

THE HIGH COURT

**[2022] IEHC 347
[2021/475 S]**

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

ELIZABETH HARSVELD

DEFENDANT

JUDGMENT of Mr. Justice Holland delivered on 31 May 2022

1. This judgment relates to adequacy of service of an application for judgment in default of appearance on foot of a summary summons issued 10th August, 2021 alleging default in repayment of two loans made by the plaintiff to the defendant and one Marius Harsveld in 2008. The plaintiff seeks judgment for €389,547.60.

2. The application is made on foot of notice of motion dated 25th October, 2021, grounded on the affidavit of Stephen Clarke sworn 26th October, 2021. The exhibited letters of sanction are both dated 14th July, 2008, signed by the defendant on 1st September, 2008 and resulted in drawdown of the loans on 18th September, 2008 in the sums of €190,460 and €167,540 respectively. Both were mortgage loans in respect of a property at Corkaghmore, Templeboy, Sligo – the necessity for two separate loans being, I infer, by reason of the fact that the loan of €190,460 was by way of a preferential home loan to the Defendant as a member of AIB staff at a rate of interest below that applicable to the other loan.

3. I am satisfied with the proofs adduced as to the making and drawdown of the loan and that the exhibited statements of account, in each case from drawdown, has sufficed to enable the defendant to decide whether or not to admit or resist the claim.

4. I am also satisfied that the defendant is in default of appearance, notwithstanding having been sent letters dated 24th April, 2021, 15th September, 2021 and 29th September, 2021 consenting to late filing of appearance.

5. I am satisfied, by the affidavits of Alla Fogheli sworn respectively 24th August and 22nd December 2021, of proof of service of the summons on the defendant by way of registered post, in respect of which proof of delivery signed by Liz Harsveld on 13th August, 2021 is exhibited.

6. Such service was effected on foot of O.9, r. 2(1)(iii) of the Rules of the Superior Courts. It permits service of summonses by registered post to the last known residence or place of business of the defendant, provided that such service shall not be deemed effective without “proof of delivery” of the envelope containing a copy of the summons to the address of the person to be served. Proof of delivery typically consists of the signature of a named person, acknowledging delivery.

7. Accordingly, I am satisfied that the plaintiff has adduced the necessary proofs both as to service of the summons and as to default of appearance.

8. I reserved judgment specifically as to the adequacy of service of the notice of motion and grounding affidavit in default of appearance and by reason of my being conscious that the law requires strict compliance with all proofs required to obtain judgment in default of appearance.

9. Having regard to affidavits of service sworn by Michelle Galligan on 12th November, 2021 and on 2nd March, 2022, and exhibited signed proof of delivery, I am satisfied that the notice of motion and grounding affidavit for judgment in default of appearance was served by registered post for the delivery of which the Defendant signed *sub nom* “Liz Marley”. On foot of the affidavit of Darragh Delaney sworn 24th March, 2022, I am satisfied that Liz Marley is one and the same as the defendant, Elizabeth Harsveld, and, in that respect, I note the content of an exhibited document headed “Industry Standard Financial Statement – for use with MARP” which, Mr. Delaney avers, was completed by the defendant and received by the plaintiff in late August 2021, shortly after the summons was served. That document was completed by the defendant in the name of “Elizabeth Marley Harsveld”, recites the mortgage account reference numbers recited in the summary summons, recites an outstanding balance approximating to the sum claimed in the summons, identifies the defendant as separated from her husband Marius Harsveld and that divorce is pending and identifies her occupation as a banker for 25 years to 2015. The document is signed by hand in the name of Elizabeth Marley Harsveld on 25th August, 2021.

10. An affidavit of service of Mary O’Boyle sworn 13th April, 2022 proves to my satisfaction the service by registered post upon Elizabeth Harsveld of that affidavit of Darragh Delaney, which affidavit of Mary O’Boyle exhibits proof of delivery signed in the name of Liz Harsveld. I should add that the exhibited letter serving the affidavit of Darragh Delaney also advised the defendant that the plaintiff’s instructions were to proceed to seek judgment when the matter was next before the court on 23rd May, 2022 - that being the date upon which I heard this matter. On that occasion, Ms. Harsveld was called but did not appear.

