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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**08/10/2026**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

Between

BELFAST HEALTH AND SOCIAL CARE TRUST

Plaintiff

-and

GAVIN NIXON

Defendant

Mr Finbar Lavery (instructed by BSO Legal Services) for the plaintiff.
Mr Mark Bassett (instructed by KRW Law LLP) for the defendant.
Mr Matthew Corkey (instructed by the Official Solicitor) as amicus curiae.

MASTER HARVEY

Introduction

[1] The plaintiff commenced these proceedings by writ issued on 19 December 2022 seeking £75,372.68, together with interest, in respect of residential accommodation provided to the defendant, between 4 March 2020 and 18 November 2022. The charges relate to the defendant's residence at Domnall Intermediate Care Centre, Old Dundonald Road, Belfast ("Domnall") since 8 August 2018, initially following a fracture to his right ankle.

[2] The defendant entered an appearance but did not serve a defence. Judgment in default was entered on 11 September 2023 for the principal sum together with costs and interest, producing a total judgment of £95,838.23.

[3] The defendant applies for an order setting aside the judgment in order to serve a defence. At the hearing I granted permission to amend the summons to reflect the correct relief under Order 19 rule 10 of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules"). The defendant accepts this was a regular

judgment properly obtained. The matters for consideration are therefore whether the defendant has demonstrated an arguable or meritorious defence and the significance, in the exercise of the court's discretion, of the circumstances in which judgment was permitted to be entered and the subsequent delay in seeking to set it aside and any prejudice arising.

[4] There has been some delay in determining this application due to uncertainty as to the defendant's litigation capacity. Professor Farooq Khan, instructed on behalf of the defendant, and Dr Barbara English, instructed by the Official Solicitor following my direction that it act as amicus curiae, initially reached differing conclusions. I directed the experts to meet and address questions agreed by the parties and approved by the court. In their joint report dated 12 April 2026, they agreed that the defendant has litigation capacity, he can understand the proceedings, give cogent instructions, understand and weigh relevant information and advice, appreciate the potential costs consequences, and give evidence. They do not, however, consider him capable of conducting the proceedings without representation and regard him as vulnerable, requiring appropriate support and adjustments.

Background

[5] The chronology leading to judgment is material. According to the plaintiff's evidence, the writ was served on 20 January 2023, and the defendant's solicitors entered an appearance on 15 February 2023. On 30 May 2023 the plaintiff's solicitor indicated that judgment would be sought unless a defence was served within 14 days. At the defendant's solicitor's request, matters were subsequently held in abeyance until 21 June 2023. No defence was served and the plaintiff applied for judgment on 29 August 2023. The decree was served upon both the defendant and his solicitor on 20 September 2023.

[6] The account advanced in the grounding affidavit of the defendant's solicitor is that difficulties arose in obtaining instructions. The defendant contacted his solicitors on 31 March 2023 indicating that he was struggling with his mental health and unable to provide instructions. Further attempts were made to obtain instructions on 30 May and 6 June 2023, but it is said that the defendant's deteriorating mental and physical health prevented him from providing adequate instructions. Following further contact in September 2023, a consultation was arranged but difficulties are said to have continued.

[7] The defendant's solicitors state that they first became aware of the judgment on 27 November 2023, when the defendant forwarded correspondence received from the Enforcement of Judgments Office. A consultation with the defendant and counsel followed on 4 December 2023. The application to set aside judgment was issued on 7 February 2024. The plaintiff disputes this account. It relies upon the correspondence preceding judgment, the service of the decree upon both the defendant and his solicitor on 20 September 2023 and the absence of any response

thereafter. The plaintiff submits that steps to set judgment aside were taken only after enforcement proceedings had commenced.

The proposed defence

[8] No draft defence has been provided. In an application of this nature, where the consequences may be significant, the court should ordinarily have the benefit of a draft defence exhibited to the grounding affidavit. This assists the court in assessing the proposed defence and ensures that the opposing party has fair notice of the case it may be required to meet.

[9] The case which the defendant proposes to plead can, however, be identified with reasonable clarity from the grounding affidavit as well as the written and oral submissions. It is no longer suggested that the defendant lacked capacity.

