

THE HIGH COURT

RECORD NUMBER: 2013 NO. 176 S

BETWEEN:

DANSKE BANK A/S TRADING AS DANSKE BANK

PLAINTIFF

AND

JOHN MEAGHER

DEFENDANT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 4TH OCTOBER 2013:

1. The defendant seeks to set aside a judgment for almost €7 million granted against him in default of appearance by order of Mr Justice Kelly dated the 25th February 2013 in the Commercial Court. He says he never received the summary summons after it was served by ordinary prepaid post pursuant to an order for substituted service made by Kelly J. on the 31st January 2013.

2. That order permitted the plaintiff to serve same on him by ordinary prepaid post at Milltown, Ashbourne, County Meath. Following service of the summary summons by ordinary post to that address, the documents were not returned to the plaintiff's solicitors. He says he only became aware that judgment had been obtained around the end of June 2013, after other steps had been taken by the plaintiff by way of enforcement. I will come to that.

3. In so far as the plaintiff says that there was no irregularity in the manner in which it proceeded to obtain judgment in default of appearance, since it served the proceedings precisely in accordance with an order for substituted service duly obtained, the defendant seeks to set aside that order on the basis that the information as to the residence of the defendant put before the court was incorrect. He says that the address in question is not his residence, that he does not reside there and never has, and he does not own the house there and never has. It has emerged that the house is owned by his sister Cora, and her husband Edward Cox, who live there with their family.

4. Having obtained its judgment, the plaintiff took certain further steps in its attempt to have the judgment satisfied. It served a Notice of Motion and grounding papers by ordinary post to the same address seeking an order for discovery of assets and oral examination of the defendant. That application was granted by Kelly J. on the 13th May 2013. That order was served on the defendant, again by ordinary post to the same address. It required the defendant, inter alia, to make discovery of his assets and documents relating thereto by a certain date, and to attend before the Court on the 10th July 2013 for examination. He did not attend on that date.

5. On the 13th May 2013 the plaintiff obtained also an order of Garnishee by which a sum of €70,000 payable to the defendant by Dublin County Council was ordered to be paid to the plaintiff in part satisfaction of the amount owing to the plaintiff..

6. Again, the defendant says that he did not receive any of these documents, as the address to which they were sent is not where he resides. An order for his attachment was made. He was out of the country at this time apparently, but heard about that through a friend who read about it in the newspapers. He returned to the country, and appears to have presented himself to Mr Justice Kelly and explained that he was unaware of an order requiring him to do anything, and appears to have been given liberty to bring the present application to set aside the judgment and other orders.

7. Before dealing with the evidence that was put before the Commercial Court on the 31st January 2013 to ground the application for substituted service was obtained prior to service of the summary summons, I want to set out a sequence of events which occurred after the plaintiff's solicitor attempted to serve the order for discovery and examination of the defendant which had been obtained on the 13th May 2013.

8. In his affidavit sworn on the 10th June 2013, Ian Bell, solicitor has averred, inter alia, that following his service of the said documents by ordinary post to the said address, they were returned to him from that address. He mentioned also that two letters sent to the defendant by registered post had been returned marked 'not called for'. When the documents were returned to Mr Bell they were accompanied by a letter from Edward Cox, who, as I have stated above is the defendant's brother-in-law being married to the defendant's sister, Cora Cox. The letter states:

"To whom it may concern:

Please be advised that these letters are continually arriving here and that John Meagher does not live here and he is not receiving these letters. We have opened some to get the return address.

Please do not send anymore as they will not be accepted.

Yours faithfully,

Edward Cox,

Milltown,

Ashbourne,

9. The purpose of Mr Bell's affidavit was to bring this fact to the attention of the Court and to seek an alternative method of serving the documents on the defendant, namely by serving a firm of solicitors which, it had been ascertained, was acting for the defendant in relation to the proceedings brought by the defendant against Dublin City Council.

10. Mr Bell has averred that on the 5th June 2013 Mark O'Callaghan, solicitor of CCK Law Firm had telephoned him and said that he was acting for the defendant in the proceedings against Dublin City Council. Some discussion took place, some of which was off the record, according to Mr Bell, and he has been at pains not to reveal any of the discussion that was off the record. However, Mr O'Callaghan appears to have been aware to some extent of the within proceedings by Danske Bank. He appears also to have seen a copy of the order of Garnishee made on the 13th May 2013, though I am unaware of who may have shown it to him.

