THE HIGH COURT

[2013 No. 2364 S.]

BETWEEN

GILL TRAYNOR SOLICITORS

PLAINTIFF

AND

H. W.

DEFENDANT

JUDGMENT of Ms. Justice Faherty delivered on the 20th day of July 2018

1. This matter comes before the Court by way of the defendant's notice of motion dated 12th July, 2017 wherein she seeks an order pursuant to O. 27, r. 14 of the Rules of the Superior Court (RSC) setting aside a judgment obtained by the plaintiff in default of appearance on 16th April, 2015.

Background

2. The summary summons issued on 23rd July, 2013. The plaintiff seeks to recover from the defendant the liquidated sum of €73,433.45 in respect of works carried out by the plaintiff by way of legal services on the defendant's behalf which said sum it is said to be due and owing within the six years prior to the issuing of proceedings.

3. In the affidavit of debt, Ms. Orlaith Traynor, a partner in the firm Gill Traynor Solicitors, avers that the summary summons was served on the defendant and that no money has been paid on foot of the claim since the service of the summary summons.

4. In order to put the defendant's application into context, it is apposite to set out in some detail the circumstances which led to plaintiff's retainer by the defendant and the events subsequent to that retainer.

5. The plaintiff's retainer commenced in 2008 in the context of judicial separation proceedings brought by the defendant's ex-husband in 2008 which, the plaintiff contends, were complex and fraught. The judicial separation proceedings came on for hearing in 2010 in Circuit Court and ran for four days. They were then settled as between the parties on terms.

6. On 15th July, 2010 the parties were granted a decree of judicial separation. The Circuit Court made a number of ancillary orders in the terms of the settlement document dated 12th July, 2010. Thereafter, on 3rd August, 2010, the plaintiff furnished the defendant with a bill for €50,742.15. It does not appear from the papers before the Court that the defendant took objection to this legal bill. Subsequently, there were residual matters from the family law proceedings (namely access issues and attachment and committal proceedings against the defendant in 2012 in relation to the enforcement of the judicial separation terms) which had to be dealt with and in respect of which the plaintiff continued to act for the defendant.

7. Further legal bills were sent to the defendant between 2010 and 2013.

8. Throughout almost five years of representation provided by the plaintiff, the defendant was furnished on numerous occasions with a breakdown of fees due and owing by way of interim fee notes issued by the plaintiff and by junior and senior counsel acting for the defendant. The sum of €73,433.45 is broken down as follows:

Gill Traynor Solicitors €43,680.75

Senior Counsel €22,689.80

Junior Counsel €7,062.90

A substantial portion of this sum relates to the judicial separation proceedings which were settled and ruled by the Circuit Court in July, 2010.

9. From May, 2013, onwards correspondence passed between the plaintiff and the defendant, and/or the defendant's then solicitors, Regan McEntee and Partners (hereinafter Regan McEntee), in relation to the plaintiff's bill of costs.

10. On 11th June, 2013, the plaintiff's solicitors, Black & Co., wrote to the defendant advising that she owed €73,433.45.

11. The defendant responded to this letter on 28th August, 2013 stating that she was at a loss to understand how her legal fees amounted to €82,000 when her case was settled for €100,000 and noting that at the commencement of the retainer the plaintiff had quoted a sum of €15,000 to conclude the judicial separation proceedings. She referred to her agreement to assign shares in FBD Holdings to the plaintiff which she stated had a current value of just over €35,000. She further referred to a payment on account made by her of €8,500. The plaintiff was requested to review the account in light of the then financial climate.

12. Black & Co. responded on 12th September, 2013 to the effect that if the defendant signed the share transfer form and furnished a proposal with regard to the balance owing, further instructions would be taken from the plaintiff as to how the remainder of the debt would be dealt with.

13. It appears that between late 2013 and July, 2015, there was little formal correspondence between the parties on the issue of the debt, save an email sent by the defendant to the plaintiff in December, 2014 which is discussed later in this judgment.

This was the timeframe in which the summary summons issued (7th July, 2013) and judgment was obtained in the Central Office.

14. Correspondence re-commenced however on 27th July, 2015, in the wake of a visit by the Co. Westmeath Sheriff to the defendant subsequent to judgment having been obtained. On 27th July, 2015, Regan McEntee wrote to the plaintiff with reference to the plaintiff's Order of fieri facias, advising that the Order had come as a surprise to the defendant "as she did not realise that a Debt Collection Court Order had issued against her and in particular was surprised in circumstances where the alleged quantum of debt has

regularly been disputed." Regan McEntee sought time for the defendant to consider her position.

15. The plaintiff responded on 29th July, 2015, stating that the debt due had never been disputed by the defendant. Reference was made to the defendant's prior offer to settle the legal costs bill on the basis of a transfer of restricted US shares, a proposal which was not acceptable to the plaintiff.

16. Thereafter, namely between August, 2015 and 22nd August, 2016, copious (and quite fractious) correspondence passed between Regan McEntee and the plaintiff in relation to the legal costs bill.

17. On 7th September, 2015, Regan McEntee made reference to a possible complaint by the defendant to the Law Society on the basis that she had not been furnished with a s. 68 letter by the plaintiff as required by the Solicitors (Amendment) Act 1994. Request was also made for copies of all relevant invoices.

18. On 11th September, 2015, the plaintiff forwarded a statement of account and a copy of the s. 68 letter which had been furnished to the defendant in April, 2008. It was also noted that the share transfer form with regard to the defendant's FBD shares had not been signed by the defendant.

19. On 24th September, 2015, Regan McEntee advised the plaintiff of the defendant's proposed instalment payment plan of €200 per month by way of discharge of the legal fees and reiterated the defendant's intention to proceed with the FBD share transfer (said to be valued at €15,000) to the plaintiff.

20. The monthly payment plan was rejected by the plaintiff on 1st October, 2015 and "a substantial upfront payment" was requested before any proposal would be considered.

21. On 29th October, 2015, the plaintiff advised Regan McEntee that they awaited a further transfer form from a stockbroker for the purposes of transmitting same to the defendant for completion, and noted that a previous form furnished to her in April, 2013, had not been signed by her. The plaintiff requested details of the defendant's proposal to sell a plot of land to discharge the legal fees as had been advised in correspondence from Regan McEntee dated 27th September, 2015.

