**THE COURT OF APPEAL**

Neutral Citation Number: [2017] IECA 102

**Record No. 2016/77**

**Hogan J.**
**Mahon J.**
**Hanna J.**

**BETWEEN/**

**CORRIB OIL COMPANY LIMITED**

**PLAINTIFF /**

**RESPONDENT**

**- AND -**

**MARTIN MURRAY**

**DEFENDANT/**

**APPELLANT**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 29th day of March 2017**

1. This is an application brought by the defendant, Mr. Martin Murray, pursuant to the provisions of Ord. 13, r.11, to have a default judgment entered against him in September 2011 in the sum of €72,615 set aside. In a reserved judgment delivered in the High Court on 4th February 2016 Barrett J. refused this application and the defendant now appeals to this Court against that decision. The matter arises in the following way.

2. On 23rd April 2009 the plaintiff, Corrib Oil Co. Ltd. ("Corrib"), commenced proceedings by way of summary summons against the defendant. The claim was, in essence, that the defendant had failed to pay for fuel oil supplied to him by Corrib. Following one unsuccessful attempt to effect service on 30th April 2009, Corrib claimed that service was finally effected by way of personal service upon Mr. Murray on 10th September 2009, although this is strongly disputed by the defendant. Apart from an affidavit of debt sworn on 26th April 2010, no further steps were taken in the proceedings until 23rd March 2011 when the plaintiff sought to serve a notice of intention to proceed on the defendant by way of registered post.

3. The defendant's address as given in both the summary summons and the notice of intention to proceed is "Crimblin, Moneygall, Co. Offaly". Mr. Murray maintains that his correct address is "Crimlin Little, Moneygall, Co. Tipperary." Moneygall is, of course, a village which straddles the borders between Offaly and Tipperary.

4. At all events, the notice of intention to proceed was returned as marked "not called for". Corrib then applied to the High Court for an order for substituted service and Peart J. made an order to this effect on 30th May 2011. The notice of intention to proceed was then served by post by way of substituted service, but Mr. Martin denies that he ever received this notice. Judgment was then subsequently obtained in default on 28th September 2011.

5. According to Mr. Murray the first he heard of these proceedings was when he received a copy of a summons for the attendance of a debtor in the District Court under the Enforcement of Court Orders Acts 1926-1940 on 10th October 2014. That summons was addressed to him at "Crimblin, Moneygall, Co. Offaly", but the accompanying letter from Corrib's solicitors (which enclosed the District Court proceedings) was addressed to him at "Crimblin, Moneygall, Co. Tipperary." Mr. Murray acknowledges that he received this notification which had been enclosed with the cover letter and he contends that he then immediately took steps to have the High Court order set aside. The District Court proceedings stand adjourned pending the outcome of this set aside application.

6. The essential question, therefore, is whether the defendant was appropriately served such that it would be unfair not to have the default judgment set aside. The Court is thus confronted with the question of whether a default judgment should be allowed to stand where the defendant's address is incorrectly described in court documents designed to give notice to a defendant. This is a topic on which there is a somewhat surprising dearth of authority and the Court is, to some degree, at least, proceeding from first principles.

**The judgment of the High Court**

7. In his judgment Barrett J. concluded, based on a review of the affidavits and the surrounding facts, that it was "overwhelmingly likely" that all the pleadings were in fact delivered to the defendant. He also noted that there was no evidence that:

> "any correspondence to the Offaly address was ever 'returned to sender'. If it was not returned, then the court considers that as a matter of probability it was delivered. Such a conclusion chimes with general experience."

8. Barrett J. also noted that the defendant had (apparently) signed a delivery docket at the address "Crimblin, Moneygall, Co. Offaly". He added that:

> "when a defendant signs delivery dockets and writes on them an address that he later avers does not exist, that, with respect, colours the credibility of his later averment that someone else is telling an untruth."

9. These comments prompt two observations. First, there was no evidence to the effect that the defendant had ever written his address on the docket. In any event, perhaps too much should not be read from the fact that someone signs a delivery docket which is incorrectly addressed. Quite often individuals scarcely glance at these addresses when they sign these dockets and, even if they

do notice a mistake, they are not always bothered to insist upon a correction. That, however, is a somewhat different question as to whether an incorrectly addressed letter is likely to be delivered by the postal system.