11. Understandably, Mr Bell asked Mr O'Callaghan if he could serve the documents relevant to the order for discovery and oral examination on the 10th July 2013 on him on behalf of the defendant. Mr O'Callaghan stated that he had no instructions in that regard, and did not indicate that he would seek those instructions.

12. Mr Bell swore a further affidavit on the 10th June 2013, and on the 11th June 2013, following the plaintiff's application for a further order for substituted service, Mr Justice Kelly made another order for that the documents in question could be served "by hand during the course of the business day" on CCK Law Firm for the defendant. That service was effected by hand by Mr Bell that day. However, by the time he served the documents on CCK Law Firm the order made that morning had not yet been perfected, which may account for the fact that on the 13th June 2013 CCK Law Firm faxed a letter to Mr Bell stating that while the letter accompanying the served documents referred to orders of Mr Justice Kelly made on the 11th June 2013, there was no indication as to what that order was, and they sought clarification of the basis on which the documents had been served upon the firm.

13. By faxed letter of the same date, Mr Bell replied enclosing a copy of the order made on the 11th June 2013, and referred to the fact that service of the documents on the 11th June 2013 had been effected in accordance with the terms of the order. He also explained that the reason the order had not been included with the papers served on the 11th June 2013 was that the order had not been perfected at that stage.

14. That letter received a reply from CCK Law Firm acknowledging receipt of the orders of Kelly J. made on the 11th June 2013, but for some reason went on to state:

"You have still not clarified the basis upon which these documents have been sent to us. Please forward by return the affidavit of Ian Bell which it appears was sworn on the 10th June 2013. Please be advised that we do not have instructions in relation to the above proceedings or these matters and we do not understand why a Court would direct service of documents which have nothing to do with us. Why have they been served on us and what are we to do with them? Neither the Orders nor your letters have explained."

15. This is an extraordinary letter given the uncontradicted averment by Mr Bell in his affidavit of the 10th June 2013 that on the 5th June 2013 it was Mr O'Callaghan of CCK Law Firm who had telephoned him, and that what is described as a 'broad ranging discussion' took place about matters clearly pertaining to the defendant, and since it is clearly the case that the firm acts for the defendant, albeit in relation to the DCC proceedings. I would have thought that an experienced litigation solicitor would immediately understand why in such circumstances a Court would feel justified in making the substituted service order that was made, in the certain knowledge that the firm had a means of contacting their client, and thus ensure that the documents came to his attention.

16. At any rate, Mr Bell responded to Mr O'Callaghan's letter dated 13th June 2013 pointing out the fact that the Court directed service upon the firm for the defendant, and stating also "obviously, you should bring the papers to your client's attention". Mr Bell went on to refer to his several unsuccessful attempts to speak to Mr O'Callaghan by telephone over the course of the 10th and 11th June 2013.

17. A even more extraordinary letter was sent by CCK Law Firm on the 14th June 2013 which reads:

"We refer to your letters of the 11th June which are relating to the above matter.

We return all the papers enclosed with your letter of the 11th June.

We are not instructed in relation to the matter. We do not have authority to accept service of documents on matters for which we are not instructed.

Yours faithfully."

18. That letter shows two things. Firstly, it shows a failure on the part of Mr O'Callaghan to appreciate the nature of a substituted service order actually granted by the Court. On an application for substituted service the Court is not necessarily concerned with whether or not the solicitor has been instructed in the particular matter, though that helps greatly. The Court's concern is to be satisfied that the solicitor who, on a factual basis, is identified as being one who acts for the defendant, albeit in another matter, will be in a position to bring the documents to the attention of the defendant. Clearly where the Court was satisfied that CCK Law Firm act for the defendant in the DCC matter, and where that solicitor had actually telephoned Mr Bell on the 5th June 2013, perhaps in relation to the Garnishee Order which had been obtained by Danske Bank over the sum payable to his client by DCC, and the two had had a discussion about the matter generally, it was perfectly sensible, and not at all unusual that the order made by Kelly J. should have been made.

