THE HIGH COURT

FAMILY LAW

[2013 No. 48 M.]

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996

BETWEEN

M. M.

APPLICANT

AND

J. L.

RESPONDENT

JUDGMENT of Mr Justice Donald Binchy delivered on the 5th day of February, 2018

1. By special summons issued on 10th September, 2013, the applicant sought reliefs under the Family Law (Divorce) Act 1996. The parties married in Co. Wicklow on 31st May, 1997. The marriage broke down irretrievably in May, 2008. When the parties sought legal advice soon afterwards, it emerged that their marriage had not been registered in the registry of marriages. This was discovered in 2009. The omission was subsequently regularised by the applicant through the issue of proceedings in the Circuit Court which the respondent did not ultimately contest. On 31st July, 2014, the Circuit Court (Johnson J.) made an order pursuant to s. 29(1)(a) of the Family Law Act 1995 declaring that the marriage was at its inception a valid marriage as and from 31st May, 1997. Subsequently, a marriage certificate issued on 23rd March, 2015.

2. It was perhaps for this reason that there was a delay in the service of the proceedings although the date of service is unclear from the papers put before the court. On 16th July, 2014 an order was made by the Master of the High Court renewing the summons for a period of six months. It is to be presumed therefore that, since no further order renewing the summons was brought to the attention of the court, service was effected within six months of 16th July, 2014. However, an appearance was not entered on behalf of the respondent until 21st January, 2016. This appearance was stated to be entered on a conditional basis (*de bene esse*).

3. Some years prior to the issue of these proceedings, the respondent had issued proceedings against the applicant in France (the "French Proceedings"). This was in 2009, following upon the breakdown of the marriage the year previously. Those proceedings were not, however, matrimonial proceedings, because the respondent was unable to prove the fact of the marriage without a marriage certificate. The respondent sought to get around this by seeking financial reliefs against the applicant on grounds unrelated to the breakdown of their marriage, and more akin to those that might be sought (in the words of the French court) on the dissolution of a business relationship. The French Proceedings progressed to the point where the courts there declined jurisdiction in favour of this court, and I deal with this in more detail below. The respondent is concerned that if this court confirms jurisdiction, that the time, effort and expense of the French Proceedings will have been wasted.

4. On the 24th February, 2016, the respondent issued a motion, grounded on his affidavit of the same date, seeking, *inter alia*, the following orders:-

> "(a) An Order under Article 17 of Council Regulation (EC) No. 2201/2003 (the "Regulation") for an examination as to jurisdiction in circumstances where the Respondent claims and/or pleads that the Irish Courts have no jurisdiction under the said regulation.
>
> (b) A Declaration under the said Article 17 that the Irish Courts have no jurisdiction under the said regulation.
>
> (e) In the event that the court refuses the relief set out above the Respondent will request the court to remit the proceedings to the jurisdiction of the Circuit Court and/or to make any directions that to the court shall see fit to enable the court to do the same."

5. This judgment relates to the respondent's motion. Although the respondent to the proceedings (the husband) is the applicant in this motion, consistent with the title to the proceedings, I will refer to him in this judgment as the respondent and to the wife as the applicant.

6. While it is undoubtedly the case that very often the factual matrix giving rise to such motions is of some complexity, I think it will become apparent that that may be said with considerable force in this case. Since the issue of the motion, the matter has been before the Court on no less than a dozen occasions and was adjourned on several of those occasions in order to enable the parties to address what the Court perceived to be shortcomings in the information and documentation placed before the Court for the purposes of determining the application. Eleven affidavits, some of considerable length, were opened to the Court, and copious exhibits. Until 28th October, 2016, the applicant had legal representation in these proceedings. However, by order of the Court she was permitted to discharge her lawyers on that date and thereafter represented herself on this application. She continues however to have legal representation in the French Proceedings.

7. Before addressing the factual background and the evidence placed before the court it is useful at this stage to recall precisely what is provided by the Regulation as regards applications of this kind. Article 17 of the Regulation provides:-

"Examination as to jurisdiction

> Where a court of a Member State is seised of a case over which it has no jurisdiction under this Regulation and over which a court of another Member State has jurisdiction by virtue of this Regulation, it shall declare of its own motion that it has no jurisdiction."

8. As regards jurisdiction, Article 3 of the Regulation provides:-

"General jurisdiction

1. In matters relating to divorce, legal separation or marriage annulment, jurisdiction shall lie with the courts of the Member State

(a) in whose territory:

- the spouses are habitually resident, or

- the spouses were last habitually resident, insofar as one of them still resides there, or

- the respondent is habitually resident, or

- in the event of a joint application, either of the spouses is habitually resident, or

- the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made there, or

- the applicant is habitually resident if he or she resided there for at least six months before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;

(b) of the nationality of both spouses or, in the case of the United Kingdom and Ireland, of the "domicile" of both spouses.

2. For the purpose of this Regulation, "domicile" shall have the same meaning as it has under the legal systems of the United Kingdom and Ireland."

9. In this case, it is the contention of the respondent that both parties were at all material times habitually resident and domiciled in France and for this reason this Court should decline jurisdiction. For her part, the applicant maintains that the parties were never resident in France, but were, following upon their marriage habitually resident in the UK. However, she says that from 2010 she has been habitually resident within this jurisdiction, and that, moreover, she has always been domiciled here. The applicant argues that she meets the requirements for habitual residence of an applicant as set out in the 5th and 6th indents of Article 3(1)(a) above, and accordingly this court should accept jurisdiction.

10. There is very little by way of common case in these proceedings other than the fact of the marriage itself on 31st May, 1997, and their eventual separation some eleven years later, in May of 2008. Both parties work in an industry which has required them to travel extensively. Both parties are Irish nationals and hold Irish passports. The respondent was born in England to an Italian mother and a Northern Irish father. At age eight the family moved to Northern Ireland where the respondent lived until he left school. The applicant avers that she was brought up in Northern Ireland until age eleven and thereafter lived in Ireland until aged twenty-one, albeit with significant periods spent abroad with her family, particularly in France.