[10] The proposed defence is instead directed to the defendant's liability for the residential charges, either in whole or in part. It has four principal elements:

i. First, the defendant relies upon his hospitalisation with COVID-19 in late 2020 and contends that, but for pressures upon hospitals during the pandemic, he would have remained in hospital receiving treatment rather than returning to residential care. He relies upon the *Department of Health's COVID-19: Guidance for Nursing and Residential Care Homes in Northern Ireland* concerning the discharge of patients from hospital to care-home settings.

ii. Secondly, the defendant contends that insofar as the services provided to him amounted to healthcare rather than residential accommodation for which a charge could properly be levied, no charge was lawfully recoverable. He relies in particular upon paragraph 63 of *Department of Health Circular HSC (ECCU) 1/2010* which he says provides that there is no authority to charge for healthcare provided in the community, including in residential or nursing-home accommodation.

iii. Thirdly, the defendant challenges the assessment process preceding the charges. He relies upon paragraph 64 of the same Circular, to the effect that a financial assessment should take place only after assessment of the service user's health and social care needs. He points to a psychological assessment undertaken in June 2021, the report of which he claims was not provided to him until March 2022 and contends that the necessary assessment of his needs had not been completed before his financial liability was determined. The defendant also places reliance upon the *Charging for Residential Accommodation Guide 2015* ("CRAG"). His proposed defence is that he was not given the required clear explanation of how his ability to pay would be assessed and was

not properly advised as to the imposition and level of residential-care charges.

iv. Fourthly, and in the alternative, the defendant proposes to plead a failure to mitigate. He contends that adequate practical assistance was not provided to enable him to leave the accommodation and obtain a suitable alternative, notwithstanding the charges which continued to accrue.

[11] Those contentions are disputed. The plaintiff relies upon a hospital discharge note said to contradict the defendant's account concerning his return from hospital. It also disputes the defendant's case concerning the basis upon which he was charged for his accommodation and the assessment process upon which he relies. The plaintiff further asserts that Trust staff engaged with other agencies in an attempt to facilitate his move from Domnall. These competing positions raise factual and legal issues which would require determination if the judgment were set aside and the action permitted to proceed.

Defendant's submissions

[12] The defendant submits that the central consideration is whether the proposed defence discloses a real triable issue. Reliance is placed upon *Bank of Ireland v Coulson* [2009] NIQB 96, *McCullough v BBC* [1996] NI 584, *Day v Royal Automobile Club Motoring Services Ltd* [1999] 1 WLR 2150 and *Bank of Ireland (UK) plc v Jones* [2014] NIQB 93. The defendant submits that the applicable threshold is an arguable or prima facie defence, rather than a requirement to demonstrate a real prospect or likelihood of ultimate success.

[13] The defendant argues that threshold is satisfied because the proposed defence raises questions about the legal basis upon which the Trust was entitled to charge for his accommodation, the distinction between residential accommodation and healthcare, the assessment which should have preceded charging, compliance with the applicable charging guidance and the adequacy of assistance provided to enable him to move to alternative accommodation. The defendant submits that the affidavit evidence demonstrates real factual disputes which should be resolved following pleadings, discovery and oral and documentary evidence, rather than summarily on this application.

[14] As to delay, the defendant accepts that the circumstances in which judgment came to be entered and the subsequent period before the application was issued are relevant to the exercise of discretion. He relies upon the explanation given by the defendant's solicitor concerning difficulties obtaining instructions arising from his health. It is submitted that the delay is not such as should deprive the defendant of the opportunity to defend a substantial claim where an arguable defence has been demonstrated. The defendant accordingly asks the court to set aside the judgment

and permit four weeks for service of a defence reflecting the matters identified in the grounding affidavit.

Plaintiff's submissions

[15] The plaintiff opposes the application on two principal grounds. Those grounds are the absence of a meritorious defence and delay. It accepts the general principle that the defendant need not establish that his proposed defence has a real prospect of success but submits that the material must nevertheless disclose an arguable or prima facie defence with merits to which the court should pay heed. Its case is that the defendant has not crossed that threshold.

[16] On the merits, the plaintiff disputes the factual basis of the proposed defence. It rejects the defendant's case concerning the basis upon which he was charged for his accommodation and the adequacy of the assessment process, relying in that regard upon the affidavit evidence and exhibited documentation. It further relies upon the hospital discharge material in answer to the contention that the defendant was prematurely discharged during the pandemic, and upon evidence that staff engaged with other agencies in an effort to assist him to leave Domnall.

[17] The plaintiff further points to the abandonment of the original capacity issue. It submits that considerable time was spent obtaining expert evidence before the defendant's own expert ultimately agreed that he did not lack capacity. The plaintiff relies upon that history as part of the wider procedural circumstances which it says the court should take into account. The plaintiff asserts the defendant wants to delay this case as long as possible. An example of this is the plaintiff's request for discovery of the defendant's bank statements which took a considerable amount of time, and these were only received after a summons was issued.