19. Secondly, to my mind, it shows a failure on the part of Mr O'Callaghan to appreciate at the time that he is an Officer of the Court. He has over-arching duties to the Court as an Officer of the Court, and the appropriate thing for him to have done in circumstances where he felt that he was not in a position to fulfill the Court's intention by bringing the documents to the defendant's attention, for whatever reason (which is unclear to me I have to say) was not to ignore the Court's order by returning the documents, but to come to the Court and ask to be relieved of the task imposed upon him by the Court, such as it might be, and have the order set aside. Indeed, in his response dated 14th June 2013, Mr Bell recommended this course of action to CCK Law Firm, suggesting that they do so on the 17th June 2013 when the plaintiff's motion was listed. In my view he fails in his duty to the Court if he engages in the sort of tiresome and unnecessary obfuscation which he was indulged in in this case.

20. I am unclear as to precisely what transpired on the 17th June 2013. Mr Bell in his second affidavit filed on the present motion has

stated at paragraph 14 thereof that Counsel appeared on that date on behalf of CCK Law Firm "as recorded in the orders made on 17 June 2013". I have not seen those orders so am not aware of what is contained therein. But it appears that on that date, leave was given to the plaintiff to bring a motion for attachment and committal returnable for the 24th June 2013.

21. On the 19th June 2013 the plaintiff issued a motion for attachment and committal against the defendant for his failure to comply with the order of the court made on the 13th May 2013 requiring that he make discovery in relation to his assets. That motion was returnable for the 24th June 2013, and was served together with the grounding affidavit firstly by hand upon CCK Law Firm, and secondly by ordinary prepaid post to the defendant at Milltown, Ashbourne, County Meath.

22. The motion for attachment came on for hearing on the return date the 24th June 2013. There was no appearance by or on behalf of the defendant. The Court was satisfied that the defendant had been served with the relevant documents and it states within the order for the defendant's attachment that "*he has chosen to ignore this division of the Court whilst conducting litigation in another division of the Court*". I note in passing also that the Court order refers to two letters from CCK Law Firm to the plaintiff's solicitors. I have not seen those letters so am unaware of what is stated therein.

23. An Order of Attachment directed to the Commissioner and members of An Garda Síochána issued from the Central Office on the 26th June 2013 pursuant to the order for attachment granted by Mr Justice Kelly.

24. According to the defendant's first affidavit filed on the present application, he was out of the country around this time, but a friend contacted him to tell him that he had read in the newspapers that an order for his arrest had been made. He says that up to that point in time he had no knowledge that he was required to do anything by any order of the court. In his second affidavit he has stated that in early June he had no knowledge of any orders made "*or indeed of the proceedings herein*". He states that in particular he had neither seen nor knew of any orders requiring any action on his part until he was informed by telephone by a friend that a newspaper had recorded an order for his arrest. He states that on hearing that news he made arrangements to come home, and returned to this country on the 30th June 2013. He states further that he then contacted CCK Law Firm and was advised that while he had been away in the Far East they had been sent papers relating to these proceedings and in which they had no instructions, and that they had returned the papers. He says he was not informed by CCK Law Firm of the nature of the proceedings, and that he was advised that he should appear at the Court to deal with what he describes as "*the charges against me*".

25. The defendant seems to have appeared before Mr Justice Kelly on the 10th July 2013. I am unclear as to what happened on that date, except that the defendant has stated that he handed his passport into court on that date. The matter appears to have been adjourned to the 16th July 2013 because the defendant in his second affidavit on this motion states that he had not instructed CCK Law Firm in relation to this matter "*until after considering the advice of the Honourable Mr Justice Kelly on the 16th July 2013*", and that the firm accepted instructions to act on the 19th July 2013.

26. In his first affidavit he refers to having been granted leave to issue the present Notice of Motion on the 17th July 2013. At any rate, in his second affidavit he reiterates that the firm had not been instructed by him in relation to these proceedings at any point prior to that date. That averment sits uncomfortably with Mr Bell's averment which is uncontradicted, that Mr O'Callaghan telephoned him on the 5th June 2013. However, I need not resolve every conflict of evidence in order to reach my conclusions on this present application, which is one whereby the defendant at this very late stage seeks to set aside the order made on the 25th February 2013 whereby judgment was granted to the plaintiff. He seeks orders also setting aside all subsequent orders. The plaintiff's motion seeking the committal of the defendant is also before the Court. In the event that the Court refuses the defendant's application to set aside the judgment granted to the plaintiff, it is agreed that the application for the committal of the defendant would be put back to be dealt with on a later date.