11. Following upon the separation of the parties in 2008, the respondent instructed solicitors in Northern Ireland, namely Messrs Campbell and Grant to act on his behalf in relation to matters connected with the separation of the parties and that firm wrote to the applicant and thereafter corresponded, on the instructions of the applicant, with her solicitors in London, namely Messrs Harbottle and Lewis. It was in the course of that correspondence that the issue was raised, apparently for the first time, by Messrs Harbottle and Lewis, that there was no marriage certificate recording the parties' marriage. In any case this correspondence appears to have come to a halt soon after this issue surfaced. Instead of issuing proceedings in Ireland, the respondent issued the French Proceedings in 2009. The respondent contends that the applicant has issued these proceedings in order to "stymie the French proceedings". On 8th March, 2016, the court of first instance in France declined to accept jurisdiction in the French Proceedings, on the grounds that the dispute is one arising out of the breakdown of the marriage, and that this court already had jurisdiction of the same. On 19th October 2016, the Court of Appeal in Aix-en-Provence upheld the decision of the lower court on this issue, although the proceedings stand adjourned pending, *inter alia*, the decision of this court.

12. Having set out all of the above I turn now to address the matter of fact raised by the respondent on his motion – in what countries were the parties habitually resident for the periods of six and twelve months respectively prior to the issue of proceedings on 10th September, 2013?

Respondent's Case

13. In simple terms, the respondent claims that the parties spent considerable periods of time in France soon after commencement of their relationship and that, around the time they got married, they decided to live in France. He avers that they purchased a family home (an apartment) in the South of France (the "First Property") and another property nearby which he claims that the applicant used and continued to use as an office (the "Second Property"). In his grounding affidavit he points out that in the special summons, the First Property is the only property identified by the applicant as having been a family home of the parties.

14. Referring to the address given by the applicant for herself in the special summons, the respondent claims that that is her father's address. The respondent describes how the First Property was the subject of two mortgages, and following the separation of the parties in May, 2008 there was default (which the respondent blames upon the applicant) in repayment of the mortgages that gave rise to the property being repossessed. The respondent goes on to say however that after repossession, the First Property was sold at a creditor's auction, to a company owned by the applicant's father, and that the applicant has continued to live at the First Property ever since. He exhibits a photograph of the applicant, unloading a car, which he said was formerly a car belonging to both parties, outside the First Property on 15th September, 2012.

15. The respondent avers that while living in France, the applicant spends periods in California, London and other locations in pursuit of her career. However, she also does a considerable part of her work at home, at the Second Property. The respondent claims that these proceedings are a contrivance and that the applicant has used her father's address in Ireland, and that she does not reside at that address. He says that she is not either ordinarily resident in Ireland or habitually resident in Ireland and he avers that she is domiciled in France. He avers that he does not believe that she can produce utility bills in Ireland or that she has made any tax returns in Ireland. The respondent does not himself produce any such documentation – I will return to this point later on.

16. The respondent refers to a number of companies incorporated by the applicant in this jurisdiction, four such companies in all. They were incorporated between 15th January, 2010 and 29th September, 2011, for specific projects of the applicant. The respondent exhibits documentation from the Companies Registration Office which shows that in the incorporation of each of these companies, the applicant gave her address as being a property in California (the "US Property"). This is a property that is also referred to by the

applicant in the statement of claim, which is held in the sole name of the applicant (the respondent claims that he paid the deposit in respect of this property in the sum of STG£20,000.00 in 2007, and the applicant when not using the property lets the same, but does not account to the respondent for rental income).

17. The respondent contends that the only connection that the applicant now has with Ireland is her directorship of these companies and that that association does not prove either habitual residence or ordinary residence.

18. Notwithstanding that it is the respondent's motion, he did not exhibit any documentation of his own to prove his own residency in France, such as utility bills, bank accounts or tax returns. All of the documentation exhibited by the respondent in his grounding affidavit is exhibited for the purpose of proving that the applicant is (a) resident in France or (b) not resident in Ireland.

19. On 5th July, 2017, after part hearing this matter, I directed each of the parties to swear affidavits exhibiting such documentation as I felt most people would be likely to have in their possession or to have access to such as to demonstrate their principal country of residence. In particular I had in mind that the parties should be able to produce documents such as tax returns, bank statements, utility bills and medical or dental records. I then adjourned the matter to 31st July to facilitate the filing of further affidavits by the parties. The failure by the parties to have exhibited such documentation previously was surprising, especially given that the matter had been before the court on seven previous occasions, including two dates on which this Court (Reynolds J.) had made orders regarding documentation. For example, on 27th January, 2017, Reynolds J. ordered the applicant to "provide documentation (phone bills etc) within two weeks…" and on 3rd March, 2017 she made a further order requiring the applicant to "provide any further information to the Respondent on or before the 27th March 2017 with all redactions to be removed from documents." It is fair to say that these orders did not relate to the respondent.

20. In any case, in response to my orders on 5th July, the respondent swore an affidavit dated 24th July, 2017. In that affidavit, as regards tax returns, the respondent avers:-

> "I say that I do not file any tax returns. I say that because I work in various countries, withholding tax is deducted from my wages at source in each of the countries I work. I say that I am however habitually resident in France and in support of this assertion I refer to the following employment documents: …"

21. The respondent then goes on to exhibit payment advice slips received from his acting agent between 26th September, 2012 and 26th July, 2013. All of these payment advice slips are addressed to the respondent at an address care of the lady who he says is now his partner. They reside in the South of France, not very far from the First Property.

22. The respondent also exhibits a foreign entertainers tax deduction certificate issued by H.M. Revenue & Customs in the United Kingdom dated 13th April, 2012, a tax credit certificate from the South African Revenue Service dated 8th August, 2012 and a certificate of withholding tax from the Czech Republic dated 23rd May, 2013. The first and the third of these state the address of the respondent as being at the same address in the South of France referred to above (his partner's address) and the second is addressed to a post office box in an unidentified jurisdiction.