[18] Delay therefore forms an important part of the plaintiff's opposition. It emphasises that the defendant was legally represented, that an appearance had been entered, that an extension had been afforded for service of the defence and that the decree was served upon both the defendant and his solicitor on 20 September 2023. No immediate application followed. The plaintiff submits that the application was prompted only by the commencement of enforcement proceedings and that no satisfactory explanation has been given for the delay. The plaintiff accordingly submits that the defendant has demonstrated neither a sufficiently arguable defence nor a satisfactory explanation for the procedural default and delay. It asks the court to refuse the application and allow the judgment to stand particularly, as it is a considerable amount of public money at stake.

The questions requiring determination

[19] The application raises two main questions. The first is whether the proposed defence has sufficient merit to warrant adjudication at trial, recognising it would be impermissible for the court to make findings of fact at this interlocutory stage in an

attempt to resolve disputed evidence. The second is whether, having regard to the circumstances in which the defence was not served and to the subsequent delay as well as the wider circumstances including any potential prejudice to the plaintiff, the court should nevertheless decline to exercise its discretion to set aside what is otherwise a regular judgment.

[20] In approaching the first question, the authorities relied upon by both parties establish that the defendant need not establish that the proposed defence will probably succeed. The threshold relied upon is whether there is an arguable defence, variously expressed as a prima facie defence, a serious defence or a real triable issue. Equally, the existence of numerous factual assertions does not itself satisfy that test. The proposed defence must disclose an answer in law to the claim which carries sufficient substance and raises serious issues which merit proceeding to trial.

[21] The four identifiable proposed defences can be summarised in brief form:

i. Healthcare rather than chargeable residential care;
ii. Absence or timing of the necessary needs/financial assessment;
iii. Failure to comply with *CRAG*/inform the defendant about charging;
iv. Mitigation/alternative accommodation.

Legal principles

[22] The amended application is brought under Order 19 rule 10 of the Rules, which provides:

> "The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this Order."

The parties proceeded on the basis that the principles governing the exercise of that discretion are equivalent to those applicable under Order 13 rule 8.

[23] Those principles were considered in *Bank of Ireland v Coulson* and were summarised in *Southern Health and Social Care Trust v Tennyson* [2022] NI Master 7 and *Wilson v O'Hare t/a O'Hare Transport* [2024] NI Master 16. The primary consideration is whether the defendant has demonstrated a defence with merits to which the court should pay heed. Default judgment forms part of the disciplinary framework by which the Rules secure the proper and timely conduct of litigation. Its purpose is not to deprive a defendant who has an arguable defence of an adjudication upon the merits.

[24] The authorities make clear that the threshold is not a high one. The defendant must establish an arguable defence. It is not necessary to demonstrate a real prospect of success, nor is it appropriate for the court at this interlocutory stage to form a provisional view of the probable outcome. An arguable defence has been described

as a defence with merits to which the court should pay heed. Conversely, where no defence to the claim is apparent from the material before the court, there is no proper basis for setting aside the judgment. In the case of *Wilson v O'Hare*, this court determined that as the sole material accompanying the set aside application was a sparse affidavit, the proposed defence was put forward with little conviction, and the court allowed the default judgment to stand.

[25] The court must guard against determining disputed questions of fact upon affidavit evidence. *McCullough v BBC* and *Day v Royal Automobile Club Motoring Services Ltd* emphasise the danger of forming provisional conclusions about the probable outcome of proceedings before the evidence has been tested. The same caution is reflected in *Governor and Company of Bank of Ireland v Conway* [2024] NICA 80, albeit in the context of a strike out application under Order 18 rule 19.

[26] The circumstances in which judgment came to be entered, and any subsequent delay are nevertheless relevant to the exercise of the court's discretion. There is no rigid requirement that a defendant provide a reasonable explanation for permitting judgment to pass by default. The application should, however, be made promptly and within a reasonable time. The explanation for the default, subsequent delay and any prejudice caused by it are matters which the court may properly take into account: *Bank of Ireland v Coulson* and the case of *Quinn v McAleenan and McConville* [2010] NIQB 31.

[27] Ultimately, the discretion is one to be exercised in the interests of justice. The court must consider the proposed defence and the procedural history together, while remaining conscious that a regular judgment has been obtained and that the burden rests upon the defendant to demonstrate grounds upon which it should be disturbed.

Consideration

[28] This was a well-argued application on both sides. The court must be satisfied on balance that the defendant has crossed the necessary threshold of demonstrating an arguable defence. If the court accedes to the defendant's application, it is not a finding that the defence will succeed and in fact the defendant's own legal team state "whether it succeeds at trial is uncertain". The question at this stage is whether it has sufficient substance to warrant determination following the exchange of pleadings, discovery, expert evidence (if required) and, if necessary, trial.