27. As I have said, the defendant instructed CCK Law Firm in relation to this matter, according to his affidavit evidence, on the 19th July 2013. While the defendant's motion to set aside the judgment was issued by CCK Law Firm on the 28th August 2013, the grounding affidavit of the defendant, and of Lauren Cox (the daughter of Edward and Cora Cox and niece of the defendant) grounding same were sworn on the 24th July 2013, only a few days after the firm was instructed to act.

28. Bearing in mind that the 19th July 2013 was a Friday, it seems unlikely that CCK Law Firm would have been in a position to have drafted and prepared those two affidavits in order to have them sworn on Wednesday 24th July 2013, and even if they had done so, it is likely that the motion would have issued earlier than it did. I have a feeling not simply because of that fact, but also because of the way in which some at least of the affidavit is worded or drafted, that the defendant himself or some other non-lawyer may have been the draftsman of those affidavits. Nothing much turns on that, but it is an impression that I have.

29. At any rate the Notice of Motion seeking to set aside the judgment was issued on the 28th August 2013 and was made returnable before me on the 23rd September 2013. Maurice Gaffney SC has appeared for the defendant and moving party. The plaintiff was represented by Rossa Fanning BL.

30. Following the issue of the Summary Summons, personal service on the defendant was attempted on several occasions by Tom Ryan, a summons server engaged by the plaintiff's solicitors. The plaintiff's application for substituted service was grounded on his affidavit. He states therein that he was informed by the plaintiff's solicitor that the defendant resided at Milltown, Ashbourne, County Meath, and attended at the address on Monday 21st January 2013. Upon arrival he discovered that access was through large wooden gates which were closed. There is apparently an intercom fixed to soome adjoining fencing together with a bell. There appeared also to be a CCTV camera above the intercom device. Upon pressing the button on the intercom there was no response. Mr Ryan then pressed the bell several times at intervals of about one minute, but on no occasion could he get a response. He attended again on the following day, and once again his attempt to speak to anybody was unsuccessful. Two days later on the 24th January 2013 Mr Ryan returned to the address, and again after several attempts to make contact with anyone on the premises by pressing the intercom and the bell, he left the property.

31. He renewed his efforts at personal service on Friday the 25th January 2013. On his way to the address that day he met the local postman, and having given the address to the postman he asked him if he knew whether the defendant lived there. The postman, according to Mr Ryan, replied that a John Meagher lived at the property,. The defendant and also Lauren Cox, his niece, have denied on affidavit that the defendant ever lived there. It is unlikely that the postman has any first hand knowledge that the defendant lives at the address, and it is fair to assume that in so far as he stated his belief that the defendant lives at the address, he meant that it is an address to which he often delivers post addressed to a John Meagher. The reason why that is probably the case is that the defendant has himself used that address for the purpose of several important documents, and I shall come to that.

32. Having spoken to the postman, Mr Ryan proceeded to the address to find that the gates were open on that occasion. He could see that there was a small grey car parked in a courtyard in front of the house. But having pressed the intercom at the gate he again

got no response. He proceeded to walk towards the house through the gates. As he approached the house and was about to knock on the front door it was opened by a young lady, who turns out to be Lauren Cox, the defendant's niece. Mr Ryan says that he asked if he could speak to the defendant, but was informed that he was not there. He says that he then asked her if this was the defendant's house and he says that *"she confirmed that it was, but that the defendant was not there at the moment"*. Mr Ryan says that he then asked the young lady if she was related to the defendant and what her name was, to which she replied that she was his niece but declined to give her name. We know that this lady is Lauren Cox because she has sworn an affidavit in which she gives a different account of the conversation between her and Mr Ryan on that occasion, and I will come to that too.

33. Mr Ryan concluded his affidavit grounding the application for substituted service by saying that he said to the defendant's niece that he had some documents for the defendant to which she said that *"I should call back sometime next week"*. He then left the property.

34. Lauren Cox has sworn a grounding affidavit for the present application setting out her response to what Mr Ryan had sworn for the purposes of the application for substituted service. That affidavit, as I have already stated, was sworn on the 24th July 2013 as was the grounding affidavit of the defendant. She says that she has read Mr Ryan's affidavit, and that the house at Milltown, Ashbourne, County Meath belongs to her parents, Edward Cox and Cora Cox, and that she herself has lived there for about 16 years. Cora Cox is the defendant's sister. She says also that the defendant is her uncle and that he has been a very occasional visitor to her home, mostly visiting around Christmas, and that she has no recollection of his ever having stayed there.

