

APPROVED

[2023] IEHC 552

THE HIGH COURT

[2019 No. 6107 P]

BETWEEN:

COSTERN UNLIMITED COMPANY

PLAINTIFF

AND

SUSAN FENTON

DEFENDANT

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 16th day of October, 2023

INTRODUCTION

1. This is a judgment in respect of an application brought by the defendant by way of a notice of motion dated 3 July 2023 following the crystallisation of an “*unless order*”. As originally formulated, the relief sought was an order pursuant to Order 122, rule 7 of the Rules of the Superior Courts, 1986, as amended, enlarging the time for the delivery and filing of the defence in the proceedings up to and including 9 June 2023. However, to reflect the proper relief being sought, and with the agreement of the parties, the application was treated as one pursuant to O. 27, r. 15 (2) of the RSC as amended, seeking to set aside a judgment obtained by default. For the reasons set out in this judgment, the court will grant the relief sought by the defendant subject to certain terms.

THE PROCEEDINGS

2. The underlying proceedings herein are professional negligence proceedings brought by the plaintiff company against the defendant solicitor. As framed in the proceedings, they arise from the retention of the defendant by the plaintiff in 2013 to act on its behalf in relation to the acquisition of certain lands. The claim is that at the material times the defendant was aware and informed that the lands were being acquired for the purpose of developing an extension to an existing nursing home and that the plaintiff would require full access and egress to those lands. The plaintiff claims that it acquired the lands on the basis that they were to have vehicular access and egress over a right of way on one of the parcels of land. An issue arose in respect of the right of way claimed. Arising from that, the plaintiff brought proceedings in the Commercial Court against the owner of adjacent lands, and those proceedings were not resolved until November 2022. The plaintiff claims that it suffered significant loss arising from the delayed development and operation of the nursing home, including the necessity to acquire the right of way from the adjacent landholder at a significant cost. These proceedings were commenced by way of plenary summons dated 31 July 2019, shortly before the expiration of the limitation period.

3. As part of its opposition to the motion herein, the plaintiff has claimed that the default on the part of the defendant which led to the order which the defendant seeks to set aside forms part of a pattern of delay in the case. For that reason, I intend to set out a brief chronology of the proceedings at this point: -

- 31 July 2019 – plenary summons issues;
- 1 October 2021 – appearance entered on behalf of the defendant;
- 27 May 2021 – statement of claim delivered;
- 22 March 2022 – notice of change of solicitor served by defendant;

- 8 August 2022 – notice of motion filed seeking judgment in default of defence against the defendant;
- 7 October 2022 – notice for particulars served by defendant;
- 2 December 2022 – replies to particulars delivered by plaintiff;
- 15 February 2023 – request by the defendant for further particulars and further information on foot of the replies to the notice for particulars;
- 24 March 2023 – reply to said letter from plaintiffs, attaching deed of easements;
- 28 March 2023 – request for further information from solicitors for the defendant;
- 5 May 2023 – reply to letter requesting information sent by solicitors for the plaintiff;
- 8 May 2023 – disposal of the motion for judgment in default of defence by way of an “*unless order*” made by the High Court by consent;

THE TERMS OF THE CONSENT ORDER

4. As noted above, an order was made by consent by the High Court on 8 May 2023 which extended the time for the delivery of the defence by the defendant and its filing in the Central Office by four weeks from the date thereof. The order went on to provide: -

“And in such event that the said Defence has not been delivered and filed within the aforesaid time IT IS ORDERED AND ADJUDGED that the said Plaintiff do recover against the said Defendant such amount as the Court may assess in respect of the Plaintiff’s claim herein for damages and the costs of suit to date – such costs to include the costs of this Motion and of the assessment to be adjudicated in default of agreement

between the parties until such assessment be had before a Judge without a jury and be set down for hearing accordingly”.

5. The effect of the order, as I understand it, was that the defence had to be served by Monday 5 June 2023. As that was a bank holiday, the defence should have been delivered by 5 p.m. on Tuesday 6 June 2023. In the event, the defence was not delivered in accordance with the terms of the order made by the court on 8 May 2023. The reasons for that default are set out in a number of affidavits sworn on behalf of the defendant, and, in turn, a number of affidavits were sworn on behalf of the plaintiff.