22. On 10th September, 2015, Regan McEntee advised that the reference to a proposed sale of a site was in the context of agreement being reached with the plaintiff on an appropriate figure.

23. On 16th October, 2015, the plaintiff advised Regan McEntee of the registration of a judgment mortgage on the defendant's property and that it proposed to seek a well charging order unless some realistic proposal was made by the defendant. The defendant was advised that interest on the debt was accruing at 8%. On the question of interest, the Court notes that the default judgment in fact makes reference to the plaintiff having waived interest on the judgment debt under the Courts Act 1981.

24. On 11th January, 2016, Regan McEntee responded, admonishing the plaintiff for registering a judgment mortgage at a time when negotiations on the debt were ongoing and querying the legality of the Debt Collection Order obtained by the plaintiff on the basis that same included costs and outlay (a reference to counsels' fees) which the plaintiff had not paid out. It was stated that this left the defendant "with no option but to challenge the legality of the Debt Collection Order".

A copy of the defendant's statement of means was also included and the plaintiff was advised that in light of same Regan McEntee were advising the defendant to seek the advice of a personal insolvency practitioner.

25. On 19th January, 2016, the plaintiff confirmed that proceedings could be served on their solicitors, Black & Co.

26. On 19th January, 2016, Regan McEntee forwarded documentation with regard to the FBD shares and repeated the defendant's offer of monthly instalment payments of €200. They further advised that the defendant was still making efforts to sell a site "with a view to discharging the debt". They wrote again to the plaintiff on 27th January, 2016, to the effect that an associate of the defendant had offered to assist her by purchasing some of her lands for €35,000. Notwithstanding that she was reluctant to part with any of her lands, they advised that the defendant was thus prepared to offer the plaintiff a lump sum "being the net proceeds from the sale of the lands in question, together with the net proceeds of the sale of her FBD Shares" upon receipt of confirmation that this would settle and discharge the plaintiff's bill "in full".

27. On 9th February, 2016, the plaintiff rejected the defendant's proposal on the basis that the debt due by the defendant was €73,433.45, with interest accruing thereon at a rate of 8% from 16th April, 2015. A letter from Campbell O'Connor, stockbrokers, was also enclosed which showed that the FBD shares were, in the words of the plaintiff, "virtually worthless".

28. On 22nd February, 2016, Regan McEntee requested the plaintiff to make a counter offer and that the defendant be allowed to inspect her files in the plaintiff's office.

29. The plaintiff responded on 29th February, 2016, advising there was no question of a counter offer and that the defendant could have supervised access to her files.

30. On 28th June, 2016, the plaintiff advised Regan McEntee that well charging proceedings had been issued regarding the defendant's property and sought confirmation that Regan McEntee would accept service of the proceedings.

31. On 22nd August, 2016, Regan McEntee advised that they would not be acting for the defendant in the well charging proceedings as she could not afford to employ them in relation to the matter. They went on to state:

> "In addition we understand that yet again you have received an offer to discharge the debt by way of providing shares. That offer was described as relating to the full Debt even though you will note from previous correspondence that our Client does not accept the amount that you are seeking is owed.
>
> At this stage we note that you have received quite a number of offers of payment and to date have accepted none. It is as such apparent that while [the defendant] is making every effort to address this issue, you are less eager to see the issue resolved."

32. In July, 2016, the defendant tendered an offer of stock in a US company owned by an acquaintance. This was rejected by the plaintiff on 12th September, 2016, on the basis that this offer had been previously made and rejected. The defendant was advised

that the plaintiff was now seeking the sale of her lands in order to settle the legal costs bill.

33. On 26th September, 2016, the defendant wrote directly to the plaintiff advising as follows:

> "I am at still at a loss to understand how you got a judgment against me without me knowing about it. Can you please send me a copy of the summons that the summon server has sworn he served on me that has my signature by me then please send me a copy of the Court order that allows for service other than on me personally."

34. The plaintiff responded on 6th October, 2016, in the following terms:

> "We have dealt fully with any queries raised in your behalf by your Solicitors Regan McEntee. Unfortunately, this protracted correspondence did not lead to any meaningful outcome.
>
> The fact is that our substantial fees are now outstanding a number of years and while interest is accruing at the rate of 8% not one cent has been paid off [the] outstanding amount and this firm will not allow this situation to continue.
>
> We do not intend to enter any further correspondence with you unless and until [you] have any proposals to how you might address discharge the payment of our fees".

35. On 3rd November, 2016, the plaintiff wrote to Regan McEntee advising that the offer of shares "which are not capable of being traded or sold are of no benefit to this firm or to Counsel", and noting that Regan McEntee would not be acting on the defendant's behalf in the well charging proceedings.

36. On 8th May, 2017, the defendant proffered a cheque for €200 and advised the plaintiff that her circumstances were "dire" but she was happy to sit down with the plaintiff "to come to some payment schedule".

37. The plaintiff returned the defendant's cheque on 15th May, 2017, on the basis that it was "totally unrealistic" in circumstances where "it would take some 31 years to discharge the amount due and when [the defendant has] sufficient assets to discharge [the debt]." The plaintiff referred to valuations obtained at the time of the defendant's divorce proceedings which, it was stated, showed that she had sufficient assets to discharge the debt.

38. The defendant replied on 26th May, 2017, advising, *inter alia*, as follows:

> "At no time during the divorce proceedings was the Judge ever told that my legal bill was going to be in the region of €75,000. At the time of the settlement I certainly was not aware my bill would be so large. I also cannot understand how the Judge could have been satisfied that proper provision was being made without knowing the size of the legal fees debts on both sides.
>
> As you know I am disputing:- that the judgment summons was ever served upon me, that the amount claimed is actually due and owing; that you fully complied with your S. 68 obligations and I believe that the court should have been informed of the size of the legal bills before deciding that proper provision was being made.
>
> …
>
> If the court knew that I was going to have to sell my home to discharge your bill then different provision would have been made. Either you were negligent in not informing the court of the size of the legal debt or your bill is grossly excessive."

39. The plaintiff was advised that the defendant had no option but to seek to have the default judgment reviewed and that a complaint would be lodged with the Law Society.