35. She takes issue with Mr Ryan's version of what happened on the 25th January 2013. She states that while walking through the house she noticed a man in the courtyard, and that when she opened the door of the house he asked her if John Meagher was there to which she says she replied "No he isn't". She says that the man asked her then if she was his daughter, to which she said that she was his niece. She goes on to deny that she said that it was the defendant's house, and says also that she was not asked if it was his house. She says that the man never gave his name, but said that he was a friend of the defendant's and that he had something for him, and that he was carrying an envelope or document. She says that he asked if he could leave the envelope or document with her but that she said there would be no point because she had no idea when the defendant would next be there.

36. The defendant in his first affidavit sworn on the 24th July 2013 states that it is sworn for the purpose seeking leave to issue a Notice of Motion seeking to have the judgment set aside on the basis firstly that he had no notice of the proceedings at the time judgment was obtained, not having been served, and on the basis also that the judgment was obtained by misrepresentation. The wording of the Notice of Motion as issued is very different, and, unlike the grounding affidavits, has the hall marks of professional draftsmanship. This may account for the delay in getting the motion issued, notwithstanding that the grounding affidavits were sworn on the 24th July 2013.

37. As far as the present application is concerned the defendant has averred that he has never owned or lived in Milltown, Ashbourne, County Meath, and that it could never be described as his house or where he resides. He says that he never received any correspondence from the plaintiff in the period shortly before the issue of these proceedings on the 18th January 2013. He says that he left the jurisdiction on or about the 27th December 2012 and returned on the 5th March 2013. He did however visit his sister and brother-in-law over the Christmas period before he left.

38. He says that this judgment was obtained during the period of his absence, and that he received *"no papers or other information"* while he was abroad. He takes issue with several of the averments contained in the affidavit of Tom Ryan. In so far as the affidavit made reference to the address being of "the defendant's house" he maintains that the Court was induced by these assertions and misrepresentations to make the substituted service order. He says that it could not be true that Lauren Cox told Mr Ryan that it was his house, because it is not. Again, he submits that this incorrect averment by Mr Ryan may have been a factor in persuading the Court to make the order for substituted service. He takes issue with what the postman stated to Mr Ryan too.

39. Ian Bell, solicitor, has sworn a replying affidavit. At the outset it is worth explaining that when the plaintiff bank granted the loan facility to the defendant on the 28th February 2011 it was addressed to the defendant at 8, Charlemont Street, Dublin 2, which was one of a number of properties on Charlemont Street owned by the defendant. That facility was for the purpose of restructuring existing borrowings which has been the subject of two earlier facilities in 2005 and 2006. Those earlier facility letters were addressed to the defendant c/o Sancta Maria Properties Limited, 6 Charlemont Street, Dublin 2. However, on the 18th December 2012, the Bank had appointed a Receiver over all the Charlemont Street properties, and hence could no longer communicate with the defendant in writing to either 6 or 8 Charlemont Street.

40. However, it would appear that there existed a banking relationship between the plaintiff and the defendant going back to at least the year 2000, because by deed of mortgage dated 5th January 2000, a copy of which Mr Bell has exhibited in his replying affidavit, the defendant mortgaged property at Charlemont Street to the bank as security for borrowings at that time. Importantly, the defendant's address contained at the commencement of that deed is Milltown, Ashbourne, County Meath. That was clearly an address which the bank had on file for the defendant and which it used for correspondence and the proceedings after the Receiver had taken possession of the properties at Charlemont Street.

41. Mr Bell has also exhibited certain B1 annual return forms from the Companies Registration Office which were filed as late as November 2012 relating to two companies of which the defendant is a named director and the sole member. The defendant gave his name and the Milltown address as presenter of the form, and this appears under the heading *"Person to whom queries can be addressed"*. That makes it perfectly clear that this is an address to which queries for the defendant may be addressed. His sister, Cora Cox is also a named director of both companies. These companies are Sancta Maria Properties Limited, and Sancta Maria Building & Civil Engineering Limited, each with a registered office at 3-8 Charlemont Street, Dublin 2. The Presenter's name and address on each is given as John Meagher, and he gives his address as Milltown, Ashbourne, County Meath. The same address is given for him where his name appears as the sole member of each company, and where it appears as a director of each company. The address for his sister, Cora Cox, is also given as Milltown, Ashbourne, County Meath. Each form is signed by both the defendant and Cora Cox, as director and secretary respectively of each company, below a certification by both the defendant and Cora Cox that the form contains the particulars for the company as of the date of the return.