THE EVIDENCE

6. The motion papers in connection with this application run to approximately 349 pages, and I do not intend to set out the full extent of what has been deposed to on each side in this ruling. Aside from the fact that much of the material in the motion papers is argumentative, I consider that the core matters can be reduced to the following matters.

7. With the exception of one affidavit, the evidence on behalf of the defendant was set out in affidavits sworn by a partner in the firm acting on behalf of the defendant. Those affidavits were sworn on 3 July 2023 and 21 July 2023. A legal secretary in the same firm swore a further short affidavit on 26 July 2023. The solicitor on behalf of the plaintiff swore two affidavits, on 19 July 2023 and 26 July 2023. A further affidavit was sworn on the 26 July 2023 by a trainee solicitor in the firm acting for the plaintiff.

8. In relation to the allegations that the proceedings were delayed by the defendant, the solicitor for the defendant asserted that there was a degree of delay on the part of the plaintiff also. In that regard, he averred that the plaintiff did not serve the plenary summons until two days before its expiration on 29 July 2020, and there was an additional ten months before the delivery of a statement of claim on 27 May 2021. Furthermore, it was asserted on behalf of the

defendant that it was necessary to obtain a considerable volume of documentation and further information from the plaintiff in order to be able to prepare the defence.

9. The solicitor for the defendant acknowledged that the defendant consented to an “*unless order*” on 8 May 2023, which provided for judgment in default of defence unless the defence was delivered within four weeks. According to the defendant’s solicitor, on 2 June 2023 he sent a letter enclosing the defence to the solicitors for the plaintiff through the Document Exchange postal system (“*the DX*”).

10. On 8 June 2023, the plaintiff’s solicitors sent an email stating that the date to deliver the defence had passed and that they were proceeding to enter judgment in accordance with the order of 8 May 2023. The solicitor for the defendant responded by providing a copy of the letter dated 2 June 2023, along with the defence, and confirmed that it was sent on 2 June 2023. The original defence did not arrive through the DX, and some further correspondence passed between the parties. Ultimately, by letter dated 20 June 2023, the solicitors for the plaintiff served a notice of trial. It appears to be uncontested that the plaintiff received a copy of the defence by email on the 8 June 2023.

11. In summary, the defendant asserted that the defence was placed in the DX and ought to have been delivered within the time prescribed by the order, where Monday 5 June 2023 was a bank holiday. The solicitor for the defendant acknowledged the defence was not filed in the Central Office until 9 June 2023 due to an oversight. On behalf of the defendant, it was asserted that the defendant would be severely prejudiced if the time for delivery of the defence was not extended to 9 June 2023, and that the plaintiff could not identify any proper prejudice arising from the enlargement of the time sought. Among the exhibits to the first affidavit sworn by the solicitor for the defendant is a letter dated 2 June 2023, on the headed paper of the solicitors for the defendant, in which it is stated that the defence is attached. There is also a copy of the

finalised defence dated 2 June 2023, with the evidence being that both the letter and defence were sent on 2 June 2023.

12. In her first affidavit, the plaintiff’s solicitor highlighted that the defendant consented to the “*unless order*”, and that the defendant’s solicitor was in receipt of a copy of the unless order from which the defendant should have been very clear as to the terms. The plaintiff’s solicitor went on to assert that the receipt of the defendant’s defence by email on 8 June 2023 was three days after the expiry of the period required for the delivery of the defence, and that its subsequent filing at the Central Office on 9 June 2023 was four days after the expiry of that period. The plaintiff’s solicitor placed considerable emphasis on the fact that all previous correspondence and dealings between the parties’ solicitors had been conducted by email, and queried why the defence was not emailed on 2 June 2023 as well as placed in the DX. The plaintiff also noted that a DX tracking number was requested on 8 June 2023, but still had not been provided. Finally, the solicitor noted that no affidavit evidence was put forward by the person within the defendant’s solicitors who physically placed the letter in the envelope and subsequently in the DX.