23. The respondent then goes on to exhibit various contracts of employment in which he is named between 27th September, 2012 and 2nd July, 2017. Of these, five relate to the period between 27th September, 2012 and 21st October, 2013. On all of these contacts, the address of the respondent is stated either to be the address of his partner in the South of France, or is stated to be care of his partner.

24. I had also directed the parties to obtain such information as they could from lawyers acting on their behalf in other jurisdictions as might help to demonstrate their respective addresses by reference to information given by the parties to those lawyers at the time of retainer. In response to this direction the respondent procured an affidavit from a solicitor in Newry, Co. Down. That solicitor had been retained by the respondent in 2008. He exhibited his first attendance on the respondent which is undated, but which predates his initial letters to both parties, one to the respondent of 7th April, 2008 and the other to the applicant dated 13th June, 2008. These letters were addressed to the parties at the First Property. The solicitor averred that he was informed that there is not on the file in the firm where he originally worked (at the time he was retained by the respondent) any photographic identification, utility bill or bank statement in the name of the respondent, which is somewhat surprising in light of money laundering regulatory requirements.

25. The respondent also procured an affidavit from the lawyer acting on his behalf in France. This lawyer swore an affidavit dated 13th July, 2017 stating that he was retained by the respondent in 2009/2010 and was informed by the respondent that he was living in France. Again, somewhat surprisingly, in light of money laundering regulations, he stated that it was not current practice in France to request proof of address.

26. As regards bank statements or evidence of bank accounts, the respondent avers as follows:-

> "I say that I am forbidden to hold a French bank account as a result of the debts which accrued subsequent to the breakdown of our marriage. I say that for this reason, my income can be seen going primary from [his agents] into the Société Générale bank account of my partner …"

He then exhibits bank statements of his partner on which credits received from his agents can be identified. He also exhibits statements from the Newry, Co. Down, branch of First Trust Bank which shows transactions comprising credits from his agents and others, and debits in the South of France and also in other locations including London, Luton Airport and Glasgow. However, the vast bulk of the transactions on the statements exhibited appear to relate to monies received from his agents and transactions in the South of France.

27. The respondent also exhibits statements from a visa card held in the name of the respondent but, care of his partner at an address in the South of France. That statement is dated May, 2017 and is not precisely the same address at the address for his partner on earlier documentation, but nothing turns on that because it is in the same locality. It should be observed however that it is clear from this documentation that the respondent does maintain a bank account in Newry, Co. Down, and that that account has been used for, *inter alia*, making payments to the account of his partner in the South of France.

28. The respondent then proceeds to exhibit various French court documents. On these documents the address of the respondent is stated to be at the French property and the address of the applicant is stated to be the US Property. These documents relate to the seizure and sale of the First Property. It should be noted that the respondent places significant reliance upon the fact that the First Property was in this sale acquired by a company established by the family of the applicant. He set this out in some detail in his grounding affidavit.

29. Finally, the respondent exhibits diverse documentation between 30th October, 2007 and 24th July, 2017 regarding registration of his scooter, gym membership, insurance, Amazon account etc. Most of these documents are current save those relating to his scooter which go back to 2007. He exhibits one document relating to his United Kingdom mobile telephone number and another relating to his French mobile telephone number, on which his address is stated to be care of his French partner.

The Applicant's Case

30. In her affidavit in reply to this motion, the applicant says the following at para. 11:-

> "Furthermore, with reference to the applicable clauses of the same Article 3 [of Council Regulation (EC) No. 2201/2003], both spouses were habitually resident in the Republic of Ireland at the point of the marriage and with reference to Council Regulation (EC) No. 2201/2003 I understand there to be multiple instances of compliance in no particular order of precedents including the facts that:
>
> • Both spouses were last habitually resident as a couple in the UK with temporary O1 work visas in the US when the Respondent abandoned the marriage.
>
> • I moved back from the UK to the Republic of Ireland in early 2010.
>
> • I have been habitually resident, notwithstanding significant periods of travel for work, in the Republic of Ireland since 2010.
>
> • I am a national of the Member States (sic) in question, i.e. the Republic of Ireland.
>
> • I am domiciled in the Republic of Ireland.
>
> • The respondent has demonstrated no evidence of a change of domicile since 2008, at which point he was domiciled and resident in Northern Ireland and the UK respectively to where the special summons was subsequently served on the basis that the Respondent's Northern Ireland lawyer confirmed in writing that he had authority to accept service.
>
> • The Respondent has demonstrated no evidence or proof of change of domicile to or residency in any other place, including France.
>
> • There were and continue to be no matrimonial proceedings pending in any other country of State, including France.
>
> • The French court has already ruled as per Article 15 that it is not the "better" court.
>
> • The French court has also examined the admissibility under Article 18 finding in the first instance that marital proceedings are the most appropriate forum to hear the Respondent's claim.
>
> • The latest French court ruling has also acknowledged that the marital proceedings filed in Northern Ireland, (sic), are currently pending in the appropriate jurisdiction and has directed the parties to revert to the "proper court"."

31. The applicant continues in the same affidavit to say that she is and always has been domiciled in Ireland, while travelling extensively for work and says that she has resided at times in Ireland, the UK and US, after her marriage. She says that she has vacationed regularly in France since her parents and other friends bought holiday homes there in 1983. She further avers that:-

> "… while in 1997 I did purchase a bolt-hole retreat and spent vacation periods and regular weekends there with the Respondent on and off until 2008, we were neither of us ever resident in France during the period we lived together from 1993 until 2008 in any ordinary sense of the word. Rather we were resident in the Republic of Ireland from 1993 until 1997 (technically 1998 from a tax perspective) and then in the UK and at certain times temporarily in the US, between 1999 and 2008."

