant applies for an order setting aside judgment in default of appearance entered on 7 July 2017. By writ of summons issued 1 June 2017 the plaintiff, an insurance company, sought a declaration pursuant to Article 98A(2) of the Road Traffic (Northern Ireland) Order 1981 that: (a) it was entitled to avoid a motor insurance policy which it had issued to the defendant on grounds of non disclosure of a material fact by the defendant; (b) it is not obliged to pay any sum under Article 98 of the Act on foot of the policy. The defendant failing to enter an appearance to the writ, the plaintiff entered default judgment on 7 July 2017 in the terms of the claim for a declaration indorsed on the writ. The defendant acted expeditiously when the default judgment was served on him on 9 August 2017, attending with his solicitor on 14 August 2017 with this summons being issued a month later.

[2] There were 2 named drivers on the policy, the defendant himself and a friend Rodney Wilson. On 31 March 2016 the defendant was travelling as a front seat passenger in the insured vehicle (a Ford Mondeo) which was being driven by Mr Wilson. It was involved in a serious collision with another vehicle and the defendant and persons in the other vehicle sustained significant injuries. The occupants of the other vehicle have sued Mr Wilson. The defendant has not done so, although a letter of claim was sent but no claim pursued because of the avoidance of the policy.

[3] Using an aggregator website, MoneySupermarket.com the defendant applied for the policy online in March 2015. The policy was renewed automatically on 4 March 2016 when the plaintiff informed the defendant that the policy would be renewed automatically subject to notification of any changes. At the time of the original application the defendant correctly stated on the aggregator proposal form that he had no non-motoring criminal convictions. The plaintiff's own form asked only about motoring convictions. However, at Armagh Magistrates Court on 18 December 2015, during the term of the first policy but before renewal, the defendant pleaded guilty to a number of charges with respect to management of toxic waste and was sentenced to 4 months imprisonment suspended for three years and ordered to pay fines totalling £2000. At the time of renewal in March 2016 these convictions were not disclosed to the plaintiff and it is this failure to disclose that constitutes the plaintiff's claim to entitlement to avoid the policy.

[4] In any application to set aside a regularly obtained judgment the primary issue for the court is whether or not the defendant can demonstrate that he has a defence to the plaintiff's claim, which has some prospect of success, and almost invariably an affidavit setting out the merits of the defence is required. There is considerable case law dealing with this issue and various formulations of the test to be applied. The basic principles are set out in Evans v Bartlam [1937] AC 473: (a) per Lord Atkin at 480; (a) The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure; (b) The Rules of Court give to the judge a discretionary power to set aside the default judgment which is in terms 'unconditional' and the court should not lay down rigid rules which deprive it of jurisdiction; (c) the primary consideration is whether the defendant has merits to which the Court should pay heed; and (d) there is no rigid rule that the defendant must provide a reasonable explanation for delay in bringing the application but clearly this is a factor to which the court will have regard in exercising its discretion to set aside a default judgment.

[5] The Evans v Bartlam principles were referred to by Sir Roger Ormrod in Alpine Bulk Transport Co Inc v Saudi Eagle Shipping Co Inc [1986] 2 Lloyd's rep 221, where the Court concluded that to arrive at a reasoned assessment of the justice of the case the Court must form a provisional view of the probable outcome if the judgment were to be set aside. In McCullough v BBC [1996] NI 580, Girvan J held that the primary consideration was whether a defendant had merits justifying the matter going to trial. At p583-584 he held:

"For my part I consider that the defendant should succeed in an application to set aside judgment if he can show that he should in the interests of justice be permitted to defend the action…. If it is clear that a defendant has in reality no defence to the plaintiff's claim the setting aside of judgment would be unjust to the plaintiff and would not be unjust to the defendant since it would merely delay the enforcement of the plaintiff's undoubted rights and send to trial an indefensible case. 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."

Girvan J differed from Sir Roger Ormrod in Evans v Bartlam in that he saw no "compelling reason why the court should be required to form a provisional view of the probable outcome if the judgment were to be set aside" as this exercise would have to be carried out at an early stage on the basis of limited material.