40. The plaintiff responded on 1st June, 2017, stating that issues raised by the defendant in relation to the s. 68 letter and the non-service of documents had been raised in correspondence with Regan McEntee over many months "and yet again this yielded no resolution". It was further stated that the proposals which had been tendered had been rejected by the plaintiff as unrealistic. Reference was made to the fact that nothing had come of an offer to sell some of the defendant's lands.

41. On 23rd June, 2017, the defendant sent the plaintiff an email the contents of which are for all intents and purposes replicated in the defendant's grounding affidavit to the within motion. In summary, she asserted that she had not been served with proceedings by a named retired Garda. She stated that she had been advised that the judicial separation and divorce proceedings had been instituted in the wrong circuit and county. She stated she had never been advised that her legal costs would amount to "the cost approximately of erecting her home and [ ]" and that the judge hearing the family law case had not been made aware of the level of her legal costs.

42. This communication was responded to on 29th June, 2017 by the plaintiff who pointed out that the family law proceedings had been issued by the defendant's ex-husband. The plaintiff also advised that as the family law proceedings were settled by a consent order it was not necessary for the judge to be aware of or have regard to the defendant's financial circumstances.

43. On 26th June, 2017, the defendant's present solicitors, Martina Sheridan & Co., wrote to the plaintiff formerly advising the intention to apply to set aside the judgment.

44. The within motion is grounded on the defendant's affidavit sworn 1st July, 2017. She avers to having inspected an affidavit of service sworn by one Denis P. O'Sullivan, a retired Garda. She states that no "retired garda" served the summons on her. She states that she wishes to respond to the costs sought by the plaintiff and to have costs taxed. She avers that the first she knew about being sued for costs was when she received a letter from the Westmeath Sheriff threatening execution on foot of a judgment. She states that thereafter she immediately consulted Regan McEntee who sought to negotiate reasonable costs on her behalf without success.

45. The defendant avers that on a date in June, 2017, she caused her legal papers to be examined by counsel following which she was advised that two sets of family law proceedings (record no. FL171/2008 MH and record no. FL121/2013 MH) in which she was involved "were issued and litigated, by the plaintiff acting on my behalf, in the wrong Circuit and wrong county".

46. The defendant avers that neither she nor her former husband had a nexus with Meath as a jurisdictional county. She avers that

her family home and associated lands were at all material times situated in [ ] Co. Westmeath, which is covered by the Midland Circuit. She avers that this is so "geographically and legally in terms of the jurisdictional Rules of the Circuit Court".

47. She states that Navan, Co. Meath is currently her sorting post office "which may have caused the mistake by the plaintiffs".

48. She avers that following the judicial separation proceedings she sold circa. 30 acres of some 47 acres which she and her former husband held as "unregistered title". She states that the sold-off portion was duly registered on a newly opened Co. Westmeath folio. She avers that she is currently advised that she must re-enter her judical separation and divorce cases "to have all Orders therein re-dealt with jurisdictionally in the correct county and circuit … this will involve reissuing, reserving and reconsideration for Westmeath and the vacating of all Orders obtained in Meath on the Eastern Circuit to deal with the unintended jurisdictional mistakes. This will involve time, effort and money".

49. The defendant goes on to state:

> "11. Due to the jurisdictional mistakes Mutual Spousal Succession Rights are not severed. Wills, if any, made are affected. Paper Title to [ ] lands over which the Plaintiff has purported to 'Well Charge' in 2016, is flawed. This is so because of the defective Family Court Orders for inter Spousal Property Adjustment. The Plaintiff's legal services have therefore significantly failed I believe and am advised."

50. The defendant also avers that the plaintiff's 2016 judgment mortgage affidavit is incorrect in that it states that the defendant still owned 47 acres of land at [ ]. It is averred that "the purported footprint of the judgment mortgage of the Plaintiff is thus too big, by a margin circa 30 acres".

51. She further avers that the plaintiff's well charging writ of 2016 issued in Dublin and thus in the incorrect jurisdictional area and that this is a further jurisdictional error on top of the jurisdictionally invalid separation and divorce orders.

52. She claims that at no stage was she warned by the plaintiff or counsel that the costs of legal services provided on her behalf "would amount to the costs approximately of her family borrowing procured as a mortgage on our title". She avers that the legal costs were not flagged to the judge hearing the family law proceedings nor deposed to in her affidavit of means. She avers to having made an interim payment of legal fees of approximately €9,500 and having paid two other professionals involved in the family law proceedings €2,500 each.

53. The defendant exhibits a draft defence and counterclaim wherein she pleads the matters deposed in her affidavit and refers to an "intended counterclaim" against the plaintiff and counsel who were involved in her family law proceedings. In her intended counterclaim, she seeks declaratory relief to the effect that "the consideration for the family law legal fees marked, notified and sued for has failed against all Defendants to the counterclaim" and "that all Defendants to the counterclaim have been professionally negligent, causing the plaintiff distress, financial loss, worry and damage". She claims the return of fees paid on account. She seeks damages and/or set off against all defendants of the cost of re-entering and processing fresh divorce proceedings in the correct court, county and circuit and damages against Gill Traynor Solicitors for stress caused by well charging proceedings "brought in error". She further seeks a declaration that the judgment mortgage is void and an order for the removal of the said judgment mortgage.

54. Ms Orlaith Traynor, a principal in Gill Traynor Solicitors, swore a replying affidavit 6th October, 2017. She refutes the defendant's contentions and asserts, *inter alia*, that at all times during which the plaintiff acted for the defendant, the defendant was kept apprised of accruing legal fees and provided with interim fee notes on a regular basis.

55. She asserts that the defendant's application to set aside the judgment is "misconceived" and based on "serious false assertions". She avers that the defendant has failed to establish any special circumstances to excuse her failure to engage in the within proceedings which issued in July, 2013 and that, additionally, the defendant has failed to demonstrate that she possesses any proper or *bona fide* defence to the plaintiff's claim.

56. Ms. Traynor describes as "a complete fabrication" the defendant's averment that she was not personally served with the summary summons. Ms. Traynor asserts that the proceedings were served on the defendant by a summons server, Francis Craven (a former Revenue official) on 7th October, 2013, at her premises at Clonmellon.

57. According to Ms Traynor, Mr. Craven was previously engaged on the defendant's behalf for the purpose of personally serving the defendant's ex-husband in the family law proceedings. It is Ms. Traynor's contention that the defendant's allegation that she had no knowledge of the summary summons proceedings is "unsustainable".