13. A replying affidavit was sworn by the solicitor for the defendant on 21 July 2023. The solicitor noted that this motion issued on 4 July 2023, having been sworn and provided to town agents on 3 July 2023; and also that the plaintiff had not actually rejected the defence that was delivered. The solicitor highlighted that the defence was drafted and settled on 18 May 2023, and that a copy was sent to the plaintiff on the same day that the plaintiff alerted the defendant to the fact that it had not received the defence. In terms of the second aspect of the order, which required the defence to be filed in the Central Office, the solicitor averred that the defence was not filed until 9 June 2023, “*due to my oversight with the new amended Rules, which was rectified without delay*”.

14. The solicitor for the defendant again took issue with the question of whether the plaintiff has been prejudiced by the delay in the delivery of the defence. He also took issue with the certificate of readiness that was filed by the plaintiff with the High Court on 26 June 2023, on the basis that it was not in compliance with the relevant High Court Practice Direction. The defendant's solicitor concluded by reiterating that granting the reliefs sought in the motion would not prejudice the plaintiff, but a refusal to grant the relief would severely prejudice the defendant.

15. The plaintiff replied to that affidavit with two further affidavits sworn on 26 July 2023. The first affidavit was sworn by the plaintiff's solicitor. Among other matters, she averred that without prejudice to the fact that "*no evidence has been presented to demonstrate if and when the Defence was sent in the DX*", the failure to file the defence in the Central Office due to a lack of familiarity with the RSC did not establish the existence of "*special circumstances*" within the meaning of O. 27, r. 15 (2) of the RSC.

16. The affidavit repeated the earlier assertions that from the perspective of the plaintiff no explanation had been given as to why a decision was made to deliver the defence by means of the DX rather than by means of email, which it is asserted had been the invariable practice between the parties to that point. The solicitor also repeated that no evidence had been proffered from the person who purported to have placed the defence in the DX addressed to the solicitors for the plaintiff, and that no evidence had been put forward that the item was either collected by the DX or out for delivery with the DX service before 5 p.m. on Friday, 2 June 2023. The final material point made was that the 2 June 2023 was the Friday before a bank holiday weekend and that the "*unless order*" would be triggered if the defence was not delivered by Tuesday 6 June 2023. It is said that the solicitors for the defendant adopted a high risk and '*eleventh hour*' approach to the delivery of the defence. Hence, if for any reason the defence

was not delivered in accordance with the terms of the order of this Court, responsibility lies with the approach adopted by the solicitor for the defendant.

17. The second affidavit sworn on behalf of the plaintiff on 26 July 2023 was from a trainee solicitor in the firm acting for the plaintiff which sets out the contents of a conversation that she held with a member of staff of the DX service helpline on 25 July 2023. Despite the clear hearsay nature of that evidence, no objection was made to it on the part of the defendant. The conversation notes *inter alia* the following: (a) generally if an item is sent out before 5 p.m. the item will be received by 9 a.m. the next day, (b) that delivery outside of that standard timeframe is not common, (c) that delays may be caused if an incorrect DX number is on the item, in which case the item will be returned to the sender, and, (d) that there is a facility to allow DX to carry out various searches if something gets lost within the DX.

18. Finally, a very short affidavit was sworn by a legal secretary in the solicitors acting on behalf of the defendant on 26 July 2023. That affidavit sets out that on 2 June 2023, she placed a letter and true copy of the defence dated 2 June 2023 in a large white window envelope addressed to the solicitors for the plaintiff, and placed it at their reception with all other letters to be collected by the DX agent for postage in the DX, and that the letter has not been returned.

LEGAL PRINCIPLES – RELEVANT RULE

19. As noted above, the principal Rule of the Superior Courts engaged in this application is O. 27, r. 15 (2), which provides as follows: -

“Any judgment by default, whether under this Order or any other Order of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit, if the Court is satisfied that at the time of the default special circumstances (to be recited in the order) existed which explain and justify the failure, and any

necessary consequential order may be made where an action has been set down under rule 9”.

20. In essence, the plaintiff’s opposition to this application is based on the assertion that no proper explanation has been provided for the failure to deliver the defence on time, and that the defendant has failed to make out any special circumstance justifying relief from the judgment that is being entered therefore the application should be refused.