[6] Higgins J considered the issue in Tracy v O'Dowd [2002] NIJB 124, wherein after analysing the various authorities he concluded at p132:

"If the defence put forward has no prospects of success then the way ahead is clear. There is nothing to be gained by setting aside a regularly obtained judgement even on conditions and ordering a trial, the result of which is a foregone conclusion. If the situation is otherwise, that is, that it has not been demonstrated that the defence has no prospects of success, then it follows a fortiori and logically that the case must have prospects of success. Like Girvan J I find it difficult to see how the question, whether the defence is likely to succeed, can or should be determined on affidavit evidence when much may depend on the credibility or recollection of witnesses or the evaluation of forensic evidence or even the construction of a document. If it has not been demonstrated that there is no prospect of the defence being successful, is a defendant, other matters being equal not entitled to have his side of the case heard"

[6] In this jurisdiction a more recent example of a decision in an application to set aside default judgment is that of Gillen J in Bank of Ireland v Mervyn Coulson (unreported judgment delivered 29.10.09). This was an appeal from an order of Master McCorry dated 11 March 2009 dismissing the application of the defendant Mervyn Coulson to set aside a judgment entered on behalf of the plaintiff on 30 November 2007. Affirming the master's order Gillen J held-

"[32] If a judgment is regular, then there is an almost inflexible rule that there must be an affidavit of merits i.e. an affidavit stating facts showing a defence on the merits (Farden v Richter (1889) 23 QBD 124).

[33] For the purpose of setting aside a default judgment, the defendant must show that he has a meritorious defence. The meaning of this expression has been discussed in a number of authorities including Alpine Bulk Transport Company Inc. v Saudi Eagle Shipping Company Inc., The Saudi Eagle (1986) 2 Lloyd's Report 221 CA, Day's case, Ann McCullough v British Broadcasting Corporation (1996) NI 580.

> [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. 584)
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> [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:
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> > *"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 …"*

(Reference to the Day case is to Day v RAC Motoring Services Limited [1999] 1 AER 1007.)

[7] The hearing of this summons was delayed due to intervening applications by both parties for discovery of the proposal and other on-line forms and the filing of further affidavits. The defendant's initial grounding affidavit by his solicitor filed 7 September 2017 was supplemented by an affidavit by the defendant himself filed 12 March 2018. The plaintiff's solicitor filed a replying affidavit on 7 November 2017 which was supplemented by affidavit by a Mr Menzies, a senior fraud analyst with the plaintiff, filed on a date not clear to me and a further affidavit setting out the online application procedure sworn 8 January 2019.

[8] It is of course imperative that this interlocutory court does not embark upon a weighing of the affidavit evidence in order to make findings of fact, particularly where the evidence is conflicting. This is not in any way a trial of the action but rather a matter of applying the law to the uncontested facts to see if they afford an arguable defence to the claim. It is possible in this case to identify the essential facts which are not contested and which may be summarised as follows.

[9] The aggregator's application form requested details of non-motoring criminal convictions which at the time of the initial application the defendant's wife, completing the form on his behalf, correctly answered in the negative. The form explained the need to notify the insurance company of such convictions and by clicking on a "Need help" box the need for this is explained albeit in very general terms. The plaintiff's own form did not request non-motoring convictions. At the time of renewal the defendant did not notify the plaintiff about the non-motoring convictions in respect of waste management offences to which the defendant had pleaded guilty.

[10] The renewal letter is important. It does not ask for non-motoring convictions but does emphasise clearly the need to inform the plaintiff of any changes since the inception of the original policy. It indicates that if the details are up to date there is no need to do anything and advises the insured to: "Please check your details are up to date so we can give you our best price. Your documents are safely stored in your customer portal." It advises of the need to "check your documents carefully and let us know if there are any changes...". It gives examples of material changes including employment status, vehicle use, any new motoring convictions, and any new losses and warns that if details are incorrect the policy may be invalid. It is common case that the defendant did not access his customer portal. If he had he would have seen among his documents the Statement of Motor Insurance which contains the basic policy information and carries the warning: "Please read the following information carefully. It is a record of the statements made and information given by you and constitutes the basis of your contract of insurance. If any information is omitted or is incorrect, please telephone us immediately ....if any of the information is incorrect it could invalidate your insurance." These warnings are further emphasised under the heading "Important information". Then, at clause 4, the Statement of Motor Insurance asks: "Has any driver had any criminal convictions, cautions or pending prosecutions?" Quite distinctly, at clause 6, it asks for motoring convictions. As the defendant had not accessed the customer portal he did not see the Statement of Insurance and was unaware of its content.

[11] At a point in the application process on the aggregator's website a range of quotes is provided and the potential insured can then choose one and go to that insurer's own website. The plaintiff's website identifies 5 steps, 3 of which will have been completed on the aggregator's site so it is clear that the insurer is proceeding on the basis of the information provided on that site which has been transferred automatically to its site (as is apparent by clicking on the "Statement of Fact"). There are a number of important statements including: "I have never been convicted of ...any non-motoring offence ...". Also: "I confirm that all details relating to this quote are accurate. I understand that knowingly providing false, misleading or inaccurate information is fraud. This will invalidate my insurance ...".