58. Ms. Traynor states that the defendant has failed to provide any explanation for her failure to engage in the proceedings which were served on her in 2013. She further avers that even by the defendant's own account (which is refuted), she was aware of the proceedings from the time she received a letter from the Co. Westmeath Sheriff in or around May, 2015, shortly after judgment was obtained. She avers that despite the fact that immediately thereafter the defendant retained Regan McEntee no steps were taken to bring an application to set aside the judgment. She maintains that the defendant's delay in bringing the within application is both inordinate and inexcusable and that no special circumstances have been established to entitle her to the relief sought.

59. Ms. Traynor disputes that there is any valid basis for the defendant's reliance on an alleged jurisdictional error in respect of the judicial separation proceedings brought by the defendant's ex-husband. She describes the defendant's reliance on the alleged jurisdictional error as "counter-intuitive" and "self-serving" in circumstances where the defendant at all relevant times had represented to Ms. Traynor that her home and business address was in Co. Meath. Ms. Traynor avers that at no stage did the defendant ever indicate that her lands were situated in Co. Westmeath. She exhibits copy invoices provided by the defendant which show the defendant's place of residence as Co. Meath.

60. She goes on to state:

> "14…The family law proceedings which were instituted by the Defendant's ex-husband were bought in the County of Meath and no issue was made of this by the Defendant. On the contrary, the Defendant at all times maintained that she was resident and operated her business out of Meath. All correspondence between my firm and the Defendant was sent to her address in Meath, as requested by the Defendant. During her proceedings, the Defendant herself swore various affidavits, including affidavits of means and welfare, in which she expressly averred that her address was … in the County of Meath.

> 15. Even after the termination of my firms' retainer with the Defendant, it is apparent that her subsequent solicitors, Regan McEntee, were given to believe by the Defendant that her address was [in Co. Meath]. The Defendants' Meath address was referenced on every letter received from Regan McEntee Solicitors. Her Meath address was also reflected in the subsequent Contract of Sale in respect of a portion of the Defendant's lands, drafted by Regan McEntee Solicitors and executed by the Defendant."

61. She avers that even if the defendant is correct and that a jurisdictional issue has emerged in relation to the family law proceedings it is entirely unclear how that could possible form the basis of a defence to the within proceedings. This is so in circumstances where the judicial separation proceedings were compromised by agreement between the parties and where the defendant fully submitted to the court process in Co. Meath. Thus, the defendant's contention that the plaintiff and/or counsel acted negligently "is utterly baseless and nonsensical".

62. Nor is it accepted by Ms. Traynor that any alleged jurisdictional error would necessitate "re-issuing, re-serving and re-consideration by Westmeath and the vacating of all orders obtained", as alleged by the defendant. She points out that the defendant has not set out any steps taken by her towards the rectification of the alleged error.

63. Ms. Traynor states that with the exception of a small number of payments on account, the defendant has failed to engage with the plaintiff in any constructive way in relation to fees. It is further averred that the defendant achieved an extremely favourably result in her family law proceedings (whereby she retained her house and business) which, it is averred, "was due in no small part to the hard-work, time and expertise" expended by the plaintiff and counsel on what was a complex and time consuming case.

64. Ms. Traynor further asserts that the defendant is quite capable of discharging the fees due and owing since she has significant assets which include a sizeable property and adjourning lands, as well as the income from her business. She avers that despite the fact that the defendant was left with a residue of monies following the sale of lands to discharge a lump sum to her ex-husband she has not used that excess to discharge her outstanding legal fees. Nor did the defendant sell lands to discharge the fees as had been proposed in open correspondence.

65. It is further averred by Ms. Traynor that the defendant has not given accurate account of the lands she presently owns.

66. Mr. Craven's affidavit of service was sworn 8th October, 2015. He avers that he personally served the defendant and that at the time of service he was "acquainted with the appearance of [the defendant] who identified herself to me and to whom I exhibited the original summons". He swore a further affidavit of service on 29th November, 2013.

67. Mr. Craven swore another affidavit on 27th November, 2017 for the purpose of responding to the defendant. He describes the events of 7th October, 2013:

> "When I initially attended at [the defendant's] residence, she was not present. I contacted (her) by telephone and she advised me she was collecting her son from school and that she due to return shortly to [her residence]. [She] returned …shortly thereafter. I further say that at the time of service, [the defendant] identified herself to me and I exhibited the original High Court summons. [The defendant] appeared to be aware of the nature and purpose of my visit to her property and accepted the summons without quibble. Furthermore, at the time of service, [the defendant] was known to me as I had previously been engaged by Gill Traynor Solicitors and met with [the defendant] for the purposes personally serving documents on her now ex-husband in the context of their family law proceedings. I was therefore acquainted with [the defendant's] appearance prior to service of these proceedings.
>
> …
>
> I say that I have in excess of twelve years' experience as a summons server and have, during that period, served countless summonses and court documents. I say that the voracity of any personal service or any affidavit in support of such personal service sworn by me has never been questioned or found to be untrue in any respect whatsoever."

68. It appears that after she read his affidavit sworn 27th November, 2017, the defendant telephoned Mr. Craven "to talk to him about a supposed serving which I never remembered getting." In her affidavit sworn 8th December, 2017, the defendant avers that in the course of that conversation Mr. Craven described her as having driven a four-wheel drive light coloured car "a kind of jeep" on 7th October, 2013 and that she had "blond shoulder length …hair" at the time. The defendant avers as follows:

> "I say in reality I have always had distinctive waist length bright red hair and on 7th October, 2013 my car was not a Jeep or a four-wheel drive but a Skoda estate. I have just checked my insurance records… and I was not driving any other car in October, 2013 except the Skoda…"

69. By way of response to Mr. Craven's affidavit, the defendant's son, C.W., swore an affidavit on 8th December, 2017 in which denies that Mr. Craven served the defendant in C.W.'s presence. Nor does C.W. believe that Mr. Craven telephoned the defendant to arrange service of the summons at any time when C.W. was a passenger in the defendant's car. C.W. also avers that in October, 2013, the defendant drove a Skoda "and not a Jeep or four-wheel drive vehicle". He further says that the defendant "always had distinctive waist length bright red hair and this was so on 7th October, 2013."