21. In approaching this application, the plaintiff placed particular emphasis on two judgments of the High Court, first, *De Souza v. Liffey Meats & Ors* [2023] IEHC 402 (“*De Souza*”), and second, *O’Brien v. McMahon* [2023] IEHC 393 (“*O’Brien*”). The defendant relies on the same judgments, but places emphasis on the earlier judgment of the Supreme Court in *McGuinn v. Commissioner of An Garda Siochana* [2011] IESC 33 (“*McGuinn*”).

22. In *De Souza*, which was a personal injuries action, the defendants sought to set aside a judgment of this Court on foot of an unless order which was dated 23 May 2022, and which required the defence to be delivered by 31 July 2022. In that case, the defence was not delivered until 20 September 2022. The solicitor acting on behalf of the defendant relied on the following matters by way of explanation: First, he was not aware that an unless type order had been made because a legal secretary or legal executive who was dealing with the matter did not understand the nature of an “*unless order*”, and she had not told him that she had consented to such an order. Second, when the “*unless order*” was sent by email to the defendant’s firm of solicitors, the solicitor averred that he had not reviewed the order. Third, counsel for the defendant had been instructed to finalise a defence, but difficult personal circumstances involving the serious illness and subsequent death of his mother delayed the finalisation of a defence. In that case, the court carried out a close and helpful analysis of the wording of O. 27, r. 15 (2), and the analogous approach adopted by the Court of Appeal in cases concerning applications to renew a summons pursuant to Order 8 of the RSC.

23. In *O'Brien*, O'Moore J. was faced with an application which he treated as one brought pursuant to O. 27, r. 15 (2) of the RSC seeking to set aside a default judgment. In that case, the court found that there was no reason for the defendants not to have delivered a defence or to have attempted to defend a motion for judgment in default of defence. The explanations that had been proffered essentially were: First, that the defendant was hoping to resolve the matter through negotiation. Because of this the defendant's solicitor assumed (wrongly) that this would have been drawn to the attention of the plaintiff solicitors, and, therefore, did not reply to correspondence as they hoped negotiations would bear fruit. The court did not accept that this was an adequate explanation. Second, there was a bald assertion that the defendants did not attend the hearing of the motion for judgment in default of defence "*due to the unfortunate circumstances of Covid in our office affecting staff at that time*". O'Moore J. found that explanation to be "*so vague as to be effectively meaningless*". In the premises, the court did not consider that special circumstances had been made out. Moreover, in that case the court was clear that the proposed narrow point of defence which the defendant wished to agitate was one which simply could not succeed.

24. Without in any way disagreeing with any aspect of the judgment in *O'Brien*, but because of the very fact specific analysis required in an application of this type, I do not consider that the judgment in *O'Brien* assists in resolving this application. This motion proceeds from a very different set of factual circumstances. I propose dealing with this motion on the basis of the close analysis of the relevant rules conducted by the court in *De Souza*.

THE APPROACH TO DETERMINING WHETHER "SPECIAL CIRCUMSTANCES" EXIST

25. In *De Souza*, Ferriter J. engaged in an extensive analysis of this question, considering the language of the Rule, and drawing by analogy with the analysis by the Court of Appeal

(Haughton J.) in *Murphy v. HSE* [2021] IECA 3 (“*Murphy*”), which analysed similar language that had been utilised in O. 8, r. 1 (4) concerning applications to renew summonses. I agree with the analysis and approach adopted in *De Souza*.

26. In my view, the following matters emerge from *De Souza*: -

- First, the question of special circumstances under the Rule is to be treated not just at the date at when the court’s order was made, but principally at the date of judgment by default; in effect when the “*unless order*” crystallises. This was so on the basis that it is only when the judgment crystallises on foot of the “*unless order*” that there is a “*failure*” within the meaning of the Rule to deliver a defence, and the plaintiff will be entitled to proceed to have the case set down. Ferriter J. considered that this analysis was consistent with that of the Supreme Court in *McGuinn*.
- Second, by reference to *Murphy*, what amounts to “*special circumstances*” must be decided on the facts of a particular case and it would be unwise to lay down any hard and fast rule. However, the test of “*special circumstances*” as expressed by Haughton J. in *Murphy*, is “*generally accepted [as being] a higher test than that of ‘good reason’*”. As explained by Haughton J., and as accepted by Ferriter J. for the purpose of O. 27, r. 15 (2), “*while this does not raise the bar to “extraordinary”, it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present*”.
- Third, in effect, the court is obliged to engage in what amounts to a two-step analysis. The test is whether the court can be satisfied that there are special circumstances which justify an extension. However, factors that go to justification will be considered only if the court is satisfied in the first instance that there are special circumstances. In that regard, and by reference to the