42. Mr Bell has also referred to what is stated by Henry O'Callaghan in his affidavit. Mr O'Callaghan (not to be confused with Mark O'Callaghan, solicitor, already referred to) is an employee in the firm of Ferris & Associates, the Receivers appointed over the defendant's properties. He has stated he had a telephone conversation with the defendant on the 20th December 2012, which was two days after the receiver was appointed, because he had been asked by Mr Ferris, the receiver, to obtain contact details for the defendant and to arrange a meeting with him. Mr O'Callaghan says that he rang the defendant on his mobile phone number at about 2.30pm that day. He says that during that call he asked the defendant for an email address and a postal address so that formal notification of Mr Ferris's appointment as Receiver and certain other documentation could be sent to him. He states that the

defendant gave Milltown, Ashbourne, County Meath as his postal address, and gave his email address as johnmeagher100@gmail.com. Following that call, Mr O'Callaghan sent an email to the defendant to that email address, and referred to that telephone call. He attached certain documents to the email, but also stated:

"The above [documents] have been issued separately by post to the advised address of Milltown, Ashbourne, County Meath" [emphasis added]

43. On that same date, as stated in the email, Mr O'Callaghan sent a letter and a number of documents by post to the defendant at that address.

44. On the following day, the 21st December 2012 Mr O'Callaghan sent an email to Mr Scully of the plaintiff bank in which he referred to the conversation with the defendant. It is worth noting that in that email he specifically reported that the defendant had given "correspondence details of Milltown, Ashbourne, County Meath".

45. None of the above details were before Kelly J. when he granted the order for substituted service order on the 31st January 2013 or any later such order. It was unnecessary in the circumstances. However, if it had, it would no doubt have served only to reinforce the Court's confidence that any service by ordinary post to the defendant at that address would achieve its purpose.

46. Mr Meagher has sworn an affidavit in order to reply to what was stated by Mr Belol in the affidavit just referred to. He states that he never made any arrangement with his niece or her family to have post forwarded to him from their address. He denies that he received any post which might have been sent to him at that address. Unfortunately, there is no affidavit sworn by either Edward Cox and/or Cora Cox which could have thrown some light on whether they made the defendant aware of any correspondence addressed to him which arrived at their house, or if they did not, what they did with it. The Court is simply left with the defendant's denial.

47. He denies that he gave that address to Mr O'Callaghan for postal correspondence, and denies that he ever gave to anybody else. He denies that he gave him his email address. He denies that Mr O'Callaghan mentioned the appointment of a Receiver over his properties. He says that Mr O'Callaghan did not identify what the purpose of the proposed meeting with him was, except to say it was in the context of his business with the plaintiff bank. In relation to the proposed meeting, he states that he told Mr O'Callaghan that he hoped to be at the airport on 23rd December 2012 to which he says Mr O'Callaghan stated that he would have to talk with a colleague first. He also referred Mr O'Callaghan to his accountant, and asked his accountant to contact Mr O'Callaghan, and refers to that person, Alan Dilloughery in that regard. Mr Dilloughery has sworn an affidavit, but it is not of much assistance for present purposes.

48. Henry O'Callaghan filed a second affidavit to respond to the defendant's denials. He repeats, inter alia, that the defendant provided the address and the email address referred to. He goes on to refer to the defendant's reference to being at his sister and brother-in-law's over Christmas 2012. In that regard he notes that his letter to the defendant was dated 20th December 2012, the clear implication being that it would have been seen by the defendant when he visited the house over Christmas.

49. It is against these facts that the defendant asserts in his grounding affidavit that the Court was "*induced to granting substituted service by post to this address partly as a result of these incorrect assertions and misrepresentations*".

50. There are two elements to this application. Firstly, in my view, it is necessary to consider the application, now made, that the ex parte substituted service order made on the 31st January 2013 should be set aside on the basis that material facts now brought before the Court by the defendant were not before Kelly J. when he made his order, and had they been he ought not to have granted the order. If that order is set aside, then the judgment must also be set aside since no proper service of the summons has been effected.

