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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*ICOS No:*
	Delivered: 11/02/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

Between:

AA BALLANTYNE LIMITED

Plaintiff/Respondent

and

DOLAN DECORATING LIMITED

Defendant/Appellant

William Gowdy QC (instructed by John McCaffrey & Co. Solicitors) for the Plaintiff
Gary McHugh QC and Heather Phillips (instructed by Meyler McGuigan Solicitors) for the Defendant

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HUMPHREYS J

Introduction

[1] This is an appeal from a decision of the Master made on 27 January 2020 whereby he dismissed the application of the Defendant to have the judgment obtained herein set aside. Judgment had been marked against the Defendant in default of Defence on 25 June 2019 by virtue of which the Defendant was ordered to pay the Plaintiff the sum of £35,419.37 together with interest and costs. The default judgment was regularly obtained.

[2] The Plaintiff had issued a specially endorsed Writ of Summons on 26 May 2017 claiming the said sum in respect of accountancy services rendered by it to the Defendant during 2014 and 2015, as well as interest and compensation under the Late Payment of Commercial Debts (Interest) Act 1998.

The Legal Principles

[3] There was no dispute between the parties as to the relevant legal principles to be applied in an application to set aside default judgment. Under Order 19 rule 2 of

the Rules of the Court of Judicature (NI) 1980, a Plaintiff may enter judgment against a Defendant for a liquidated sum at any time after the period fixed for service of a defence has expired. By Order 19 rule 9:

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

[4] Girvan J considered this provision in *McCullough v BBC* [1996] NI 580:

> *"If it is clear that if a defendant has in reality no defence to the plaintiff's claim the setting aside of the 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."*

[5] The touchstone is therefore that of whether there is a 'real triable issue'. Weatherup J elaborated on this in *Bank of Ireland v Jones* [2014] NIQB 93 at paragraph [16]:

> *"(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."*

[6] The task of this Court therefore is to consider whether, on the materials before it, the Defendant has established a 'real triable issue' or an 'arguable defence'.

The Affidavit Evidence

[7] At the time of consideration by the Master, the evidence from the Defendant in support of its application consisted principally of an affidavit from Francis Dolan, a director of the Defendant company, dated 14 August 2019 and its associated exhibits.

[8] In his affidavit, Mr. Dolan accepts that the Plaintiff company provided accountancy services to the Defendant but states that the fees for the period between March 2014 and October 2015 are disputed *"in their entirety"*.

[9] Mr. Dolan references an investigation launched by HMRC into the affairs of the Defendant company in June 2015. He complains that the Plaintiff prepared accounts which were inaccurate and did so without obtaining relevant information or authority. As a result, he says, the Defendant *"was forced to pay a significant fine to the HMRC"*, although he does not give any details as to this fine.

[10] The full defence which the Defendant enjoys to the Plaintiff's claim is said to include:

> *"(i) The Plaintiff's failure to perform the contract leaving the Defendant company facing a crippling fine from the HMRC.*
>
> *(ii) The Plaintiff failed to engage with the HMRC to explain its mistakes once the investigation had begun. The Defendant was forced to engage directly with the HMRC without any professional guidance. Furthermore, another professional was instructed to complete the relevant accounts correctly.*
>
> *(iii) Accounts were filed incorrectly without informed consent or any request for supporting documentation."*

[11] It is noteworthy that Mr. Dolan again fails to give any particulars of the 'crippling fine' nor does he depose to any additional costs sustained by the Defendant company by reason of the instruction of new accountants. There were no documents exhibited to the affidavit which provided any support to the contentions put forward by the Defendant.

[12] In a replying affidavit sworn on 30 December 2019, Adrian Ballantyne, a director of the Plaintiff company, references the fact that the Defendant had made a complaint to the Association of Chartered Certified Accountants in relation to the Plaintiff in November 2015. On 12 October 2016, ACCA found there was no case to answer in respect of the Defendant's complaint. This decision was upheld by an independent assessor on 23 January 2017.

[13] Following the dismissal of the Defendant's application by the Master, and the filing of an appeal, the Defendant was given leave to file additional evidence. This includes an affidavit from Colin McMenamin, the Solicitor formerly acting for the Defendant. He deposes to the fact that Goldblatt McGuigan, Chartered Accountants, were instructed on 28 November 2017, over 18 months before judgment was entered, to prepare a forensic accountancy report on behalf of the Defendant.

Mr. McMenamin asserts that there had been failure on the part of the Plaintiff to provide relevant documentation and states:

> *"Mr. Paul Black of Goldblatt McGuigan has also created a draft report concluding that the Defendants do have a basis for their complaint based on the material he had reviewed to date."*

[14] Mr. Black himself has sworn an affidavit, over 3 years after his receipt of instructions. His letter of instruction, which was not exhibited, advised him of the client's position that:

(i) It had been 'grossly overcharged' by the Plaintiff;

(ii) The level of service fell far below the level of service to be expected;

(iii) The Plaintiff's actions led to the Defendant being subjected to a tax investigation.