judgments of the Court of Appeal in *Nolan v. Board of Management of St. Mary's Diocesan School* [2022] IECA 10 (“*Nolan*”), and in *Murphy*, “*special circumstances*” must be established before the overall justification issue arises. Hence, questions of prejudice and the interests of justice form part of the analysis of the justification, and not part of the question of special circumstances. On that analysis, if the court is not satisfied as to the existence of sufficient special circumstances it will not be necessary to proceed to consider the “*interests of justice*” type issues.

- In that regard, it appears to me that there is some apparent differences of emphasis in the approaches adopted by the Court of Appeal in *Murphy* and *Nolan*. In the earlier judgment of *Murphy*, Haughton J. seems to suggest that the need for the court to consider the interests of justice type issues, “*is not a second tier or limb to the test. The need for the court to consider under sub-rule (4) [of Order 8] the interests of justice, prejudice and the balancing of hardship is in my view encompassed by the phrase “special circumstances [which] justify extension”. ... The High Court should consider and weigh in the balance all such matters in coming to a just decision.*” On the other hand, in *Nolan*, a judgment from July 2023, Noonan J. explained the above comments as meaning that “*special circumstances and the justification for renewal are not two separate and distinct matters, but fall to [be] considered together in the analysis of whether it is in the interests of justice to renew the summons. Prejudice is a component of that analysis.*” Noonan J. went on to clarify that “*before that analysis can be arrived at, it must be established that there are special circumstances.*” It seems to me that whether the test is approached as a single composite test or a test in effect comprised of two components, there is a clear

need for the court to be satisfied that there are special circumstances. As noted later, in this application I explain why I was satisfied that special circumstances have been established, and for that reason, it is not necessary to address how the court should proceed if there is a strong interests of justice argument combined with a weak special circumstances argument (albeit it is hard to envisage how that would arise).

- Fourth, in the preponderance of cases, inadvertence or inattention on the part of a solicitor rarely will constitute “*special circumstances*”. This flows from a number of factors, including the words of the sub-rule itself. As explained in *De Souza* and by reference to *Murphy*, part of the rationale for requiring a more demanding set of reasons or circumstances is that there has been a general tightening of the approach to compliance with deadlines and the expedition of litigation in light of the constitutional and convention imperatives of ensuring that justice is administered efficiently and expeditiously. This imperative likewise informs the rationale for seeking to apply O. 8, r. 1 (4) in a consistent manner with O. 27, r. 15 (2). Flowing from that, as noted by Ferriter J., “*the general point remains that to treat a mistake or inadvertence by a solicitor as to the period ordered by a court for delivering a defence, failing which judgment will follow, would risk undermining the rationale for the rule being that of ensuring greater compliance with deadlines and court orders and ending the old culture of lax approaches to court-imposed deadlines and indulgence of disregard for court orders on procedural matters*”.

