Neutral Citation No. [2015] NIMaster 11 | *Ref:*

Judgment: approved by the Court for handing down | *Delivered:* **16/10/15**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Bus Eireann

Plaintiff;

And

John Connor

Defendant.

Master Bell

Introduction

[1] I issue this written judgment in this application at the request of the defendant's counsel in order to allow her client to fully consider his options following my decision.

[2] The application before me was an application made by the defendant under Order 19 Rule 9 to set aside an assessment of damages made by Master McCorry on 24 March 2015 and to order a rehearing. I declined to do so on the ground that I lacked jurisdiction to make such an order.

[3] Appearing on the application were Mr Spence instructed by Macauley and Ritchie for the plaintiff and Miss Fee instructed by Fergusons Solicitors for the defendant.

Context of the Application

[4] The context of the application is as follows. The plaintiff issued a writ against the defendant claiming £15,537 after a bus hit a cow owned by the defendant which had escaped and was on a public road. Fergusons Solicitors entered a Memorandum of Appearance for the defendant and a Statement of Claim was served on them on 25 January 2011. According to the grounding affidavit in this application, the defendant then took the view that, if he entered a defence to the claim, he would likely incur legal costs which would exceed the amount of damages being claimed. So he decided to allow judgment to be marked against him and simply make representations on the issue of quantum at the assessment of damages hearing. Judgment in default of defence therefore issued from the Central Office on 17 November 2011.

[5] A summons for an assessment of damages by a Master issued on 20 February 2014 and was listed for a directions hearing on 24 March 2014. It seems to have had a troubled history as it subsequently required to be listed before the court on 28 April 2014, 9 June 2014, 15 September 2014, 29 September 2014, 14 October 2014, 11 November 2014, and 12 January 2015. The affidavit from Trevor Ringland of Macauley and Ritchie Solicitors on behalf of the plaintiff summarises the hearing on 12 January 2015 in the following way :

> "Mr McCausland attended before the Master although the defendant, his solicitor and Mr Bonar did not. Mr McCausland successfully applied to adjourn the assessment on the basis that Mr Bonar had decided not to come to court. His difficulty was that his fees had not been paid. In fact, it was said that Mr Bonar was in his office in Lisburn at the time. The Master advised that Mr Bonar be subpoenaed, if need be, for the next hearing. The Master awarded costs to the plaintiff against the defendant, such costs to be agreed or, in default, to be fixed by the Master. The Master fixed the hearing date for 24 March 2015."

[6] What then happened at the hearing on 24 March 2015? The grounding affidavit by William Ferguson, a legal executive working out of Fergusons Solicitors, states *inter alia* that he received a telephone call from the defendant's counsel on the morning of 24 March 2015 before he had left home. Counsel asked Mr Ferguson if he intended to be at the hearing later that morning. Mr Ferguson states that it was a surprise to him to learn of the hearing. Nor had he contacted the defendant's expert witness. He states that it was impossible because of personal and business commitments for him to make the journey to Belfast for the hearing. He states therefore that he advised counsel to attend and apply to have the hearing adjourned.

[7] Miss Fee's skeleton argument states :

> "The defendant's solicitor has provided an explanation as to why he was not in attendance on either 12th January or 24th March 2015, but is at a loss to understand why Counsel retained failed to remain at the

hearing on 24th March 2015, to cross examine the Plaintiff and his witnesses and to make submissions in respect of the assessment of damages, given his long standing instructions in respect of same. "

[8] Mr Ringland's evidence in respect of the hearing on 24 March 2015 is :

"Mr McCausland appeared but there was no appearance by his solicitor, the defendant or Mr Bonar. Mr McCausland told the court that he had telephoned his solicitor that morning to enquire whether the defendant, Mr Bonar and he intended to appear at court. He was told that they would not be appearing. There was no application to adjourn and, since he did not have instructions, Mr McCausland withdrew. Damages were therefore assessed."

[9] I do not have defendant's counsel's version of events as I was not provided with an affidavit from him. However Master McCorry's order of 24 March 2015 specifically states that :

"UPON HEARING counsel for the plaintiff,

AND UPON HEARING counsel for the defendant confirming that he had no instructions to defend the plaintiff's action, and had no further application or submission to the Court"

whereupon Master McCorry then considered the evidence and assessed the damages in the action.

Basis of the Application

[10] It was in this context that Miss Fee submitted in her skeleton argument that there had been no proper adjudication of the quantum of damages in this case.

[11] Miss Fee's written submission argued that I have an unfettered discretion to set aside a default judgment. At the hearing I agreed with that submission but pointed out to her that she was not seeking to have the default judgment in this action set aside. Rather she was seeking to have the subsequent assessment of damages set aside in a context where Master McCorry had had both parties represented before him and had heard and considered the evidence in the action. In her oral submissions Miss Fee then expanded her argument to submit that I have a discretion to set aside any judgment, even where evidence has been heard. Miss Fee submitted that Order 19 Rule 9 allowed me to set aside "any judgment".

[12] In a brief submission Mr Spence submitted that Order 19 was headed, and governed circumstances where there had been, "Default of Pleadings" and that Rule 9 clearly stated :

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

Thus the Rule only allowed me to set aside a default judgment

[13] Miss Fee's client is not content with the outcome of the assessment of damages hearing. Accordingly he now seeks to have the order set aside. Paragraph 15 of Mr Ferguson's grounding affidavit states that there are "substantial triable issues" in respect of this assessment of damages. He sets out the seven issues which he says arise. These include an issue of whether the procedural approach adopted by Master McCorry at the hearing on 24 March 2015 was reasonable and fair.

Decision

[14] I agree with Mr Spence's submission. Order 19 Rule 9 was never designed to allow one Master to set aside a judicial ruling by another Master in circumstances where he had had counsel before him representing both parties and had heard evidence in the matter.

[15] Order 58 Rule 2 provides that appeals from a Master's decision on an assessment of damages shall lie to the Court of Appeal. If the defendant genuinely believes that issues arise from the hearing on 24 March 2015 then the only forum for those issues is the Court of Appeal.

[16] The application to set aside Master McCorry's decision on the assessment of damages in this case is wholly misconceived. I do not have jurisdiction to make such an order. It inevitably follows that I award costs of the application to the plaintiff and certify for counsel.