70. In a further affidavit sworn 18th January, 2018, Mr. Craven describes the defendant's objective in telephoning him as an attempt "to elicit inconsistencies in my account which could be used to attack my credibility in these proceedings". He states that he is at a loss to understand the defendant's "personal and quite vindictive attack" on his character. He avers that on 7th October, 2013, he served a true copy of the summons and states "for the record …I am certain of this fact." He refers to having endorsed the summons on 8th October, 2013. He states that service is further evidenced by an entry in his diary for 7th October, 2013 which he exhibits. He goes on to aver:

> "I say and believe that the Defendant's actions in calling me without notice, completely out of the blue, over four years after the date of service itself, is a most transparent attempt to seek out and procure some ground upon which can be said that my account is in some way inconsistent. I say and believe that the Defendant's account does not in fact contradict in any material way the account given by me in my affidavits of 8th October 2013 and 29th November 2017."

71. Ms. Traynor's second affidavit was sworn on 18th January, 2018. She describes the defendant's attempt to undermine Mr. Craven as "wholly self-serving and represent a desperate attempt by her to lend the appearance of truth to her false account in respect of service, where she was at all times wholly aware of the existence of these proceedings."

72. She avers that in her experience, the defendant's hair was neither "bright red" nor "waist length". Ms. Traynor describes the defendant's hair (at the time) as being "strawberry blond and slightly longer than shoulder length". As such she believes Ms. Craven's description of the defendant was not inaccurate. Ms. Traynor further states that she is aware that the defendant did in fact drive a jeep or four-wheel drive vehicle on occasion and states that it is noteworthy that the defendant has not denied that fact, instead placing emphasis on the car she owned at the time.

73. Ms. Traynor thus describes the defendant's averment that she only became aware of the summary proceedings when she received a letter from the Westmeath sheriff (in or around May, 2015) as a "complete fabrication" and inconsistent with the defendant's own actions and correspondence with the plaintiff's solicitors, Black & Co., during the course of the summary proceedings.

74. Ms. Traynor also rejects the account given by the defendant of her financial position, stating that the sum of €116,500 which the defendant received over the course of 2013 for the sale of lands described as plot B is testament to the fact that the defendant was in funds at that time, a fact not disclosed to the plaintiff.

75. She again avers that the defendant has failed to provide the Court with a full and accurate picture regarding the lands she retains at [ ]. Ms. Traynor avers that the defendant retains a sixteen-acre plot which is entirely mortgage free. In such circumstances, Ms. Traynor believes the picture presented by the defendant in respect to her finances is misleading.

76. She describes defendant's reliance on an alleged jurisdictional error as entirely disingenuous and contrary to the defendant's own actions and representations throughout the course of the plaintiff's retainer with the defendant. She goes on to state:

> "Furthermore the Defendant had the benefit of legal representation of Regan McEntee Solicitors between July 2015 and November 2016 and at no point did either the Defendant or her Solicitors raise the perceived concerns now expressed in the within motion. On the contrary, the fact that the Defendant resided in Co. Meath was confirmed time and time again in the face of all correspondence received from the defendant's former Solicitors."

The defendant's submissions

77. Counsel submits that there has to be a doubt about the service of the summary summons, given the contents of Mr. Craven's affidavit of 27th November, 2017 and what was subsequently deposed to by the defendant and her son in their later affidavits.

78. It is further contended that neither the defendant nor the judge hearing the family law proceedings were apprised by the plaintiff of the ultimate cost of the legal services provided by the plaintiff. While it is acknowledged that the defendant received interim fee notes along the way up to 2013, at no stage, however, was she warned of the likely amount of legal fees she would incur.

79. More particularly, it is submitted that the defendant has a good defence to the within proceedings by reason of the jurisdictional errors which attaches to the judicial separation and divorce proceedings to which the defendant was a party. In light of the fact that the Circuit Court is a court of local jurisdiction the said proceedings should have been instituted in Co. Westmeath which is the county where, geographically, the defendant and her ex-husband resided and carried on their business at all relevant times.

80. As made clear by the defendant's email of 23rd June, 2017 and her grounding affidavit, the defendant advised the plaintiff that she has no jurisdictional nexus to Co.Meath and queried why her judicial separation proceedings were issued and litigated on her behalf by the plaintiff in Co. Meath. It is also the defendant's contention that the well charging proceedings are beset by jurisdictional error.

81. It is submitted that in view of jurisdictional error, the defendant will have to issue judicial separation and divorce proceedings in Co. Westmeath in order to regularise matters. Counsel submits that it may well be the case that the defendant and her ex-husband are not validly divorced. It is presently unclear if the re-issuing of divorce proceedings will cause difficulties or further costs for the defendant. Accordingly, the defendant wishes to defend the summary summons proceedings on the basis of the negligence of the plaintiff in failing to spot jurisdictional error. Counsel contends that there is no basis for Ms Traynor to assert that there is nothing wrong with the judicial separation orders when it is apparent that the proceedings were issued and litigated in the wrong jurisdictional area. It is submitted that in light of the "legal chaos" which attaches to the judicial separation and subsequent divorce orders, the defendant has a good defence to the within proceedings.

82. In aid of her submissions in this regard, counsel points to the affidavit sworn 9th December, 2017 by Ms. Martina Sheridan, principal in Martina Sheridan & Co.:

> "The issue of the Circuit Court /s being constituted under the Constitution as "Courts of Local and Limited Jurisdiction", was brought home to me as a Practicing Solicitor when I sought to issue Family Law proceedings for [a client] resident in [ ] in 2016 in circumstances where her estranged Husband permanently resided in London. My said Client's An Post address was stated as …[ ], Navan, County Meath whilst she resided in the geographical area of Co. Westmeath. I say that I received a note from the County Registrar, Trim, informing me my Client's proceedings could not be issued in Trim Circuit Court Office, nor for the Eastern Circuit, as [ ] is geographically located in the County of Westmeath and neither party had a jurisdictional nexus with the County of Meath."