DECISION

27. The plaintiff in its affidavits, and oral and written submissions to the court, emphasised what it characterised as deficiencies in the explanations provided by the solicitor acting on behalf of the defendant. In my view, given the status of the solicitor in question as an officer of the court and the fact that a reasonably detailed explanation was given in his affidavits, I am prepared to accept his evidence of the material events. That said, it must be acknowledged that the task of the court would have been easier and perhaps the high level of dispute on this procedural matter could have been avoided if more detail was given. In particular, I acknowledge that there is some justification for the plaintiff's complaint that there is some incongruity between the previous practice of sending all documents by email and the decision to send the defence by way of DX. No real explanation was given for this change of approach. However, if the delivery by DX had been successful it would have amounted to proper compliance with that aspect of the order of the 8 May 2023. Likewise, for obvious reasons it would have been preferable if the defence had been sent a more comfortable distance in time from the deadline set out in the unless order. Again, if the delivery by DX had been successful the defence would have been delivered in time; however, undoubtedly the facts in this case highlight the danger of sailing too close to the wind. Nevertheless, the solicitor on behalf of the defendant has explained, and there is no evidence to the contrary and no reason to doubt this, that a settled defence was prepared by counsel well in advance of the deadline. Having obtained his client's approval, the defendant's solicitor sought to place, and understood that he had placed, the defence in the DX on Friday 2 June 2023, with the result that he believed that the defence would be delivered to the plaintiff within the period provided for in the "*unless order*".

28. Viewed in this way, it does not seem to me that this properly is a case of mistake or inadvertence on the part of the defendant's solicitor, or at least a mistake or inadvertence in the sense that it has been discussed in case law. It seems to me that the solicitor was well aware of

the existence of the unless order, was aware of the timeline provided for in the order and took reasonable steps to deliver the defence within that timeline.

29. In those premises, I consider that the reasonable belief on the part of the defendant’s solicitor that the defence in fact had been delivered to the plaintiff in accordance with the terms of the “*unless order*” amount to “*special circumstances*” within the meaning of O. 27, r. 15 (2), which would justify setting aside the judgment.

30. There is a further aspect to this part of the analysis. As noted by the plaintiff, the “*unless order*” did not simply require the delivery of the defence to the plaintiff within a specified period, but also that the defence be filed in the Central Office. This was not done until 9 June 2023. The explanation provided by the solicitor for the defendant was that this aspect of the default was due to a lack of familiarity with the RSC. Presumably, there also was a failure to consider the terms of the “*unless order*” with proper attention. That explanation constitutes a classic instance of simple inadvertence or mistake on the part of legal advisors. If that were the only explanation for the circumstances that gave rise to the crystallisation of the unless order, it would be inadequate and, in and of itself, could not amount to “*special circumstances*” for the purpose of O. 27, r. 15 (2).

31. On balance, I do not consider that the sub-rule requires the court to be satisfied that special circumstances exist independently for both the failure to deliver the defence and the failure to file the defence in the Central Office. In my view, the sub-rule requires the court to consider the overall circumstances leading to the crystallisation of the unless order and to discern whether special circumstances exist for setting aside the order. Moreover, it is hard to envisage that the sub-rule would require such a harsh result if, for instance, a defence in fact had been delivered to the plaintiff within the time specified in an “*unless order*” but there was a failure to file that defence in the Central Office. There are two primary reasons for that view: First, if the purpose, or at least one of the primary purposes, for O. 27, r. 15(2) is to ensure the

efficient and expeditious progress of litigation, that objective is achieved if the defence is delivered to the plaintiff. That delivery allows for the further progress of the litigation. Second, it is reasonable to understand the requirement for filing as an administrative provision that allows the Central Office in cases of default on an “*unless order*” to deal with applications by the plaintiff consequential on a default without the need for any extensive further inquiries. In effect, if the defence is not filed, that will be as far as inquiries will have to go.

32. Hence, in deciding how to approach the failure to file the defence in the Central Office, I am of the view that the reasons for this failure can be considered alongside the reasons for the failure to deliver the defence to the plaintiff within the requisite timescale; and viewing both elements of the default together, I am satisfied that the test for special circumstances has been made out.

33. As noted above, aside from the question of whether the court is satisfied that special circumstances exist which explain the failure, the court must also be satisfied that those special circumstances explain and justify the failure. This engages questions of hardship, injustice or prejudice flowing from a decision to set aside or refuse to set aside a judgment. In this regard, the court notes that in parallel with a growing reluctance to tolerate delays, there is a further theme running through case law concerning failures to comply with the rules of court. This theme was emphasised in the majority judgment for the Supreme Court in the *McGuinn* case, and explained in the following passage commencing at p. 28 of the unreported judgment of Murray J.: -

“In Croke v. Waterford Crystal Ltd [2005] 2 I.R 383, Geoghegan J. endorsed as “pertinent and useful” a dictum of Bowen L.J. in Cropper v. Smith [1884] 26 Ch. D. 700 stated: -

“I think it is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they make in the

conduct of their cases by deciding otherwise than in accordance with their rights . . . I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. The courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right”.