11. Accordingly, I am satisfied as a matter of fact that the defendant was notified of and thereby became aware of the hearing of 23rd May, 2022. I am further satisfied, in particular on foot of the proof of delivery signed in the name of Liz Marley exhibited by Ms. Galligan in her affidavit of 2nd

March, 2022 that, if service thereof by registered post with signed proof of delivery suffices, the defendant is on notice of the motion in default of defence issued against her.

12. Particular rules apply to service of motions in default of appearance. *Delany and McGrath on Practice and Procedure*¹ record that, where no particular mode of service is directed by the rules, O.121, r.5 of the Rules of the Superior Courts permits, in a case in which no appearance has been entered, service of documents by filing in the Central Office. However, *Delany and McGrath* record that in *Taylor v. Huband-Smith*², it was held that this rule did not apply to a motion for judgment in default of appearance and that personal service of the notice of motion for judgment was required - citing also *Provincial Bank of Ireland v. Phelan*³. This view of matters was more recently confirmed in *Trafalgar Developments Ltd v. Mazepin*⁴ - to the effect that “a motion for judgment in default of appearance is generally required to be served personally”.

13. While the possibility of substituted service on foot of an order permitting it is also canvassed in the authorities, that issue does not arise in the present case, as the plaintiff relies, as compliant with the ordinary requirements, on the service actually effected by way of registered post and subsequent exhibition of signed acceptance of delivery which, as I have said, I accept was signed by the defendant.

14. The question which arises, therefore, is whether it suffices to serve a notice of motion in default of appearance by registered post if signed proof of delivery is exhibited on proving service.

15. It appears to me, first, that the authorities cited by *Delany and McGrath* were premised on the position before the amendment of O.9 of the Rules of the Superior Courts by SI 475 of 2017. That introduced the possibility of service of a summons by registered post as long as it was proved by proof of delivery. Nor is it apparent that in *Trafalgar v. Mazepin* the question arose whether proof of service by that means would suffice in the case of a motion in default of appearance.

16. The amendment of O.9 in 2017 reflected a change of view on the part of the Rules Committee as to the proofs required to prove service of a summons. Until then, service of summonses had to be by personal service and that is the most exacting form of service required by the Rules of the Superior Court in respect of any documents. This, of course, is entirely understandable given the importance of a summons in the commencement and prosecution of litigation.

1 4th Edition, para. 4-29

2 [1920] 55 ILTR 120

3 [1909] 2 IR 698

4 [2019] IEHC 7, para. 26

17. It does appear to me that the amendment of O. 9 in 2017 indicates that service by registered post delivered to the Defendant's address, if proved by proof of delivery, represents an adequate substitute for personal service – adequate to the extent that no leave is required for adopting that means of service. This seems at least some indication that similar service of a motion in default of appearance should be considered sufficient.

18. However, I do bear in mind that, from a defendant's point of view, the judgment is of very particular and far greater importance than even the service of a summons commencing proceedings – thus arguably implying that proof of the motion for judgment is of even greater importance than proof of service of the summons.

19. For all that, it does appear to me that there can be no injustice in granting judgment in default of appearance on foot of a form of service of the notice of motion and grounding affidavit which, on the facts of this case, has resulted in the defendant herself signing acknowledgement of such service by way of registered post upon her.

20. I leave aside for present purposes, as on present facts I need not decide, whether service of such motion papers by registered post at the address of the defendant and signed for by some other person would suffice. Here, the defendant herself signed for receipt of the registered post in question.

21. In those particular circumstances, and informed by the decision of the Rules Committee to draw at least considerable equivalence between personal service of a summons and its service by registered post once there is proof of delivery, I conclude that service has been effected upon this defendant sufficient to permit judgment in default of appearance which, being satisfied as to the other proofs necessary for such judgment, I therefore grant. The plaintiff shall have its costs as following that event.

David Holland
31 May, 2022