[12] Under the old law insurance contracts were governed by the principle of uberrimae fidei or utmost good faith, in other words an absolute duty upon the potential insured to make complete disclosure, modified and tempered to some extent by the developing case law. However, since 2012 the law has been codified in the Consumer Insurance (Disclosure and Representations) Act 2012 which applies in this jurisdiction. Section 1 provides that the Act applies to consumer insurance contracts which means a contract of insurance between "(a) an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession", and a person who "carries on the business of insurance". It is agreed that the Act applies in this case.

[13] Section 2 provides "(2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer. (3) A failure by the consumer to comply with the insurer's request to confirm or amend particulars previously given

is capable of being a misrepresentation for the purposes of this Act (whether or not it could be apart from this subsection). (4) The duty set out in subsection (2) replaces any duty to disclosure or representations by a consumer to an insurer which existed in the same circumstances before this Act applied." (5) (a) "any rule of law to the effect that a consumer insurance contract is one of the utmost good faith is modified to the extent required by the provisions of this Act ...". It is clear therefore that the principles which applied before the Act with respect to the duty on the consumer making disclosure and representations to the insurer have been replaced by a test of reasonable care. The consumer must take reasonable care not to misrepresent including when confirming or amending particulars previously given, which it seems to me must cover the situation where a policy is being renewed.

[14] Section 3 provides: "(1) Whether or not a consumer has taken reasonable care not to make a misrepresentation is to be determined in the light of all the relevant circumstances." Subsection (2) sets out examples of things which may need to be taken into account in determining if the consumer has exercised reasonable care. These include the type of insurance contract and its target market, any relevant explanatory material, the clarity and specificity of the insurer's questions, whether or not an agent acted for the consumer and of particular relevance in the present case: "(d) in the case of a failure to respond to the insurer's questions in connection with the renewal or variation of a consumer insurance contract, how clearly the insurer communicated the importance of answering those questions (or the possible consequences of failing to do so)." Subject to (4) and (5) the standard of care required is that of "a reasonable consumer". If the insurer was, or ought to have been, aware of any particular characteristics or circumstances of the actual consumer, those are to be taken into account; and "(4) a misrepresentation made dishonestly is always to be taken as showing lack of reasonable care". It is not for this court to decide whether or not the defendant has exercised reasonable care in this instance, but it is appropriate for this court to consider the documentation set out at [9] to [11] above in assessing whether or not the defendant, taking into account the relevant circumstances including those examples at subsection (2), has an arguable defence that he did so.

[15] Before leaving the Act section 4 provides for "qualifying misrepresentations", that is a misrepresentation which affords the insurer a remedy. To qualify, the misrepresentation must be made before inception of the contract, be in breach of the consumer's duty to take reasonable care, and the insurer can show that without the misrepresentation that insurer (not for example insurers generally) would not have entered into the contract either at all or only on different terms. The remedies are set out at Schedule 1 and in the case of a deliberate or reckless misrepresentation may avoid the contract without return of premiums. If the misrepresentation was careless, and but for it the insurer would not have entered into the contract on any terms, then it may avoid the contract but return the premium. If it would have entered the contract but on different terms then the insurer may treat the contract as if those terms applied.

[16] Finally section 5 provides that qualifying misrepresentations must be either "deliberate or reckless", or "careless". It is reckless where the consumer "(2) (a) knew

that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and (b) knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer". Subsection (3) provides that a qualifying misrepresentation is careless if it is not deliberate or reckless. It is for the insurer to show that it was deliberate or reckless but it is presumed, unless the contrary is shown, that the consumer had the knowledge of a reasonable consumer, and knew that a matter about which the insurer asked a clear and specific question was relevant to the insurer. In the present case the question about non motoring convictions appears on the form on the moneysupermarket website but not the plaintiff's own form. However, the plaintiff encourages the applicant for insurance to go to the customer portal, which can be done simply and easily by using the link provided, where the Statement of Insurance can be seen, which very clearly asks about non-motoring criminal convictions.