Murray J. went on to observe: -

“The Courts in the interests of justice, lean in favour of a determination of litigation on the merits of the issues between the parties rather than preventing a party from having access to the Courts, when his or her rights or obligations are being determined, for procedural reasons including culpable delay. This is not to say that the Courts would not be more stringent in requiring adherence to time limits in particular when set by an order of a court in a particular case, for the reasons outlined by Hardiman J. and referred to above”.

34. The reference to Hardiman J. was in respect of the now well-known observations made by him in *Gilroy v. Flynn* [2005] 1 ILRM 290, at p. 293/294 , which highlighted the growing cognisance of the unfairness that could arise from delay and cautioned that “*comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end*”.

35. In this case, I am satisfied that the defendant addressed their minds to the effect of the crystallisation of the unless order as soon as it was drawn to their attention and issued this

motion within a reasonable period of time. From the perspective of the plaintiff, I do not consider that any specific prejudice would arise from setting aside the judgment. The plaintiff will continue to be able to agitate this litigation in a manner that they see fit, and ultimately, if required, there will be a full determination of each side's rights and obligations. The reality is that the plaintiff was in possession of the defendant's defence a very short number of days after the date identified in the "*unless order*". While it is true to say that the case has been characterised by some delays, viewing the overall situation from a position where a statement of claim was delivered in May 2021, and where there was considerable correspondence regarding the provision of documents, replies to particulars, and requests for further information, I do not consider that the attribution of responsibility for that delay is so clear cut to suggest that this should be a factor to take into consideration in the application.

36. From the perspective of the defendant however, a failure to grant the order sought in this application would result in the case proceeding on an undefended assessment-only basis. This would occur in circumstances in which it is clear that the defendant wishes to, and if permitted, intends to fully defend the action. Unlike *O'Brien*, this is not a case in which there has been any issue as to the potential viability of the proposed defence. The action itself is reasonably complex, is predicated on assertion of professional negligence on the defendant's part and involves a claim for very considerable damages.

37. It seems to me that in light of the reasonable belief on the part of the defendant's solicitor that proper steps were taken to ensure that the defence would be delivered in accordance with the terms of the "*unless order*", refusing to set aside the judgment in this case would amount to an unnecessarily harsh outcome that would be disproportionate to the circumstances that gave rise to the crystallisation of the order of this court dated 8 May 2023. In effect, the approach agitated for by the plaintiff would involve the court punishing the defendant for the matters that arose and lead to a situation where there is no proper

determination of the litigation, an approach cautioned against by the Supreme Court in *McGuinn*. In the circumstances, I am satisfied that the explanation provided by the solicitor for the defendant meets the “*special circumstances*” test and that the balance of justice very strongly favours granting the application.

38. In the premises, and for the reasons set out above, I am proposing to make an order setting aside the judgment obtained by default and setting aside the subsequent notice of trial. The judgment will be set aside on the basis that I am satisfied that at the time when the default occurred there were special circumstances which explain and justify the failure, and that setting aside the judgment is in the interests of justice. The special circumstances to be recited in the order are that reasonable efforts were made to comply with the order of this Court dated 8 May 2023 and there was a reasonable belief on the part of the defendant’s legal representatives that the defence would be delivered to the plaintiff within the period set out in the said Order.

39. In circumstances where the “*unless order*” had crystallised and therefore this motion had to be brought by the defendant, I am further proposing that the defendant will pay the costs of and associated with this motion to the plaintiff together with the costs of and associated with the preparation and service of the notice of trial. I consider that the plaintiff is entitled to those costs regardless of the outcome of the underlying proceedings and therefore there will be no stay on the costs order. The costs are to be adjudicated in default of agreement.

40. As this judgment will be delivered electronically, and in case either of the parties wishes to agitate for a different form of order, I will list this matter for a further final short hearing at 10.30 a.m. on Friday 27 October 2023.