***Wards v Hendawi* [2018] EWHC 1907 (Ch)**

Application to set aside default judgment – CPR 13.3 – mistaken payment – change of position defence

Practical implications

The decision of HHJ Paul Matthews (sitting as a Judge of the High Court) in *Wards v Hendawi* demonstrates that the Court can and should grasp the nettle and not allow default judgments to be set aside where the hypothetical defence is considered not to be arguable, and where there would no other useful purpose in the claim effectively being reopened. Further, even if allegations of bad faith are made, if the Court can decide the matter on the basis of legal argument and the applicant's facts only, then there will be no advantage in the matter proceeding to the live evidence stage. In such circumstances, the tendency must be towards finality in the litigation. The default judgment, if correctly entered, must stand.

The second point raised is that, although the change of position may still be considered to be in a state of flux (not least because of the way the defence was introduced by Lord Goff in *Lipkin Gorman v Karpnale*), the elements of the defence are now sufficiently stable to decide a summary judgment or set aside application. Indeed, by way of comment, it is a feature of the common law that all of its aspects are in a state of fluency. Over two and a half decades since *Lipkin Gorman*, it is suggested that there is now a sufficient body of authority such that the defence need not be considered a 'developing area of law' for the purposes of such applications, notwithstanding the continuing academic interest in the subject.

Background

The matter has a long history. Wards accidentally paid £177,000 to Mr Hendawi in December 2005. The error soon came to light, and Wards informed Mr Hendawi on 12 December 2005 that there had been a mistake and that he needed to return the money. Mr Hendawi returned £143,975 on 14 December, leaving a shortfall of £33,025.

Mr Hendawi's case during the application was that this sum was accounted for by a payment on a post-dated cheque in the sum of £25,000 to one Herold Buddington, which was cleared on 13 December 2005, the repayment (by way of automatic set-off) of an overdraft to the defendant's bank in the region of £8,000, and the sum of £25 as a transaction fee required by his bank.

The claim form for the £33,025 was issued on 5 December 2006 and served by the Court. Under the CPR as in force at the time, this was deemed to be good service, and was held by HHJ Paul Matthews (at [17]) to be so, even though the claim form was returned. Judgment was obtained in default in January 2007.

After investigations were made, Wards served a statutory demand on Mr Hendawi, which he received on 4 August 2017, over 10 years after the judgment had been obtained. Mr Hendawi's case was that he first became aware of the underlying judgment on that date. Bankruptcy proceedings were commenced. After several months, Mr Hendawi made an application to set aside the default judgment on 29 March 2018.

Issues

HHJ Paul Matthews identified five issues:

(1) Did Mr Hendawi have a real prospect of successfully defending the claim if the default judgment were to be set aside?
(2) Was it necessary to resolve the questions of bad faith in order to reach a conclusion on issue (1)?
(3) Was there 'some other good reason' for setting aside the judgment, such as the fact Mr Hendawi had not received the claim form?
(4) Was it relevant that Wards had delayed in seeking to enforce the judgment?
(5) The requirement for promptness under r.13.3.

The Judgment

No real prospect of successfully defending the claim

On the first issue, HHJ Paul Matthews found that there was no real prospect of the claim being successfully defended. Mr Hendawi raised a defence to Wards' unjust enrichment claim on the basis of a change of position, namely (1) the £25,000 paid to Mr Buddington; (2) the £8,000 overdraft that automatically cleared when the funds transferred into his account; and (3) the £25 bank transaction fee for returning the majority of the funds to Wards.

Some ten years after the seminal case of *Lipkin Gorman v Karpnale* [1991] 2 AC 548 that unequivocally recognised (at 580) the availability of the change of position as a matter of English law, the Court of Appeal considered in *Scottish Equitable plc v Derby* [2001] 3 All ER 818 whether the defence could be available where a debt is repaid. In *Scottish Equitable*, a life assurance company overpaid the amount due under a pension policy, sought to recover it, and the defendant payee sought to rely on the defence of change of position. The recipient had used part of the money to pay off a mortgage debt. Robert Walker LJ (with whom Simon Brown and Keene LJJ agreed) observed (at [35]):

> "...In general it is not a detriment to pay off a debt which will have to be paid off sooner or later: *RBC Dominion Securities v Dawson* (1994) 111 DLR (4th) 230. It might be if there were a long-term loan on advantageous terms, but it was not suggested that that was the case here; and as the judge said (at p 803f) the evidence was that the house was to be sold in the near future."

Notwithstanding the alleged preparedness of Mr Buddington to write off the loan, HHJ Paul Matthews found that there was no doubt, as a matter of law, that he was entitled to be repaid the loan. As Wards argued, the fact that the debt had been repaid had simply given rise to a situation where one creditor (Mr Buddington) had been replaced by a different one (Wards). As HHJ Paul Matthews described it at [31], "*the fact that the identity of the creditor changes, and the debtor may not have such an easy ride, is simply one of the vicissitudes of life*".

The defence of change of position was also not available because there was no causal connection between the mistaken payment and the money paid to Mr Buddington. At the time that the defendant gave the post-dated cheque the mistaken payment was still many months in the future. In other words, the defendant did nothing in reliance on or awareness of the mistaken payment to bring about the payment of the post-dated cheque. The payment of the cheque was therefore not sufficiently causally connected to the mistaken payment for the defence to be available. Similar reasoning applied to the overdraft being cleared (at [35]); Mr

Hendawi did not decide, knowing of the payment in, to pay off his overdraft. It happened automatically, without his knowledge.

The only arguable defence that existed, therefore, was in relation to the £25 transfer fee.

Bad faith irrelevant

The above conclusions therefore made it unnecessary to consider the issues relating to bad faith (at [37]). The Court was not in a position to deal with such allegations, particularly in light of the lack of cross-examination. But the key point is that the Court did not need to go into them.

Some other good reason

HHJ Paul Matthews accepted and proceeded on the basis that Mr Hendawi was unaware of both the claim form and the judgment until August 2017. The question was whether this was a sufficient basis by itself for holding that there was a good reason for setting aside the judgment.

Following *Akram v Adam* [2005] 1 WLR 2762, CA (in turn following *Godwin v Swindon BC* [2002] 1 WLR 997), the Judge decided that no useful purpose would be served by setting the judgment aside. As he described it at [42]:

> "...although the fact that the defendant never received the claim form is a relevant factor in deciding whether as a matter of discretion to set aside a default judgment, on its own it is not enough. It may not be necessary to show an arguable defence, but it is necessary to show how setting aside the judgment will serve some useful purpose, such as in relation to reputational or costs issues."

Mr Hendawi pointed to the bankruptcy proceedings as giving rise to that 'some other reason', but HHJ Paul Matthews said that the threat of bankruptcy was no more or less potent now than it had been ten years ago. Nor was it a good reason that the claimant has delayed so long before seeking to have the defendant made bankrupt, because Wards were entitled to enforce the judgment, or not, during such period as the rules allow.

Promptness

HHJ Paul Matthews also found that Mr Hendawi had not acted promptly in making the application, as is required by CPR, r 13.3(2). Although some of the delay between August 2017 and March 2018 was explicable by a lack of representation, this was not prompt 'on any view'. Accordingly, the Judge concluded (at [47]) that "*even if the defendant had an arguable defence to the whole claim*" he "*would not have set aside the judgment*."