83. It is further submitted that insofar as the plaintiff relies on representations made by the defendant as to where she was residing in order to refute the defendant's claim of negligence, such an argument cannot be sustained in circumstances where the defendant is a lay person and could not be expected to have knowledge of how the jurisdiction of the Circuit Court for the purposes of the initiation of judicial separation proceedings is determined. It was a matter for the plaintiff to satisfy themselves that the judicial separation proceedings to which the defendant was a party were jurisdictionally correct. The fault cannot lie with the defendant even if she gave her address as Co. Meath.

84. Part of the judicial separation negotiations conducted in 2010 was for the defendant to take over the mortgage on the family home and business. The settlement negotiated required the defendant to pay her ex-husband a lump sum payment of €100,000. This necessitated selling off some 30 acres of land. Counsel submits that the plaintiff's work in this regard required a perusal of the title to the house and lands. Such perusal would have shown that the house and lands were in Co. Westmeath. In those circumstances, the plaintiff's attempt to lay blame on the defendant because she gave her postal address as County Meath is not sufficient. Had the plaintiff made sufficient enquiries, they would have seen that the judicial separation proceedings had been commenced in the wrong county and circuit. In this regard counsel points to the contract for sale of lands described as plot A which was concluded in 2012, as exhibited in Ms. Traynor's affidavit, and which describes the lands as situate in Co. Westmeath. For the purposes of the settlement negotiations in the judicial separation proceedings it is presumed that the plaintiff would have had to acquaint themselves with the

defendant's title. Thus, they would have seen that the lands were situated in Co. Westmeath. The plaintiff should then have known that the judicial separation proceedings had been commenced in the wrong circuit and county.

85. It is also submitted that if the default judgment is set aside, the defendant could have recourse to the County Registrar, pursuant to s. 27 of the Courts and Courts Officers Act 1995, for the purposes of seeking an order of taxation in respect of the plaintiff's legal costs bill.

86. Counsel further submits that if the defendant does not get an opportunity to defend the summary proceedings her lands will be sold and she will be left with no assets. Furthermore, if the summary judgment is not set aside, the plaintiff may take steps to remedy the jurisdictional error which attaches the well charging proceedings by seeking to institute fresh well charging proceedings for Co. Westmeath, thereby putting the defendant's lands in jeopardy.

The plaintiff's submissions
87. At the outset, counsel for the plaintiff submits that what the defendant is attempting to do in the within proceedings is to rewrite history and disregard entirely the level of representation which she required in the context of the judicial separation proceedings.

88. It is submitted that there is no merit to the defendant's argument that she was not served with the summary summons. The defendant's now efforts to impugn Mr. Craven's integrity represents a new low by her in her efforts to avoid discharging the plaintiff's legal fees. The defendant appears to suggest in her recent affidavits that the summons server was engaged in some sort of conspiracy with the plaintiff to pretend that the summary summons was served when it was not, a matter which has caused Mr. Craven undue distress.

89. Moreover, on the defendant's own account of events, she wasted two years from May, 2015 (when she says she became aware of the proceedings) before bringing the within motion to set aside. Thus, the defendant's delay is inexcusable and unconscionable particularly in the context of her complete failure to engage in any meaningful way with regard to the debt due to the plaintiff.

90. It is also the plaintiff's contention the jurisdictional issue raised by the defendant cannot give rise to a claim of negligence against the plaintiff, or counsel who acted for the defendant.

91. This is so in circumstances where at all relevant times the plaintiff relied on the defendant's representations as to her residence and place of business. While the defendant now contends that the judicial separation and divorce proceedings should have been instituted in Co. Westmeath, she never intimated to the plaintiff otherwise than she resided in Co. Meath. Furthermore, all of the documentation provided by the defendant to the plaintiff referred to her residence and business address as being in Co. Meath. Counsel contends that it is not the standard practice that lawyers acting for family law litigants would resort to a perusal of title deeds in the face of being given express instructions by the client as to her residential address and place of business.

92. Of further note is the fact that after the defendant parted company with the plaintiff, she continued to represent her address as being in Co. Meath. Moreover, the defendant's present solicitors equally operate on the basis that the defendant is resident in Co. Meath, as in evident from correspondence sent to the plaintiff in June, 2017.

93. Counsel further submits that even if there was a jurisdictional error of the kind described by the defendant, it is not accepted that the plaintiff bears responsibility for such error in circumstances where the judicial separation proceedings in respect of which the plaintiff was retained were issued by the defendant's ex-husband. It is submitted that the plaintiff bore no obligation, when acting for the defendant, to look behind the defendant's own express instructions that she was resident in Co. Meath and that her business was in Co. Meath.

94. Insofar as reliance is placed by the defendant on Ms. Sheridan's affidavit, counsel submits that what Ms. Sheridan deposes to is that she sought to institute judicial separation proceedings in Co. Meath for a client resident in [ ]. It appears that she told by the Trim Circuit Court Office that the proceedings should issue in Co. Westmeath. This suggests that a fair and honest mistake was made by Ms. Sheridan; yet the defendant seeks to attribute negligence of the plaintiff for a similar mistake (if it be a mistake) in the context of judicial separation proceedings which were not instituted by the plaintiff on the defendant's behalf. It is submitted that for the defendant to succeed in the within application, she has to show the plaintiff was negligent in her handling of the defendant's judicial separation proceedings, a threshold which the defendant has not met.

95. Even if a jurisdictional error exists, the plaintiff does not accept the defendant's argument that she is now obliged to re-issue judicial separation and/or divorce proceedings. The judicial separation proceedings were compromised by way of a binding agreement which was thereafter adopted as part of the divorce proceedings. Accordingly, if there is a concern the judicial separation/divorce proceedings were commenced in the wrong jurisdictional area, then the said proceedings can be re-entered in Co. Meath for the purpose of a transfer to Co. Westmeath to have the settlement ruled. That such a course might be warranted however is not a defence to the within proceedings in circumstances where the settlement negotiated between the defendant and her ex-husband in 2010 is not in any way impugned by the defendant in the within proceedings.

96. Moreover, unlike the example proffered by Ms Sheridan, it is common case that the judicial separation and divorce proceedings to which the defendant was a party were accepted by Co. Meath.

97. Counsel also submits that there is no basis for the defendant to evince surprise at the level of fees sought by the plaintiff in circumstances where she was kept apprised from the outset of the fees being incurred.

98. With regard to the third limb of the defendant's purported defence, namely that she has no means to meet the judgment, that is not a defence to the plaintiff's proceedings. In any event, the defendant's alleged financial circumstances are not accepted by the plaintiff.