[17] Ultimately, if the case goes to full hearing, the court will have to decide whether a failure to access the customer portal, which was the only way to view the insurance documents, was reckless or deliberate, demonstrating a failure to exercise reasonable care not to make a misrepresentation, or just careless, or in all the circumstances arguably not careless and not a failure to take reasonable care. Obviously it is much more difficult for the defendant to argue, with any prospect of success, that a reasonable consumer's failure to go to the customer portal and view the insurance documents, may not be careless, than to argue that it is not deliberate or reckless. The distinction is crucial in that if the defendant is unsuccessful in arguing that his failings were not deliberate or reckless, the plaintiff is entitled to avoid the policy without return of premium. If the defendant is deemed not to have been reckless or deliberate in his misrepresentation, but was careless, then the plaintiff is still entitled to avoid the policy but only if it can show that but for the misrepresentation it, as opposed to another insurer, would not have entered the contract, or would have done so on different terms. That, it seems to me is a question of fact for the court to decide rather than the subject of evidence by experts in the insurance field.

[18] The defendant referred to numerous authorities, mostly pre-dating the 2012 Act and in some instances therefore of less weight. Reynolds v Phoenix Insurance Co [1978] 2 Lloyds Rep 440 at 459 says that an insurer ought not to regard a conviction as material unless it can fairly be said to have a bearing on the risk proposed. Whether a consideration is material or not is a question of fact to be determined by a judge or jury as the trier of fact: Morrison v Muspratt (1827). The questions put by insurers in their proposal forms may enlarge or limit applicant's duty of disclosure: Roselodge Ltd v Castle [1966], Vrbanic v London Life Insurance Company [1996]. Would a reasonable man (reasonable consumer since the Act) reading the form (in this case this would have to include the renewal email), be justified in thinking that the insurer had restricted his rights to receive some information by not asking for it? (Doherty v New India Insurance Co [2005] All ER (Comm) 382, R&R Developments Ltd v Axa Insurance UK Plc [2009] EWHC 2429). These cases are not fundamentally inconsistent with the provisions of the Act, and are illustrative of how the courts

have approached the issue of misrepresentation in insurance cases, but ultimately it is to the Act that this court must turn.

[19] Plaintiff's counsel approaches the case with focus on the question of materiality, i.e, was the misrepresentation material to the plaintiff's consideration of the application and renewal. He queries the terminology used in the defendant's affidavit when describing the non-motoring convictions where there is reference to "other ancillary offences" without detail as to what they were. Since the hearing the court has seen the certificates of conviction and it is clear the convictions all related to waste management: a charge of keeping controlled waste (namely waste oil) on land without a waste management licence contrary to Article 4 (1) and (6) of the Waste and Contaminated Land (NI) Order 1997; and 4 charges of failing to comply with the standard procedure for transfer of hazardous waste by providing a copy consignment note to the Department of Environment pursuant to Regulations. The defendant took responsibility as the manager of the company concerned and pleaded guilty. Counsel suggests that the way that this was described in the defendant's affidavit was dishonest, but I am not persuaded that this characterisation is entirely merited and it seems to me that the offences consist of keeping hazardous waste on land and failing to attend to the requisite paperwork. These are serious offences, as is reflected in the sentence imposed, but they are not offences of dishonesty.

[20] The question then is how does the court decide whether or not these convictions, if notified to the plaintiff, would have caused it to refuse to offer insurance to the defendant, either at all or on the terms offered in ignorance of the convictions? It is not simply a case of the plaintiff saying had we known we would have rejected the application because it could do that even in a case of innocent misrepresentation. It is clear from Section 4 of the Act that the test is clearly not based on what other insurers may or may not do in such circumstances, but what this insurer would have done. This is not answered by what the insurer now says, with the benefit of hindsight, it would have done had the non-motoring convictions been disclosed at renewal, but rather what evidence suggests it would have done at the time if the non-motoring convictions had been disclosed. Again this is a factual issue perhaps requiring an examination of what this insurer has done in similar cases, which of course would require further discovery, a stage not yet reached in this case. I am mindful of Girvan L.J.'s caution in McCullough v BBC about attempting to reach provisional views as to the likely outcome at an early stage on the basis of limited material, repeated by Gillen L.J. in Bank of Ireland v Coulson.

[21] I am satisfied that there are factual issues to be determined in this case before a court could decide whether or not in all the circumstances the defendant failed to exercise reasonable care; and the effect in terms of the plaintiff's decision making, of disclosure of the non-motoring convictions at renewal stage, if they had been disclosed then. Whilst I have the impression, as opposed to a provisional view, that the defendant may face an uphill struggle, in successfully mounting a defence, I cannot conclude at this stage that he has no prospect of doing so. That being the case he is entitled to defend the action and the default judgment must be set aside to enable him to do so.