51. Secondly, however, the application to set aside the judgment must be considered even if the Court is satisfied that the substituted service order should not be set aside. The onus would be on the defendant to satisfy the Court that because of mistake on his part, or that he was taken by surprise, which deprived him of an opportunity to defend the claim, the Court should set aside the judgment. However, any consideration of the latter would be predicated on the fact that as far as the plaintiff is concerned the judgment was obtained regularly. Service of the summons was found to be in order, there was no appearance entered by the defendant, there was no appearance by him or on his behalf in Court, and the debt was duly proven. The judgment was in all respects in these circumstances properly and regularly obtained.

Application to set aside the substituted service order:

52. I have serious concerns as to the defendant's credibility when he says that he never became aware of these proceedings until June 2013. He is a man who has used his sister and brother-in-law's address for business purposes at least as far back as January 2000. He has as recently as November 2012 filed documents in the Companies Registration Office stating that his address is Milltown, Ashbourne, County Meath. It beggars belief in circumstances where his sister is also a signatory to those documents filed in the Companies Registration Office, that she and her brother would not have discussed and agreed the fact that he was giving her address as his own. In those circumstances the Court cannot conclude simply on the basis of the defendant's denials that any post which arrives at her house addressed to the defendant would not be brought to his attention, forwarded to him. It must be assumed that a sensible and workable arrangement was put in place.

53. It is also a feature of this application that no affidavit has been sworn by Edward or Cora Cox. They might have supported what the defendant says, such as it is. They could have referred to the considerable amount of mail they were receiving from time to time for the defendant and could have told the Court what they did with it, or what arrangement they had with the defendant. It is not credible that there was none. Neither would it be credible in my view that these family members would simply bin or otherwise dispose of any such post addressed to the defendant without either opening it to see how important it might be, or without at least contacting the defendant to know how to get it to him. There is no suggestion that they have fallen out or are not on normal family terms.

54. While the defendant denies that he gave that address to Henry O'Callaghan, the latter's evidence is that he did, and that is corroborated by the fact that when he emailed Donal Scully of the plaintiff bank on the following day, the 21st December 2012, he specifically stated that the defendant had given that address to him. I do not accept that Mr O'Callaghan would have said that if he had not been so informed by the defendant.

55. All of this suggests that the postman to whom Mr Ryan spoke on his way to the address on the 25th January 2013 was correct to confirm the address as that of the defendant. I have already said that it can be presumed that the postman was indicating by his response that this was an address to which he was used to delivering post addressed to John Meagher.

56. The defendant makes much of the fact that when Mr Ryan swore his affidavit he stated that he had been informed that he had been informed by the plaintiff's solicitor that he resides at the address. In similar vein he protests at Mr Ryan's reference in his affidavit of service to "*the defendant's house*", He has even counted those various references and reached a total of ten. These complaints form the basis for his contention that Mr Justice Kelly was misled by the plaintiff on the application for substituted service, and that the order should be set aside.

57. It is remarkable to my way of thinking that nowhere in his affidavits has the defendant taken the trouble to say where he does in fact reside, or what address these documents ought to have been sent to in order that they might reach him. His grounding affidavits refer to him as being "*of Apartment 10, Atlantic House, West Beach, Cobh, County Cork*". The first affidavit was sworn on the 24th July 2013. Yet, I note that on the 5th June 2013 when he commenced his High Court against Dublin City Council, he gave his address on page 3 thereof as 302, Harold's Cross Road, Dublin 6W. He appears either to live a very peripatetic existence frequently moving from address to address, or he chooses to conduct his affairs using different addresses for different purposes.

58. In my view there is no proper basis for setting aside the order for substituted service. There was a sufficient basis even as set forth in Mr Ryan's affidavit for the making of the order. Nothing except a bare denial has been put forward by the defendant. Put against the evidence that has been sworn to on behalf of the plaintiff, his denials sound hollow, even if the affidavit of Lauren Cox is taken into account by way of support. The sworn evidence and documents exhibited on behalf of the plaintiff only serve to persuade me further that the order for substituted service made by Kelly J. was an appropriate order for him to have made, and I see no basis for setting it aside. I refuse that application. It follows that in my view the plaintiff's judgment was not irregularly obtained.