Considerations
99. Order 27 r. 14 (2) of RSC deals with applications to set aside default judgments. It provides that any judgment by default 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 the time of the default special circumstances (to be recited in the order) existed to explain and justify the failure of pleading.

100. In *McGuinn v. Commissioner of An Garda Síochána* [2011] IESC 33, Murray C.J. characterised the rule as "*specific and narrowly focussed*" which "*introduced a new, and stricter, criterion which an applicant must satisfy before he or she can rely on the court exercising its discretion in his or her favour".*

101. As regards the present case, in the first instance, I am not satisfied that it has been established that the judgment was irregularly obtained. From the evidence put before the Court, I am satisfied that the defendant was served with the summary summons, as deposed to by Mr. Craven in his affidavits. While the Court is all too aware of the dangers of reaching any significant conclusions of fact on the basis of conflicting affidavit evidence, it seems to me that there are sufficient indicators in the case to allow the Court to conclude that the defendant was properly served with the summary summons such that the defendant's now averments, and those of her son, should be given little or no weight. Most particularly, the Court takes note of the very late stage at which the defendant raises the issue of service in circumstances where for a substantial period of time between July, 2015 and August, 2016, when she had solicitors acting for her, she did not instruct them to raise the issue of service.

102. As deposed to by Mr. Craven, the summary summons was personally served on the defendant at her address at [ ] on 7th October, 2013. On the same date, Mr. Craven endorsed the summary summons. He swore an affidavit of service on 8th October, 2013. He swore a further affidavit on 29th November, 2013. For the purposes of requiring judgment to be marked, Black & Co. certified on 28th February, 2014 that the necessary affidavits had been filed.

103. The defendant contends that she first became aware of the summary summons proceedings in May, 2015 when visited by the Co. Westmeath Sheriff. I am satisfied that this cannot be the case given the defendant's response in December, 2014 to Black & Co's service on her of a notice of intention to proceed dated 27th November, 2014, apparently received by the defendant on 7th December, 2014.

104. An email of 11th December, 2014 sent by the defendant to Black & Co. reads, in part, as follows:

> "This email is in regards to the notification that I received in the post on December 7. It is [u]nfortunate that Orlaith and I have not been able to resolve this debt issue. First let me provide you with some background info. I was initially quoted €15,000 for the cost of my separation. I had documented previously the amounts I already paid as we went along. I have also tried to have discussions … with Orlaith regarding the amount owed.
>
> The last discussion with my attorney Orlaith we had discussed the exchange of stock to settle my debt. Unfortunately, we were never able to reach an agreement on a reduction of monies owed to apply the value of the stock towards. At this time Orlaith had physical possession of FBD Plc ordinary share [which] consist of 10,317 shares. Those discussions have broken down when Orlaith would not continue to meet or discuss the billing or … come [to] terms to try and resolve this issue.
>
> …
>
> At this time I propose that you accept my shares in payment as there is really nothing else I can provide. I am on an interest only mortgage, that will shortly come up for review and I can hardly manage as it is. I no longer have sufficient land to sell … So to put it in simple terms, I have a large mortgage and I am being sued by my CC card company along with paying a weekly amount back to social services on an overpayment I seemed to be claiming. [My] OD accounts far exceed my funds. I am on welfare benefits … I would suggest some other course of action other than going to court…"

I note that the defendant did not therein raise any issue with regard to service of the summary summons proceedings.

105. Moreover, following the default judgment on 16th April, 2015, the defendant's then solicitors, Regan McEntee, wrote to Black & Co. on 27th July, 2015. Whilst they expressed their client's surprise at receipt of the Sheriff's Order and her surprise that a Debt Collection Order issued in circumstances where the quantum of the debt had been regularly disputed, no issue was raised as to service of the proceedings on the defendant. Over the course of thirteen months thereafter, Regan McEntee communicated with the plaintiff on the defendant's behalf and, again, no issue was raised as regards service. While threats of referral to the Law Society and litigation were made by Regan McEntee over that period of thirteen months with regard to, respectively, the plaintiff's alleged failure to comply with s. 68 of the Solicitors (Amendment) Act 1994 (an unfounded allegation) and the alleged illegality of the Debt Collection Order on the basis that same referred to costs and outlay not incurred, it was never suggested on the defendant's behalf that she had not been served with the proceedings on foot of which the judgment was obtained.

106. The issue of non-service appears to have reared its head in the defendant's letter of 26th September, 2016 to the plaintiff, a time when Regan McEntee had stepped out of the picture. It seems to me extraordinary that the defendant would not have discussed the issue of the alleged non-service of the summary proceedings on her with Regan McEntee had that in fact been the case.

107. The Court therefore proposes to treat the judgment in issue in this case as a regular judgment. As set out in Delaney and McGrath, the jurisdiction to set aside a regular judgment obtained in default of appearance is based on the principles identified by Lord Atkins in *Evans v. Bartlam* [1937] A.C. 473 that *"unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure".*

108. As also pointed out by Delany and McGrath, while surprise and mistake are the most common grounds for seeking to set aside a judgment, the Court enjoys "*an untrammelled discretion*" to set aside a judgment where the interests of justice so require, as opined by Budd J. in *Maher v. Dixon* [1995] 1 ILRM 218 at p. 221.

109. However, in order to succeed in an application to have such a judgment set aside, it is an essential prerequisite that the defendant demonstrate that he or she has a defence on the merits which has a reasonable prospect of success.

110. The requirement for a defendant to demonstrate that he or she has a defence to the plaintiff's claim which has a reasonable prospect of success was also emphasised by Peart J. in *Allied Irish Banks Plc v. Lyons* [2004] IEHC 129, where the learned judge opined that whilst the court did not have to be satisfied that the defendant would succeed it was necessary to demonstrate that the defence was more than arguable and had a real prospect of success. In *O'Tuama v. Casey & Ors* [2008] IEHC 49, Clarke J. adopted the same test.