32. Later, in the same affidavit she avers:-

> "I have simply never been resident in France. I have never paid taxes in France nor been registered to pay social charges in France or to vote in France. I have never been employed in France. I do not have French nationality nor have I ever possessed a French carte de sejour …".

and later again in the same affidavit she says:-

> "While I facilitated the purchase and sale of a number of properties in both of our names in France, they were clearly property investment transactions unrelated to our official residency status, which for the lion's share of our marriage was the UK. Prior to that, from 1994 we lived in the Republic of Ireland, (where we were married) …"

33. The applicant places particular reliance upon the fact that she is of Irish nationality and exhibits her Irish passport. She says that at all times both she and the respondent have held Irish passports and Irish driving licences. She exhibits a certificate from Dublin City Council to demonstrate that she has had Irish driving licences since 1991.

34. She applied for a PPS number in 2014 and exhibits a letter from the Client Identity Services of the Social Welfare Services office dated 2nd December, 2014 whereby she is, apparently for the first time, allocated a PPS number.

35. It appears the applicant has never paid tax in this jurisdiction. She exhibits correspondence from Mazars, international advisors and accountants, to demonstrate that while she was tax resident in this jurisdiction for the calendar year 2013 (that conclusion was based upon information supplied by the applicant herself to Mazars as regards the number of days she spent in various jurisdictions during the years 2011-2013) her earnings in respect of the projects that she worked on during that period were paid from one company of the applicants' to another, and that none of those funds were received by the applicant personally. The applicant was paid out of pocket expenses personally but, on the basis that she did not receive any income as such during the relevant period, she had no taxable income and no tax return was filed for her during those years. It appears that the applicant has never made tax returns in this jurisdiction. It should be noted that Mazars prepared that opinion expressly for the purpose of these proceedings and

very carefully pointed out that they were not the applicant's personal tax advisers at the time.

36. In relation to the companies referred to above, the applicant established four companies between January 2010 and September 2011 for the purpose of different projects upon which she was working. The returns in the Companies Registration Office in respect of these companies' state that the applicant's address is at the US Property. The applicant acknowledges that she went to reside in the US for a period after the breakdown of the marriage and avers in her first replying affidavit that "at the time the four Irish companies referred to were set up, I was primarily resident in my solely owned property in Los Angeles. This house has now been sold (for the reasons noted above) and the CRO in Ireland was subsequently notified of her change of address." (The applicant explained earlier in the affidavit that the US Property was sold at a loss because she could not continue to cover the cost of servicing the mortgage and the upkeep of that property). Later, in the same affidavit, the applicant avers:-

> "It is clear from my working life and associated residency that I have been based in Ireland since at least 2010".

37. In relation to the four companies, the applicant places significant reliance upon the fact that in order to obtain certain tax reliefs as regards the activities of those companies, it was essential that most of the work of those companies should be undertaken in Ireland, and that it was necessary for her to be in Ireland for that purpose. She exhibits documentation from Mazars in this regard. One of these projects was delivered in 2011 and another in 2014. In order to meet the taxation requirements associated with these projects, it was necessary for 80% of the costs of delivery of the projects to be incurred in Ireland, and Mazars stated that having regard to the role of the applicant in the projects, a significant amount of her time would have been spent working on the same in Ireland during the relevant period. They say that if she had not been working in Ireland, the expenditure incurred would have been excluded from the amount of eligible expenditure as work carried on outside Ireland does not qualify. The applicant also exhibits another letter from a well-known company in the same industry which worked with the applicant and her companies on these projects and which states:-

> "With specific reference to the period September 2012 to September 2013 … [the applicant] was regularly in the building working on the development of the project and the closing of the finance across September to December 2012 in which we participated. On review of our records, I can confirm that … [the applicant] was personally present [executing the project] … which was carried out exclusively here at [their premises in Dublin]."

This letter goes on to say that the applicant continues to work at the premises of that company on other projects.

38. The applicant also relies on an affidavit of her former solicitor in Dublin which was furnished at the suggestion of the court. I was specifically concerned to know what information the applicant gave to that solicitor as regards her residence at the point in time of first instruction. The solicitor avers that he first met with the applicant in summer of 2013 and that, when setting up her file, the applicant provided him with a copy of her passport. He continues:-

> "I say that the applicant also confirmed the various companies of which she was a director. There was a list of in or about nine Irish companies currently in being at that point, with some older companies dissolved, stretching back as far as the 1990s. I say that she confirmed that all companies were Revenue compliant, with all appropriate taxes up to date. I say that a director's search was completed by my office and it was confirmed that all companies she referred to it had registered offices within the city of Dublin and the correspondence address provided to me was also a Dublin address, verified as the address provided to the CRO in respect of her directorship of [one of the companies referred to above]. I say that I had also met the applicant in Ireland on a number of occasions in connection with her company [the company referred to above] and its dealings. I say that whilst I knew that her job brought her to overseas locations I never had any doubt but that she was resident in the Republic of Ireland."

The solicitor exhibits a new matter form which gives the address of the applicant as being the Dublin address of her parents where she says she resides in Ireland. He also avers that he instructed senior counsel in connection with the applicant's affairs and that at no point did either he or senior counsel feel that her Irish residency was in question and he says that that it "was the abiding opinion of all that this jurisdiction was in fact the correct location to issue the proceedings. This was on the basis that I was firmly aware that the applicant was residing with her parents in Co. Dublin." He avers that he was introduced to the applicant by her father, a long standing client of his firm. It should be observed at this point that there is some inconsistency between what is averred by the solicitor as regards the address given to the Companies Registration Office in respect of the company referred to above, and the companies' office search exhibited by the respondent. The search, which is dated 19th January, 2016, and gives information for the period from the incorporation of the company up to 3rd December, 2015, states that the address of the applicant is the US Property. It is provided as the address for the applicant both as a director and as the secretary of the company. The solicitor did not exhibit any of the searches to which he refers.

39. The applicant also places reliance upon dental records procured at the request of the Court. These records show that the applicant attended a dentist in Dublin on eight occasions between 11th August, 2010 and 11th July, 2014. Many of these attendances are described as being for "emergency treatment" and the nature of the work undertaken appears to be in that category. Nonetheless it is clear that she was attending this dentist regularly during that period.