Application to set aside the judgment:

59. Where a defendant claims that a judgment was obtained irregularly by the plaintiff, the defendant must specify the irregularity in question. This requirement is reflected in the provisions of Order 124, rule 3 RSC. If the Court is satisfied that there has been an irregularity in the manner in which the judgment was obtained, the defendant will be entitled to have that judgment set aside *ex debito justitiae*. There will in such circumstances be no requirement upon the defendant to demonstrate an arguable defence to the plaintiff's claim. Clearly, where a judgment ought not to have been granted due to some fundamental error on the part of the plaintiff seeking judgment, or on the part of the Court, it could not possibly stand. But the error must be established to the satisfaction of the Court. In such circumstances it would be unjust if a defendant had to go a step further than establishing the irregularity, and establish also that he had an arguable defence. Indeed, Mr Gaffney submitted as much on the present application when addressing the fact that in this case the defendant has not stated on affidavit what his defence to the proceedings might consist of. I accept his submission in that regard, but only in circumstances where there has been an established irregularity in the judgment obtained.

60. That this should be so does not really require authority. It would seem to reflect basic justice. But there is plenty of authority, some of which is of long-standing. By way of example, I would refer to a Court of Appeal judgment of O'Brien L.C. in ***Crane & Son v Wallis 1915 2 IR 411***. In that case the plaintiff had applied for judgment in default of appearance. However no affidavit of service of the summons had been filed, and the Court at first instance was not informed of this failure to observe the terms of Order 13 of the then Rules of the Superior Courts which required that prior to applying for judgment the plaintiff shall file an affidavit of service. This had not been done, even though service had been properly effected. This error was held to have deprived the Court of jurisdiction to grant judgment. It was a case where it was clear there could be no defence on the merits. Nevertheless the judgment could not stand as the Court simply had no jurisdiction under the Rules of the Superior Courts to grant judgment. In so holding, O'Brien L.C. at p.415 stated that "*apart from the rules, the Court has no jurisdiction to give judgment against a defendant who has not brought himself before the Court by entering an appearance*".

61. But in the present case, I have already held that there is no proper basis for setting aside the order for substituted service. Even at this stage, and in the light of all the evidence which has been adduced, and accepting that the defendant did not reside at the particular address, I would consider that the order was an appropriate one. As I have said, I do not find it credible that this defendant was not made aware of the proceedings, and the absence of any evidence from Edward and Cora Cox is significant in this regard. Service in compliance with that order was proven by affidavit of service prior to judgment being granted by Kelly J. There is no irregularity therefore in the manner in which this judgment was obtained.

62. As far back as ***Farden v. Richter 1889 23 QBD 124*** it has been held that where judgment is regular "it is an inflexible rule that the judgment could not be set aside without an affidavit by the defendant suggesting that he had a defence to the plaintiff's claim". In his judgment, Huddleston B. P. stated at p. 129:

"where there is no such affidavit, it is only natural that the Court should suspect that the object of the applicant is to set up some mere technical case. At any rate, when such an application is not thus supported, it ought not to be granted except for some very sufficient reason."

63. In the present case The defendant has not stated on affidavit any defence which he wishes to make to the plaintiff's claim. His affidavits are silent in this respect. Mr Gaffney has submitted in this regard that where a person has not been served with proceedings he should be under no obligation to disclose his defence. I have no difficulty in accepting that submission as a general principle. But here the defendant was served in accordance with an order for substituted service, which I have determined is not an order which ought to be set aside. The defendant could not have assumed in his preparation for this application to set aside judgment that he would be successful in establishing that the judgment was irregularly obtained. He must be taken to be aware that in the event that the Court was satisfied that the judgment was regularly granted he would be required to set forth an arguable defence to the claim before the judgment was set aside. He has not done so. *Farden v. Richter* [supra] does not rule out that there may be some exceptional circumstance where this otherwise inflexible rule should not be an obstacle to a defendant who seeks to set aside a judgment obtained against him. But there are no such circumstances in this case. The defendant's mere averment that he had no knowledge of the proceedings before judgment was granted is insufficient in the light of the evidence in this case. Put more bluntly, I do not believe the defendant when he says this.

64. For these reasons I refuse to set aside the judgment obtained by the plaintiff on the 25th February 2013, and I refuse to set aside any order made subsequently. As I have already referred to, it is agreed that the application for the committal of the defendant would be put back to be dealt with on a later date.