10. Second, it is important to stress that the defendant emphatically denied that he had ever seen the Offaly address on any delivery note that he had signed and that he had never "at any time received a delivery from the plaintiff company to my home address." Barrett J. nevertheless purported to resolve the conflict of fact as between the plaintiff's delivery driver and the defendant as to whether the latter had in fact been served in September 2009 by reference to the affidavits which the respective deponents had filed. In the absence of any cross-examination of the respective witness, I am bound to think that the trial judge fell into error in this respect. As Hardiman J. observed in *Boliden Tara Mines v. Cosgrove* [2010] IESC 62:

> "It cannot be too strongly emphasised that, where evidence is presented on affidavit, a party who wishes to contradict such evidence must serve a notice of intention to cross-examine. In a case tried on affidavit, it is not otherwise possible to choose between two conflicting versions of facts which may have been deposed to. In a case where there is no contradictory evidence an attack on the evidence which is before the Court must include cross-examination unless the contradicting party is prepared to rely wholly on a submission that the plaintiff has not made out its case, even taking the evidence it has produced at its height."

11. In any event, I consider that for the reasons I am about to set out, the trial judge focussed on the issue of service in September 2009 when, by reason of the later events, the real question was whether a notice of intention to proceed was properly served on the defendant in May 2011. As will shortly become clear, I am not satisfied that there was such proper service of the order for substituted service given that the address of the defendant contained two errors and given further that the regularity of the default judgment ultimately rests on proof of the adequacy of substituted service. In these circumstances, it is no longer necessary to determine the factual issue of whether the defendant was personally served in September 2009.

**The purpose of the service requirements**

12. As Costello P. observed in *Fox v. Taher*, High Court, 24 January 1996, the object of the service rules provided for the in the Rules of the Superior Courts is "to bring home to defendants the nature of the proceedings and the documents related to the claim being made against them." In a similar vein Dixon J. had previously stated in *Royal Bank of Ireland v. Nolan* (1958) 92 I.L.T.R. 60 that the fundamental objective of service "was to give the defendant notice and sufficient warning of the proceedings he might have to contest." It is precisely for this reason that "it is vital that proper service be effected and the Rules of the Superior Courts contain detailed requirements in this regard": see Delaney and McGrath, *Civil Procedure in the Superior Courts* (Dublin, 2012) at 209.

**The order for substituted service**

13. It is true that in the High Court Barrett J. placed a great deal of emphasis on the question of whether in fact Mr. Murray had been personally served in September 2009. In some ways, however, that is really beside the point so far as the facts of this case are concerned because the regularity of the default judgment in the present case ultimately depends not on whether Mr. Murray was ever served with the original proceedings in September 2009, but rather on whether Mr. Murray *was validly served with the notice of intention to proceed which accompanied the order for substituted service in May 2011*.

14. Had Corrib Oil proceeded to mark judgment in the 12 months after what it claimed was valid personal service in September 2009, then, of course, the question of whether there had been such personal service at that time would have been crucial in any subsequent set aside application. Since, however, for whatever reason Corrib did not immediately proceed further with the proceedings, but instead waited for over a year before taking a step in the proceedings, it was obliged by the requirements of Ord. 122, r.11 to serve a notice of intention to proceed prior to taking any further steps in those proceedings. The validity of the default judgment which it subsequently obtained in September 2011 accordingly depends in turn on proof that the notice of intention to proceed had been validly served by pre-paid post as permitted by the order for substituted service.

15. The curial part order of the High Court dated 30th May 2011 was to the following effect:

> "…the service of the notice of intention to proceed here to be effected by serving a copy thereof, together with a copy of this order, by ordinary pre-paid post on the defendant at Crimblin, Moneygall, Co. Offaly be good and sufficient service of the said notice and any future documents requiring personal service upon the said defendant."

16. The plaintiff does not really dispute but that this address is incorrect and, indeed, this was admitted by the plaintiff's solicitors in correspondence in November 2014 when the defendant through his solicitor protested that he had never been served with the default judgment and that he had not known anything about it. The plaintiff, however, maintained that this was simply a harmless clerical error which had no bearing on the validity of regularity of the default judgment. The defendant contends, however, that these errors were fatal because it was precisely these errors in the address meant that he did not receive notice of the intention to proceed.

**How should the courts approach the question of the errors regarding the defendant's address in the order for substituted service?**

17. How, then, should the Court approach this question of an error in the address? Some guidance is, I think, to be found in other areas of the law where variants of this problem have also been encountered.