40. The applicant also relies on the decision of the French court as affirmed on appeal to decline jurisdiction in France and submits that that constitutes a decision by the French court that this jurisdiction is the correct jurisdiction for these proceedings.

41. Finally, as far as the applicant's case is concerned, she was unable to exhibit any utility bills or bank account or credit account details in her own name. Such utility bills that she did exhibit were exhibited (upon the prompting of the court) and are in the name of her mother. She exhibits bank and credit card statements in the name of the companies referred to above. She explains this on the basis that during the period she was living on cash "*per diems* (sic)" with the use of company credit cards for personal expenses which were deducted from her salary allowance in the budget once the project was funded. Telephone bills also exhibited by the applicant were not in her name but rather in the name of one or other of her companies. The applicant does not place any reliance on this documentation but simply submits it in response to directions of the court.

42. The applicant claims that the only banking facilities available to her in 2012 and 2013 were her Irish company bank accounts. She says that she did not have a personal bank account for the same reason that the respondent could not i.e. owing to the financial difficulties they were encountering in France, which, amongst other things, impacted upon her credit rating. However, the respondent exhibited a bank statement of the applicant's in France (which he had obtained in the context of the French court proceedings). This statement deals with transactions between 31st October, 2003 and 16th September, 2004. On that date there was a credit balance of €798.35 in the account. While the applicant says that this account closed in 2005, the statement exhibited is stated to be for the period from 1st February, 2001 to 30th September, 2009, suggesting that the account was open at least up until 2009. The applicant

did not exhibit anything to confirm that the account had been closed.

43. The applicant applied for a bank account in this jurisdiction, through Bank of Ireland, in 2015. On this form, the applicant gave two addresses: the first address is the address that she says is her Dublin address, where her parents' home is also located. The second address is that of the First Property. In the same form the applicant has ticked a box stating that she is a homeowner and it is stated that she moved to that address in 1997 i.e. the year she got married. The applicant gives a somewhat convoluted explanation for this which is best recited in full:-

> "The particular application to the Bank of Ireland was guided by the manager at the time under circumstances where she was endeavouring to open a personal bank account for me when:-
>
> (a) I was not actually and am still not strictly until
>
> November 2017, entitled to open a personal bank
>
> account in Europe, (and neither is the respondent);
>
> (b) My previous address of (here she mentions the new address of the US
>
> Property) would cause complications for the Bank because it was in the US so she asked me for any other previous address outside Ireland, even a secondary residence, in Europe which would explain why I had not had a personal bank account in Ireland since 2000, so I explained my exact circumstances and postal address options and she proposed that address as the most helpful to the application. On reflection, I should have perhaps given her the UK address but the property was actually for sale at the time."

44. Finally, in relation to the bank accounts of the applicant, having previously furnished statements with redactions, she was directed by Reynolds J. to produce unredacted statements. She failed to do so, explaining that she was unable to because the reactions had been endorsed on the original statements prior to copying. The applicant averred that she made the redactions because she was concerned that the respondent should not be to identify her exact movements while she is in France, because she has at times been harassed by the respondent, or his agents. Some of the redactions made however appear on the Bank of Ireland accounts statements of the applicant's companies and it is possible to make out the name of the applicant as the transferee of funds from the company concerned. It appears that the applicant received through this account, between January 2013 and July 2013 payments totalling of the order of €61,000.00. In the case of three of those payments, there is a corresponding receipt described as the "directors fee". However, although it is clear that these sums were paid out to the applicant, it is not clear how they were paid out, but given the amounts involved it seems more likely that they were paid to an account of the applicant rather than in cash. No such account has been disclosed by the applicant. The respondent drew attention to these payments in his affidavit of 5th September, 2017, but the applicant does not specifically reply to this point.

45. The applicant also places some reliance on a schedule of her days spent in Ireland, France, the UK and the US in the years 2011, 2012 and 2013, which she exhibited to her affidavit of 26th July, 2017. The applicant said that while she did not prepare this schedule herself (she says it was prepared by an assistant accountant in a firm retained by her) and it was prepared for the purposes of providing information to French forensic accountants in 2013. She says that "the day count was provided for tax residency purposes and it was required to count each travel day twice (as one day per country travelled to and from, even if the trip was a day trip)." She goes on to say that documentary evidence of every boarding pass and flight taken in and out of the State was subsequently provided to Mazars for the purposes of their providing an independent opinion with regard to her tax residency for the period in question. This opinion, which is dated 19th September, 2017, refers to the schedule at the outset of the letter as follows:-

> "I am basing my views on tax residency on the information forwarded to me by you on 15th September, 2017 specifically the Excel spreadsheet in which the days in Ireland, France, UK, US and "other" are compiled from your appointment schedules for the period and flight boarding passes for the entire three year period."

It is not clear from this if Mazars themselves subjected the Excel spreadsheet to scrutiny by reference to documents such as boarding passes, as the applicant claims. In any case, according to this schedule, the applicant spent, during the three year period, 493 days in Ireland, 330 days in France, 14 days in the UK, 231 days in the US and 107 days in "other". The corresponding figures for the calendar year 2013 are 219 days in Ireland, 90 days in France, 9 days in the UK, no days in the US and 79 days in "other" jurisdictions.

46. The respondent analysed these figures himself by reference to the bank statements and credit card information exhibited by the applicant, notwithstanding that they remained heavily redacted. He expresses the opinion that many of the redactions related to flights and transactions carried out in the town where he claims they resided in France. He refers to a three month period, April, May and June of 2013 when the applicant claims to have spent 42 days in Ireland and 32 days in France. However, on the analysis of the respondent, he claims that she spent 7 days in Ireland and 62 days in France during that period.