[29] The proposed defence is not simply a bare denial that the charges are due. As explained above, the defendant challenges the plaintiff's entitlement to recover the charges by reference to the circumstances and purpose of his residence at Domnall, the distinction which he seeks to draw between chargeable residential accommodation and healthcare, the alleged requirements concerning assessment before charging, the application of CRAG and the adequacy of the assistance said to have been afforded to him to secure alternative accommodation.

[30] In particular, the defendant relies upon *Department of Health Circular HSC (ECCU) 1/2010* and its statements concerning charging for healthcare provided in the community and the sequence of health and social care needs assessment and financial assessment. He also relies upon the *Charging for Residential Accommodation Guide 2015* and upon the particular circumstances of his residence during the COVID-19 pandemic. These contentions raise questions both of fact and of the proper application of the relevant charging framework to the defendant's circumstances. I do observe that the fourth element of the proposed defence regarding mitigation is really an issue of quantum rather than liability and I attach little weight to this aspect of the defence.

[31] The plaintiff has sought to put forward a substantial answer to all these matters. In particular, it disputes the defendant's factual case concerning his discharge from hospital, maintains that the defendant was charged the full cost of his accommodation rather than being assessed under CRAG, and contends that Trust staff did take steps with other agencies to assist him in obtaining alternative accommodation.

[32] Those matters may ultimately prove fatal to some or all of the proposed defence. It would, however, go beyond the function of the court on this application to resolve those competing factual accounts or determine their legal consequences. The existence of the plaintiff's contrary evidence does not of itself demonstrate that the proposed defence is unarguable. The question for this court is not which party's version of events is ultimately to be preferred.

[33] I have separately considered the defendant's earlier reliance upon incapacity. That aspect of his case is no longer maintained, the experts having ultimately agreed that he did not lack capacity. The history of that issue is relevant to the procedural course of the proceedings and has led to considerable delay. I recognise the difficult position the defendant's solicitor found himself at various stages in seeking instructions. At the hearing counsel for the Official Solicitor correctly reminded the court the defendant is a vulnerable individual and this is supported by the expert evidence. The abandonment of the capacity issue is ultimately not determinative of this application.

[34] The wider procedural history is plainly unsatisfactory. The defendant was legally represented, and an appearance had been entered on his behalf. The plaintiff warned that judgment would be sought if a defence was not served and afforded further time for its service. No defence followed. Judgment was entered on 11 September 2023 and, according to the plaintiff's evidence, the decree was served upon both the defendant and his solicitor on 20 September 2023. It is difficult to reconcile that evidence with the defendant's solicitor's account that he did not become aware of the judgment until 27 November 2023. On the defendant's case, however, the application to set aside was issued approximately 10 weeks after his solicitor became aware of the judgment, a period which included Christmas.

[35] I have considered the explanation advanced on behalf of the defendant that difficulties in obtaining instructions arose because of his health. I have also taken account of the plaintiff's contention that meaningful steps to challenge the judgment were taken only after enforcement proceedings had commenced. The explanation for the failure to serve a defence and for the subsequent delay is not altogether satisfactory. Those matters weigh against the defendant in the exercise of the court's discretion.

[36] They are not, however, determinative. I must weigh them against the nature of the proposed defence and the consequences of allowing a substantial monetary judgment to stand without adjudication of an arguable defence. I have also considered whether the delay has caused prejudice to the plaintiff. There is no evidence before the court of substantive prejudice which could not adequately be addressed in costs. I have borne in mind that the plaintiff is a public body seeking to recover public money, while the defendant is a vulnerable individual against whom a substantial judgment has been entered. While this is not a public law action, the issues raised are arguably of wider significance. The legal framework governing care home charges is also complex. That provides further reason for caution before reaching any concluded view on the merits at this interlocutory stage.

[37] The proposed defence raises an identifiable dispute as to the legal basis and extent of the defendant's liability for the residential charges, including the application of the administrative framework upon which he relies. The plaintiff has put forward a substantial answer to those contentions. The proper resolution of those competing cases requires pleadings and the relevant evidence rather than determination upon the affidavits filed in this application.

[38] Having weighed the merits of the proposed defence against the procedural default, the subsequent delay and the absence of demonstrated substantive prejudice to the plaintiff, I am satisfied that the discretion should be exercised in the defendant's favour.

Conclusion

[39] For the reasons set out above, I set aside the judgment entered on 11 September 2023 and direct the defendant to serve his defence within four weeks of the date hereof. The fact that the judgment is set aside does not, in my view, justify requiring the plaintiff to bear the costs occasioned by the defendant's default. In all the circumstances, I order that the plaintiff have its costs of obtaining the default judgment and of this application, such costs to be taxed in default of agreement and I certify for counsel.

[40] Finally, I wish to record my gratitude to the Official Solicitor and counsel instructed on their behalf for the helpful assistance to the court throughout these proceedings.