18. In the case of planning notices, the courts have, on the whole, *asked whether the error was of a kind that might mislead. Thus, for example, in Crodaun Homes Ltd. v. Kildare County Council* [1983] I.L.R.M. 1 the relevant planning notice published in a newspaper referred simply to "Leixlip Gate, Co. Kildare", but omitted the reference to Celbridge, Co. Kildare. The question was whether this incomplete address was nonetheless sufficient to ensure that the relevant statutory notice was valid.

19. The lands in question were part of the well known Castletown Estate in Celbridge, Co. Kildare and the lands were situate in the townland of Kilmacraddock Upper. The local general practitioner in Leixlip, the local postman in Leixlip and a resident of Leixlip all gave evidence that they would have known where Leixlip Gate was without any further description.

20. A majority of the Supreme Court held that the notice was insufficient although it would have been sufficient if either a reference to Castletown Estate or Celbridge or Kilmacraddock Upper had been included. In his judgment Griffin J. stated ([1983] I.L.R.M. 1, 3):

> "The primary object of the publication in a newspaper is to ensure that adequate notice is given to enable those members of the public who are interested in the environment, or who may be affected by the proposed development, to ascertain whether they may have reason to object to the proposed development. In my view to satisfy the requirement of stating "the location of the land" both the letter and the spirit of the regulations require that in the case of land and in particular land which is not in an urban area, the site on which it is proposed that development should take place must be correctly

> and accurately so described in relation to the district in which the land is situate for example by the estate of which it forms part, or the townland, or the neighbouring village as to be readily and reasonably identifiable."

21. A different problem arose in *Walsh v. Kildare C.C.* [2000] IEHC 103, [2001] 1 I.R. 483. Here the applicant (who had been living with his sister following the breakdown of his marriage) gives his name and her address to the planning authority in the course of his application for planning permission. While the applicant did receive certain letters from the authority at that address by registered post, the authority could not locate his address when they endeavoured to serve him with an objection just as a particular statutory time period was about to expire. Finnegan J. held that the address given was insufficient ([2001] 1 I.R. 483, 489):

> "Having regard to the circumstance that the address given is for a dwelling situate in a rural area and the fact that notwithstanding reasonable efforts on his part, [the planning official] was unable to effect delivery of the notice I hold that the address given by the applicant in his application for planning permission was inadequate and accordingly that his application for planning permission was bad."

22. Another variant on this theme can be seen in the case law dealing with the misdescription of the addressee of a search warrant. A good example is supplied by the decision of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Mallon* [2011] IECCA 29, [2011] 2 I.R. 544, a case where the warrant referred to "4 Marrowbone Close, Dublin 8", rather than "4 Marrowbone Lane Close, Dublin 8.". In his judgment for the Court O'Donnell J. said of the argument advanced by the defendant who contended for the invalidity of the warrant that ([2011] 2 I.R. 544, 570-571):

> "Everything in this argument depends on the characterisation of the warrant as being for a premises that does not exist. It seems that the more natural way of approaching the warrant is to ask if it adequately describes a premises that does exist – namely the premises searched. What was involved here can be properly described as a mere misdescription. Indeed, it can only be described as a misdescription in the sense that it is not a complete and full address. It does, in the Court's view, *describe* these premises, although it could do so more completely. But in the words of the decided cases, it was not calculated to mislead, and perhaps just as tellingly, did not mislead. If before the execution of the warrant an issue had arisen as to what premises was described in it, the Court does not believe that anyone knowing of the existence of 4 Marrowbone Lane Close, whether postman, taxi driver, a member of the Garda Síochána or occupier, would have had difficulty in pointing out the premises. In that sense it is telling that the interpretation of the warrant advanced by the [defendant] is that it must be read as authorising the search of nowhere – a premises that simply does not exist. It seems more natural to understand the warrant as being directed to premises which do exist and to see this as an adequate, if imperfect, description of it. Taking the three words that make up the full address of the premises, there is no doubt that the word omitted, "Lane", is the least important in identifying these premises. "Marrowbone" identifies the cluster of streets which are in Dublin 8 and "Close" the particular street. If the choice is therefore to understand the word as referring, albeit imperfectly and incompletely, to the premises searched, or as referring to nowhere, then the conclusion seems obvious and even unavoidable."

23. It is important to stress that Mallon was not a case where there was any suggestion that there was any real doubt about the identity of the dwelling which was the subject of the search warrant. Nor was there any element of misdescription: *Mallon* was rather a case where the address was incomplete, albeit that the key components of the address had been stated.