Conclusions on Matters of Fact

47. Resolving the conflicting positions of the parties in the proceedings has to no small degree been hampered by the absence of the most basic documentation that would normally serve to demonstrate a person's country of residence. So for example, and quite extraordinarily, neither party has any tax returns to exhibit. The respondent explains this by saying that taxes owing in respect of his earnings are deducted at source in whatever country he is working from time to time, and he exhibits documentation that demonstrates that this is so. It seems extremely unlikely however that that is an end to his obligation to account for income received to the tax authorities in the country in which he resides.

48. As far as the applicant is concerned, she, in effect, claims that for the period that is most relevant i.e. the period of twelve months prior to the issue of proceedings in September 2013, she had no income to declare for tax purposes. However, redactions notwithstanding, it is clear from the bank statements that she exhibited that between 9th January, 2013 and 26th September, 2013 funds totalling €61,000.00 were paid to the applicant, and moreover no explanation was given as to how these funds were received i.e. in to what bank account the funds were transferred.

49. Neither party is able to exhibit utility bills in their own name. Neither party is able to demonstrate a bank account in the jurisdiction where either claims to reside, although it may fairly be pointed out that on this they seem to agree that French regulations at least prevent them from having a bank account in that country, owing to the financial difficulties in which they found themselves following the breakdown of their marriage. Neither party exhibits any documentation from a medical practitioner whom

they attend. The applicant did however exhibit the dental records referred to above, demonstrating her attendance with a dentist in Dublin for various emergency treatments. Neither party is able to exhibit a PPS number (or its French equivalent) for the period in question, although the applicant did apply for and obtained such a number in 2014. So, therefore, in the face of such a highly contentious dispute, the Court does not have the benefit of the kind of objective information or documentation that for most people would be routine indicators of their country of residence. In any case, I will commence this part of the judgment by setting out those facts that appear to be agreed, or at least non-contentious:-

(1) The parties were married in this jurisdiction on 31st May, 1997.

(2) Soon after they married, the parties purchased a residence in the South of France with the financial assistance of the applicant's father.

(3) Each of the parties are Irish nationals, holding an Irish passport.

(4) There are no children of the marriage.

(5) The applicant has always held an Irish driving licence. She claims the respondent has always held a Northern Irish driving license – this was not denied by the respondent.

(6) The marriage broke down irretrievably in 2008.

(7) Following upon the breakdown of the marriage, the respondent instructed solicitors in Northern Ireland to correspond with the applicant and/or her representatives with a view to reaching agreement on terms of separation.

(8) The applicant then drew the attention of the respondent to a difficulty with the registration of their marriage. Court proceedings were then issued in the Circuit Court with a view to correcting that difficulty. The respondent did not initially engage with those proceedings but in the end did not contest a court order, made on 31st July, 2014, declaring the marriage to have been, at its inception, a valid marriage. Registration of the marriage was eventually completed [March] 2015.

(9) In the meantime, however, each of the parties had issued proceedings against the other. The respondent issued proceedings against the applicant in France. On account of the fact that he could not demonstrate that the parties were married, he chose to issue proceedings claiming an interest in the properties owned by the parties and other financial reliefs.

(10) Some four years later, while the French proceedings were ongoing, the applicant decided to issue these proceedings. Her solicitors invited the solicitors in Northern Ireland, acting on behalf of the respondent, to accept service of these proceedings, and they confirmed authority to accept service of the same. It is not clear when the proceedings were served, but a conditional appearance was entered on behalf of the respondent (challenging jurisdiction) on 21st January, 2016.

(11) The respondent has an active bank account in Northern Ireland, but the withdrawals from that account appear mainly to be in France.

(12) The applicant had an account in France which she claims closed in 2005 (but no evidence to this effect was furnished).

(13) Both parties travel extensively for the purposes of their respective careers, and have always done so.

(14) The applicant purchased a residence in her own name in the United States in or about 2007, which she has since sold.

(15) On 8th March, 2016, the court of first instance in France delivered its decision in the French proceedings issued by the respondent. It dismissed the respondent's claim, in significant measure because once the marriage of the parties was proven upon its registration on 23rd March, 2015, the assets held by the parties comprised marital assets which are more properly the subject of the divorce proceedings issued in Ireland. In the translation of that judgment placed into evidence, the court notes, in the grounds of its judgment, that:-

> "The assets jointly held by the spouses are therefore assets comprising of their marital estate, the liquidation of which falls under the jurisdiction chosen for the divorce judgment, in this case, the Irish judge, the case having been properly brought before him by [the applicant] on the evidence that the marriage was celebrated in Ireland, between Irish nationals, [the applicant] proving that she is residing in that country, all items which determine that this French jurisdiction declares itself incompetent in favour of the foreign jurisdiction already in process."

On these grounds, the court declared itself incompetent to hear the dispute and directed the parties to take proceedings in the proper court i.e. this Court.

50. That judgment was appealed by the respondent, and the Court of Appeal in Aix-en-Provence handed down what appears to be in the nature of an interlocutory ruling on 19th October, 2016. In that decision, the court noted that the respondent had originally brought his proceedings forward on the basis of "dissolution of a "business relationship"", but having accepted the validity of the marriage in Ireland (following its registration) it appears that the respondent then asked the Court of Appeal to remit the case before the Family Law Court in France (this was also an alternative relief sought in the proceedings as originally issued). In its decision, the court then went on to uphold the judgment of the Lower Court, including the ruling on the jurisdiction of the court seised, but went on to require the respondent to clarify the legal basis of his ongoing demands. It appears therefore that a final decision of the court of Aix-en-Provence is awaited and this is confirmed by a letter, helpfully procured by the applicant, from her lawyers in France and dated 20th July, 2017. It is understood that at this point, the Court of Appeal in Aix-en-Provence may now be awaiting delivery of this judgment.

51. While the decision of the court of first instance in France, in the passage recited above, records that the applicant has proven that she is residing in this jurisdiction, it does not appear from that judgment that as this issue was argued before that court for the

purposes of Article 3 of the Regulation and nor does it appear that any conclusions were formed as to the residence or habitual residence of the parties in the periods of either six or twelve months prior to the issue of these proceedings.