[15] In his role as an expert, Mr. Black reviewed the various documents provided to him and noted that the invoices in respect of work done during 2014 and 2015 were significantly higher than those raised for 2011, 2012 and 2013. In his preliminary view, *"the Company would be justified in raising fears of over-charging."*

[16] An error occurred in the accounts filed in 2013 & 2014 as they failed to refer to an overdrawn director's loan account. This information was subsequently corrected. The 2014 accounts also referred to a *"quasi-loan due to the Company"* which the Plaintiff later referred to as a *"mistake and should be ignored for all years."*

[17] In Mr. Black's opinion, these matters resulted *"partially at the very least, to the resulting HMRC enquiry and liability."* He does not say what this *'liability'* actually amounted to.

[18] Mr. Ballantyne swore a further affidavit in response to the new evidence relied upon by the Defendant. In it, he explains that during the two years in question the Plaintiff performed a number of exceptional, non-recurring items of work for the Defendant. These included advising the Defendant on setting up a pension scheme and representing the client in respect of a VAT investigation.

[19] Mr. Ballantyne also addresses the alleged failings in the service rendered by the Plaintiff company. He accepts that, due to a formatting error, the loan figures were shown as balances owed by the Defendant to its directors rather than *vice versa*. The net effect of this, when correctly adjusted, was that the Defendant company paid the tax which was always due on the profits made.

Consideration

[20] It is settled law that in relation to contracts for professional services, where the obligation has been substantially performed, the professional is entitled to his fees and there is no scope for the application of the doctrine of abatement. As Jackson J stated in *Mutiplex Construction v Cleveland Bridge* [2006] EWHC 1341 (TCC):

> *"Abatement is not available as a defence to a claim for payment in respect of professional services…Multiplex's only remedy for unsatisfactory drawings which required revisions or modifications is a claim for damages for professional negligence. However, if there are some drawings which were so unsatisfactory that they were discarded and no use was made of them, in my view Multiplex could refuse to make any payment whatsoever in respect of those drawings."*

[21] In this jurisdiction, Deeny J commented in *McAteer v N R Devine Limited* [2007] NIQB 89:

> *"Nor in law could he point to any modern authority which suggested that an accountant…was disentitled to the entirety of his fees if it was established that some of his conduct was below professional standards."*

[22] In order to raise an arguable defence, therefore, the Defendant must show either that it has an arguable claim for damages for professional negligence or that the work done by the Plaintiff was worthless and therefore there is no obligation to pay for it.

[23] In order to maintain a claim for damages for professional negligence, it is necessary to show that some actionable loss has arguably been sustained. If, for instance, an accountant performed his work poorly so as to expose a client to penalties and interest imposed by HMRC, then those losses could arguably be recovered. Equally, if a client was required to retain a new firm of accountants to rectify errors in the work carried by the former accountants, those costs could be claimed in an action for professional negligence.

[24] The evidence in this case does not allege, let alone reveal, any such actionable loss. There is no evidence of any *'crippling fine'* being imposed by HMRC as a result of any wrongdoing on the Plaintiff's behalf. Equally, there is no evidence to support the claim that the Plaintiff in some way contributed to a *'liability'* sustained by the Defendant company. There is no reference to any additional costs incurred. Insofar as the admitted error in the loan accounts is concerned, it is apparent that the rectification of this mistake simply resulted in the Defendant paying the amount of tax which was properly due.

[25] I am conscious that these proceedings were issued in 2017 and the Defendant has had over 3 and a half years to marshal its case. In the absence of any evidence of loss, it simply cannot be said that the Defendant enjoys an arguable claim in respect of professional negligence.

[26] There remains the claim that the Defendant was overcharged in respect of the services rendered. This has been reviewed by an expert forensic accountant whose analysis, 3 years after receipt of instructions, is that "*the Company would be justified in raising fears of over-charging.*" I have considered the Plaintiff's response to that bare allegation and it is clear that substantial additional work was undertaken in 2014 and 2015. The allegation of overcharging has no underlying evidential substratum. There is, for instance, no evidence that the hourly rate charged is excessive or that the hours billed were not actually worked. There is nothing in this claim which is sufficient to meet the relatively modest hurdle of an 'arguable defence'.

[27] The Defendant has had an inordinate period of time in which to gather evidence or make legal submissions. The Court does not have the benefit of a draft Defence or draft Counterclaim, despite an indication in July 2019 that this would be forthcoming. There is no expert evidence on the issues of overcharging or breach of duty. In these circumstances, I consider that the Defendant has failed to discharge its burden of establishing that it has an arguable defence to the Plaintiff's claim.

Conclusion

[28] Accordingly, I dismiss the appeal and affirm the Order of the Master. The judgment will carry interest at judgment rate from the original date of entry. I order that the Defendant pay the costs above and below and I certify for Senior Counsel.