24. The only contemporary Irish case where the issue of a possible error in the address for service by way of an order for substituted service has been examined is that of the judgment of Laffoy J. in *Danske Bank v. Meagher* [2014] IESC 38. In that case Laffoy J. accepted that the order for substituted service at a particular address constituted good service even though it was accepted that the order incorrectly described the property in question as the defendant's residence. But that decision clearly turned on the Court's conclusion that it had been reasonable for the High Court to have inferred:

> "from the totality of the evidence that there was an arrangement in place between [from the person residing at that address] and the appellant whereby the appellant would be apprised that correspondence and documents had been sent to him by post at the address in Milltown, and that the appellant could ascertain the contents of the correspondence and documents, so that, in the case of documents for the initiation and prosecution of legal proceedings, the appellant would have an opportunity to respond thereto in whatever way he thought fit."

25. Other than confirming the importance of ensuring that a defendant receives due notice of proceedings, the decision in *Meagher* is not otherwise of direct relevance to the present case. In particular, *Meagher* did not involve a case where the address in the order for substituted service was itself in some respects incomplete or erroneous.

26. While there may well be nuances between the judicial approaches in respect of errors in the address in all these instances, there is, I suggest, one unifying theme between the case-law on planning notices, search warrants and addresses contained in orders for substituted service, namely, the need for a high degree of accuracy. It is only in those instances where the courts are satisfied that the error was essentially harmless and was most unlikely to mislead that such errors will be excused. It may be noted, for example, that in *Crodaun Homes* the Supreme Court felt that the reference to Leixlip Gate in itself insufficient, even though the local postman had given evidence that he could have identified the property without any further description, precisely because third parties reading the notice in the newspapers might have been misled by the misdescription. On the other hand, in view of the postal evidence in *Croadaun Homes*, it may be that an order for substituted service of an individual residing at that Leixlip Gate property would have been sufficient if such an incomplete address had been used in view of precisely the same postal evidence to the effect that a letter bearing that incomplete address would nonetheless have been safely delivered to the addressee.

27. In the present case there appears to be two errors in the address, namely, the reference to "Crimblin" rather than to "Crimlin Little" and to describe the premises as being in Co. Offaly rather than Co. Tipperary. The real question is whether it can be said that the Court can be satisfied with a high degree of assurance that these errors were immaterial and harmless *in the context of a letter sent by ordinary pre-paid post* where such has been sanctioned by an order for substituted service. Not without considerable hesitation I find myself obliged to conclude that this Court cannot be so satisfied.

28. It is true that, as Barrett J. himself acknowledged, the majority of letters containing partial errors or misdescriptions of the address of the addressee of kind at issue here are in fact delivered safely. But we all have had experiences of where even apparently minor or mundane errors – such as inserting "Avenue" instead of "Road" or "1A" instead of "1" – have led to the post going astray. Given the importance of ensuring proper service – especially when what is at issue is a default judgment resting itself upon an order for substituted service – the court must, generally speaking, at least, err on the side of caution. This is particularly the case where the registered post containing the notice of intention to proceed addressed to "Crimblin, Moneygall, Co. Offaly" was returned as not called for, where the defendant maintains that he was unaware of both the order for substituted service and of the default judgment

and that immediately he was notified of the District Court proceedings, he took steps to have the High Court default judgment set aside.

**Conclusions**

29. In summary, therefore, I cannot be satisfied that the defendant was served with the notice of an intention to proceed given that the address given in the order for substituted service contained two errors and I cannot say that these errors were simply trifling or harmless. Given that the validity of the subsequent default judgment rests on such proof of service, I fear that I have little alternative but to allow the appeal and to set aside that default judgment. For the avoidance of any possible doubt, I would wish to make it clear that as the defendant is now fully aware of the proceedings and as any possible prejudice to him has been rectified with the setting aside of the default judgment, it will no longer be necessary for the High Court to resolve any further questions in relation to service. It will now be a matter for the plaintiff to pursue and for the defendant to defend the substantive merits of the claim

30. I reach this overall conclusion with not a little hesitation and with considerable sympathy for the position of Corrib Oil. I propose nevertheless to set aside the judgment on terms. I will accordingly require the defendant to file any replying affidavit to the original proceedings within four weeks of the delivery of this judgment. At that point it will be a matter for the plaintiff to take such further steps as it may be advised to seek judgment afresh in the High Court.