52. So much for those issues that are non-contentious. The principal disagreement between the parties is of course as to the country in which each was resident and/or habitually resident for the periods of six and twelve months prior to the issue of proceedings. Not only are the parties in disagreement in this regard, they disagree vehemently as to their country of habitual residence throughout their marriage. In simple terms, it is the respondent's case that, when the parties married, they moved to France and have been resident there ever since, although they each travel extensively for their respective work commitments. The applicant on the other hand contends that the First Property was only ever intended to be a bolt-hole or a holiday property, and that over the years they were resident in this jurisdiction from 1993 until 1997, then in the United Kingdom, and occasionally in the United States. She says that following the breakdown of the marriage she tried to make a new start in the US and it was for this reason that the US address was given on the incorporation of the various companies referred to above. She says that she returned to Ireland in or around 2010/2011 in order to be able to work from home in Ireland on the projects in which those companies were involved, and at the same time to be able to travel to France in order to defend the proceedings issued by the respondent, rather than having to do so from the West Coast of the United States.

Relevant Authorities

53. I have been referred to just two authorities on the application of the Regulation. The first is a decision of this Court (Sheehan J.) of 1st July, 2008 in the matter of *O'K. v. A.* [2008] IEHC 243, and [2008] 4 I.R. 801. In that case, Sheehan J. considered the application of the Regulation in the context of a couple who were both citizens of the United States, and had two children, also citizens of that country. The applicant was also an Irish citizen. They had purchased a property in the West of Ireland where they resided between October, 2004 and March, 2005, and then returned to Florida where they remained until May 2005. They purchased a property in Florida but almost immediately moved to Wisconsin where they remained until September, 2005. They then moved to Florida where they remained until May 2006. Between May and August, 2006 they divided their time between Chicago and Florida. In August, 2006 they returned to the home they had purchased in Ireland. The parties separated and the respondent issued proceedings pursuant to the Guardianship of Infant Act 1964 in the District Court in May of 2007. In November 2007, the applicant issued proceedings claiming a decree of judicial separation, and the respondent then instituted divorce proceedings in the State of Florida in December 2007.

54. Sheehan J. found that the respondent was habitually resident in Ireland. He also found that the children were habitually resident here and he found that the respondent was habitually resident in Ireland when the proceedings were commenced. He relied on the judgment of the Supreme Court in *S. v. S.* [2004] IESC (unreported, Supreme Court, 24th November, 2004) and also the judgment of Munby J. in *Marinos v. Marinos* [2007] EWHC 2047 (FAM), [2007] 2 F.L.R. 1018. From these authorities he noted firstly that the term "habitual residence" is not a term of art, but is a matter of fact to be decided on the evidence in each case. He noted that Munby J. in *Marinos v. Marinos* concluded that a major factor to be taken into account in deciding habitual residence is the location of a party's "centre of interest". He then held that "… an important aspect of the centre of interest is to be found in where a party's primary responsibility lies."

55. Sheehan J. accepted the assertion of the applicant that the parties in that case intended to settle in Ireland and to bring up their children here. He relied on the following factors in arriving at his conclusion that the habitual residence of the parties was in Ireland:-

> (1) The parties had purchased a substantial home in Ireland;
>
> (2) There were ongoing proceedings in the District Court under Guardianship of Infants Act 1964, at the time of the issue of the judicial separation proceedings;
>
> (3) The primary responsibility of the respondent on the date of issue of the proceedings was to his family and in particular to his two children, and that this responsibility included access to the children;
>
> (4) On the facts, it was the intention of the parties on their return to Ireland in 2006 to settle in this country; and
>
> (5) The respondent was a person of independent means not employment outside Ireland.

56. *Marinos v. Marinos* is of particular interest because in that case Munby J. gave a detailed consideration to the meaning of Article 3 of the Regulation and in particular to the meaning of the term "habitual residence" in Community law. He noted that the term had as an autonomous meaning in community law. He referred to the case of *Silvana di Paulo v. Office National de l'Emploi* (Case 76/76) [1977] 2 C.M.L.R. 59 where the ECJ had to consider the meaning of an exception in Article 71(1)(B)(II) of Regulation No. 1408/71 giving an entitlement to social security benefit to a "worker … who is wholly unemployed and who makes himself available for work to the employment services in the territory of the Member State in which he resides. The case involved a migrant worker, an Italian national who had last worked in the United Kingdom and then returned to her family in Belgium. The question was whether she was entitled to unemployment benefits under Belgian law. She claimed the benefit of Article 71(1)(b)(II) on the basis that she had remained resident in Belgium whilst working in the United Kingdom." However, the court held that:-

> "The concept of the 'Member State in which he resides' must be limited to the State where the worker, although occupied in another Member State, continues habitually to reside and where the habitual centre of his interests is also situated."

57. The court went on to hold that "…whenever a worker has a stable employment in a Member State, there is a presumption that he resides there, even though he has left his family in another Member State." The court held (at para. 22) that for the purpose of the Regulation under consideration, "… account should be taken of the length and continuity of residence before the person concerned moved, the length and purpose of his absence, the nature of the occupation found in the other Member State and the intention of the person concerned as it appears from all the circumstances."

58. Citing other authorities of the European Court of Justice, as well as an explanatory report prepared by Dr Alegra Borrás on the equivalent provision of Article 2 of Brussels II and a decision of the Court of Appeal in Provence, all of which led to the conclusion that the term "habitual residence" means "… the place where the person had established, on a fixed basis, his permanent or habitual centre of interest, with all the relevant facts being taken into account for the purpose of determining such residence." This of course was the major factor in the decision of Sheehan J. in *O'K. v. A.*

59. Interestingly however, in *Marinos* Munby J. drew a distinction between the habitual residence of a worker, as in the case of *Silvana di Paulo* and the habitual residence of a spouse. Referring to the presumption identified by the ECJ in *Silvana di Paulo* that "whenever a worker has a stable employment in a Member State there is a presumption that he still resides there even if he has left

his family in another State", Munby J. said that "… where the claimant comes before the court not *qua* a worker, but rather, as here, *qua* spouse, the presumption carries less weight and is more easily rebutted."