111. In the within application, the defendant has exhibited a draft defence denying the plaintiff's claim "in full". I agree with counsel for the plaintiff that this is not a tenable position in circumstances where the defendant has at various times acknowledged the debt owed to the plaintiff albeit on occasions she disputed the level of the debt. I note the defendant's email of 8th September, 2016 to the plaintiff offering an exchange of US stock for the plaintiff's "legal debt". I also note the defendant's most recent letter of 8th May, 2017 to the plaintiff wherein she requested a meeting so that "some payment schedule" could be negotiated. It is also noteworthy that this 2017 correspondence did not suggest that the default judgment was improperly obtained.

112. In the entire sequence of correspondence between Regan McEntee and the plaintiff in the period July, 2015 to August, 2016, the focus was on proposed solutions/offers to satisfy the debt. Regan McEntee did not make the case that the plaintiff was not owed monies. On the contrary, in their correspondence of 22nd August, 2016, they point out that the defendant's offer of shares to the plaintiff related to the "full debt" albeit they added the proviso that the defendant did not accept the full amount being sought by the plaintiff was owed. In all those circumstances the defendant's now denial of the plaintiff's claim "in full" is not a sustainable position.

113. I am also satisfied that the level of fees as claimed in the summary proceedings cannot have come as a surprise to the defendant given the incremental fee notes she was furnished with between 2009 and 2013. It is also the case that the plaintiff's s. 68 letter informed the defendant that it was not possible to calculate the precise extent of fees and that the level of fees would depend on a range of factors and that the plaintiff may furnish interim bills, as in fact happened. Guidelines as to minimum fees charged in judicial separation proceedings were enclosed with the s. 68 letter. Furthermore, the s. 68 letter specifically advised the defendant that she had a legal right to have the costs referred for taxation. This option was not availed of by the defendant at any stage. I agree with the plaintiff's submission that the opportunity to do so has passed and it is not for this Court in the within application to direct a referral to taxation, as appears to be suggested by the defendant's counsel.

114. Accordingly, the Court is not satisfied that the defendant has a defence on the basis that she was taken by surprise by the amount claimed by the plaintiff in circumstances where over the course of a number of years she was issued with fee notes on an incremental basis and particularly in circumstances where, following the conclusion of the judicial separation proceedings in July, 2010, she was presented with a bill of an excess of €50,000 to which she did not then take objection or refer the matter to taxation.

115. It is also of note that the defendant does not seek to impugn the terms of the agreement reached between herself and her ex-husband in the judicial separation proceedings by reason of any alleged negligence on the part of the plaintiff or counsel then acting for the defendant.

116. The Court must also take cognizance of the fact that the plaintiff did not act for the defendant in the divorce proceedings which were instituted by her ex-husband. Thus, insofar as it is suggested that the plaintiff was negligent in failing to alert the trial judge to the defendant's legal costs bill for the purposes of a consideration of "proper provision" in the divorce application, any argument as to the plaintiff's alleged negligence in this regard is not sustainable. It has not been made clear to the Court whether the defendant herself apprised the judge hearing the divorce proceedings of her financial circumstances or the scale of her indebtedness.

117. To my mind, the only conceivable defence which the defendant has put forward is that by virtue the judicial separation and divorce proceedings having commenced in the wrong jurisdictional area, she will have to re-issue family law proceedings in the correct jurisdictional area in order to rectify matters. In this regard the defendant asserts that she will incur the expense of instituting fresh family law proceedings in the correct county and circuit in order to regularise matters. Ms. Traynor, however, makes the point that the defendant has not set out what steps she has taken to rectify the alleged jurisdictional error. This is a consideration in this case, to my mind. It is also the view of the Court, even accepting that there may be a jurisdictional error, that it is stretching matters too far to assert that the defendant and her ex-husband's erstwhile family law proceedings would have to be re-litigated in full. This is in circumstances where the financial aspects of those proceedings were compromised by agreement and where issues pertaining to custody or access no longer arise.

118. In my view, any possible defence the defendant has to the within summary summons would be by way of a claim for a set off in circumstances where the defendant may be obliged (for the purposes of clarity and certainty) to re-enter the family law proceedings in Co. Meath for the purposes of a transfer to Co. Westmeath, or, alternatively, to issue divorce proceedings in Co. Westmeath for the purposes of ruling the settlement previously arrived at between the defendant and her ex-husband.

119. The defendant has not established on affidavit any basis to suggest that she would be put to inordinate expense in so doing such as might equate in monetary terms to the judgment obtained by the plaintiff for the work done for the defendant over a period of approximately five years.

120. Of course all of the foregoing is predicated on the defendant having a real prospect of establishing that the plaintiff was negligent in failing to discern the alleged jurisdictional error. The plaintiff was retained by the defendant (a lay person) as her legal advisors in connection with her judicial separation proceedings. The defendant can therefore reasonably argue that she was entitled to rely on the plaintiff to ensure that the judicial separation proceedings were jurisdictionally correct. It is reasonably conceivable that she could also argue that at the time of the divorce proceedings (by which time she was no longer represented by the plaintiff and was unrepresented), given that no issue had been raised in the judicial separation proceedings by her erstwhile legal advisors in relation to jurisdiction the defendant herself would not have had any reason to raise it in the context of the divorce proceedings. Accordingly, for the purposes of the within application, I am prepared to find, that the "real prospect of success" threshold has been met such that the defendant might in her counterclaim to the within proceedings recover from the plaintiff what it may cost her to clarify and/or rectify the jurisdictional error.

121. However, in all the circumstances of this case, I am satisfied that any setting aside of the default judgment has to be on terms which includes the lodging by the defendant of a substantial cash sum in court as a precondition to the default judgment being set aside. This is by reason of the Court's finding that at numerous stages throughout the relevant time period the defendant has acknowledged her indebtedness to the plaintiff. In requiring a monetary sum to be lodged in court I am also mindful of the unconscionable delay on the part of the defendant in bringing the within application. Accordingly, I am directing that the defendant lodge in court the sum of €36,716.77 being 50% of the sum claimed by the plaintiff. Furthermore, the setting aside of the judgment is subject to the defendant's undertaking not to dispose of or contract to dispose of her property pending the determination of the proceedings, or in the event of judgment being granted against her, attempt to so dispose of the property for a period of ten weeks after such judgment so that the plaintiff may have a period of time to take such steps to secure their judgment as they see fit. The setting aside of the judgment will also be subject to strict time limits, particularly as regards the delivery of the defendant's defence and counterclaim. I will hear submissions in this regard.