60. Munby J. also noted that it is clear from the language of Article 3(1)(a) and ECJ case law, that for the purpose of the Regulation, it is not possible to be habitually resident in more than one country at the same time. That said, he points out that the ECJ has recognised that it is possible to be resident *simpliciter* in more than one country at a time. He noted that Article 3 requires two things:-

> " (i) Habitual residence on a particular day and
>
> (ii) Residence, though not necessarily habitual residence,
>
> during the relevant immediately preceding period."

61. In deciding *Marinos*, Munby J. took into account a variety of factors such as the employment and education interests of the wife, her country of birth, the country to which she retained an emotional commitment as well as other links, and against all that, the centre of her emotional, personal and family interests, as well as the country in which her children lived (Greece). He concluded by saying:-

> "At the end of the day all of these various factors, some pointing in one direction, some in the other, have to be balanced and evaluated with a view to identifying *the* habitual centre of the wife's interests. One cannot, as it seems to me, say a *priori* that any one factor is of more or less intrinsic weight than another. How the balance comes to be struck must depend on all the factors in issue in the particular case, the task for the judge being to attribute to each of those factors the weight which in his estimation attaches to it in the particular circumstances of the particular case. In one case the factor of employment may weigh more heavily than in another superficially similar case. In another case the location of the matrimonial home may carry a particular weight."

Decision

62. In this case, the parties do not agree on the location of the matrimonial home. There are no children to be taken into consideration. The parties do not agree on the centre of the applicant's work interests.

63. I am satisfied however that when the parties first married and acquired the First Property, they established the matrimonial home at that property. The respondent has not even purported to put forward any other property as being their matrimonial home at that time. It is undeniably the case that the work interests of the parties took each of them, continuously, to different locations, but I am satisfied that it was to the First Property that they returned as their matrimonial home, and not simply as a vacation property or a "bolt-hole".

64. As far as the respondent is concerned, I am satisfied that he has established that he has at all material times resided in France. He has provided the Court with documentation that demonstrates that he provides the address of his partner on all of his employment contracts, not to mention the very fact that he has a partner of some years standing in France (and had at the time the applicant brought forward these proceedings). The same address appears on payment advice slips and tax deduction certificates. While the respondent has at all times had a peripatetic lifestyle, I believe that his centre of interest at all material times, and in particular in the twelve months preceding these proceedings has been in France. So I am satisfied that at the time of issue of the proceedings, the respondent was habitually resident in France.

65. But what of the applicant? I am satisfied on the facts as presented that the applicant left the First Property in the wake of the breakdown of their marriage in 2008 and went to live in the US property as a respite from the trauma from the breakdown of her marriage and with a view to making a new start (in her own words) in that jurisdiction. At that point I believe the applicant became habitually resident in the United States. This is evidenced by the fact that she gave that jurisdiction as her address when setting up the companies that have been referred to earlier in this judgment. She provided that address as late as 2010. However, the applicant says that she returned to the State in 2010/2011. I am satisfied from the evidence put forward by the applicant from Mazars, and also from the company referred to above with whom she was working on these projects and indeed the Irish revenue certificate in relation to these projects that the applicant would have been required to spend a great deal of her time in this country, in the twelve months preceding these proceedings, working on those projects.

66. That by itself is not determinative however. As Munby J. observed in *Marinos*, different considerations may apply when a claimant comes before a court not *qua* a worker, but rather *qua* a spouse, as is the case here. But as he also observed, in one case the factor of employment may weigh more heavily than in another superficially similar case, whereas in another case the location of a matrimonial home may carry particular weight.

67. On the facts, I am also satisfied that, following upon the acquisition of the First Property by the applicant's family via a corporate vehicle in France in 2012, she had full access to that property, even though its ownership status as amongst family remains unclear. What is clear however is that at this point in time the applicant's main interest was her work, and this was also her primary responsibility. While she has many years affinity and connection with France and the First Property in particular, she is an Irish national, grew up substantially in this country and her parents reside here. Her parents own a substantial property where the applicant certainly resides while in the State.

68. While it is apparent from the facts that I have set out above that there are factors pointing in the other direction as far as the applicant is concerned, and that there are some contradictions within the applicant's own case, the conclusion that I have come to is that the applicant's centre of interest for the period of twelve months prior to the issue of proceedings was the State, because at that point in time at least, the principal interest in her life was her work. Not only was it the means by which she earned herself a living, but the projects on which the applicant was working, and which were for the most part undertaken in the State between 2011 and 2014 afforded the applicant the opportunity to advance her reputation in her chosen field. That being the case, I am satisfied that Ireland was the applicant's habitual residence on the date that she issued proceedings, and that, as likely as not, she resided principally in this jurisdiction for at least one year before the proceedings were issued. I have little doubt but that she spent reasonable periods of time in France during that period also but, given her work commitments, it is unlikely that that would have been such as to render her resident in that jurisdiction.

69. It follows therefore that notwithstanding that the respondent was habitually resident in France, the applicant was entitled to issue proceedings in this jurisdiction by reason of the fifth indent of Article 3.1(a) of the Regulation, as she was habitually resident in

the State at the time of the issuing of these proceedings. While the respondent too would have had an entitlement to issue the proceedings in France by reason of the third indent of Article 3.1(a) of the Regulation, not having done so this Court is now seised of the proceedings issued by the applicant governing the dispute between the parties, and this Court has jurisdiction to determine the same.

70. Finally, both parties have raised the question of remitting these proceedings back to the Circuit Court, in the event of my holding as above. Insofar as I have had any evidence as to the value of the assets placed before the court, it tends to suggest that those assets are well within the jurisdiction of the Circuit Court and accordingly the proceedings should be remitted to that court.