APPROVED **[2024] IEHC 369**

THE HIGH COURT

2022 606 P

BETWEEN

LYNDSEY FARRELL

PLAINTIFF

AND

RAS MEDICAL LTD
(TRADING AS AURALIA CLINIC)
AHMED RAMZI SALMAN
SHADAB IMTIYAZ AHMAD

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 24 June 2024

INTRODUCTION

1. This ruling is delivered in respect of an application to set aside a default judgment. The default judgment is said to have come into effect in circumstances where the defendants failed to deliver and file a defence to the proceedings within the time period specified in a so-called "*unless order*".

2. It should be explained that the term "*unless order*" will be deployed throughout this ruling to describe an order made pursuant to Order 27, rule 9 of the Rules of

the Superior Courts. An "*unless order*" is one which extends time for delivery of a defence, subject to a proviso that in the event that the defendant fails to deliver and file the defence within that time period, the plaintiff shall have liberty to enter judgment in default (without further order). Put otherwise, a plaintiff is entitled to a default judgment "*unless*" the defence is delivered and filed within the extended time period allowed by the court.

3. The resolution of the set aside application in the instant case requires the court to consider the following three issues. The first issue concerns the circumstances in which the original "*unless order*" came to be amended. This requires consideration of whether it is permissible for one party to apply unilaterally to have an order amended without reference to the other party. The second issue is whether the criteria under Order 27, rule 15(2) have been met. This requires consideration of whether "*special circumstances*" existed which explain and justify the failure to deliver and file the defence on time. The third issue only arises if the amendment to the original order is valid. The issue is the identification of the precise date upon which the defence should have been delivered and filed.

PROCEDURAL HISTORY

4. The within proceedings take the form of a personal injuries action. The claim arises out of the provision of cosmetic surgery to the plaintiff on two dates in 2020. The personal injuries summons was issued out of the Central Office of the High Court on 15 February 2022. As is explained therein, the summons had been issued prior to the plaintiff having the benefit of an independent expert report confirming that there were reasonable grounds for bringing an action in

professional negligence. The summons was issued to preserve the plaintiff's position in respect of the limitation period. An independent expert report was subsequently obtained, and the plaintiff's solicitor delivered further particulars in July 2022. The affidavit of verification was filed in September 2022.

5. Thereafter, the defendants' solicitor sought certain medical records from the plaintiff in advance of delivering a defence. The plaintiff's solicitor treated this as a request for voluntary discovery and furnished medical records from the plaintiff's general practitioners in two tranches in October 2022 and March 2023, respectively.

6. On 15 March 2023, the plaintiff's solicitor wrote to the defendants' solicitor seeking the delivery of a defence. As required under Order 27, rule 10, the letter confirmed that the plaintiff would consent to the late delivery of a defence within twenty-eight days of the date of the letter. It seems that no response was received to this correspondence.

7. On 11 May 2023, the plaintiff's solicitor issued a motion for judgment in default of defence. This motion was returnable before the High Court on 19 June 2023.

8. Prior to the return date, there were discussions between counsel for the respective parties and it was agreed that the motion would be dealt with on consent. More specifically, it was agreed that an "*unless order*" would be made which would allow the defendants a period of six weeks within which to deliver their defence, with judgment to be entered in the event that this did not occur.

9. It should be explained that an order of this type may only be made by a judge and cannot be made by the registrar (as mistakenly suggested by the plaintiff's solicitor in her affidavit). It is a judicial function. Order 27, rule 9 provides that the court must be satisfied, for reasons to be recited in the order, that it is

necessary in the interests of justice that the time for delivery of the defence should be extended. The court must, to the extent possible, determine the specific relief claimed in the statement of claim to which it considers the plaintiff to be entitled in the event of the failure of the defendant to deliver a defence.

10. On the return date of 19 June 2023, an "*unless order*" was made on consent before the High Court (Dignam J.). This order was subsequently perfected, i.e. drawn up by the registrar, on 21 June 2023. This order will be referred to as "*the original order*".

11. The original order is directed to only one of the three defendants, i.e. the first named defendant. The plaintiff maintains the position that the order is erroneous and does not reflect the consent terms agreed between counsel for the respective parties. Importantly, the order accurately reflects the application actually made by counsel to the court. The application had been moved by counsel for the plaintiff. Counsel had, seemingly through inadvertence, sought an order against the first named defendant alone.

12. It is at this point that the procedural history takes an unusual turn. Rather than simply write to the other side and seek their consent to the correction of the order under the slip rule (Order 28, rule 11), the plaintiff's side instead made an *ex parte* application to the High Court (Dignam J.) on 4 July 2023 to have the order amended. The digital audio recording of the application indicates that the judge was told, mistakenly, that the application to amend was on consent. The consequences of this are addressed under the next heading below (at paragraphs 28 and onwards).

13. The normal course in circumstances where an order has been amended is that a revised version of the original order is drawn up. This revised order will state

clearly on its face that it has been amended and will state the date of the amendment. The revisions are then indicated by striking out or underlining text, as appropriate.

14. For some reason, however, this was not the approach adopted by the registrar dealing with the matter in July 2023. Instead, a fresh order was drawn up on 6 July 2023. This order will be referred to as "*the amending order*".

15. The operative part of the amending order reads as follows:

> "IT IS ORDERED that all references in the aforesaid Order of the 19th day of June 2023 to the 'First Named Defendant' be and they are hereby substituted with the term 'Defendants'"

16. As already explained, this amendment had been achieved without notice to the defendants. Thereafter, the solicitor acting on behalf of the plaintiff served copies of both orders on the defendants' solicitor under cover of letter dated 14 July 2023.

17. On the plaintiff's calculation, the six week period for the delivery and filing of a defence expired at the close of business on 4 September 2023. The six week period is said to run from the date of the perfection of the original order (21 June 2023) but excludes the month of August having regard to Order 122, rule 5.

18. The plaintiff's solicitor wrote to the defendants' solicitor, by registered post sent on 4 September 2023, stating that the plaintiff would now be seeking to have the proceedings heard as an assessment of damages only due to the defendants' non-compliance with the "*unless order*".

19. The defendants' response to this was, first, to serve a request for further and better particulars on 5 September, and then to purport to deliver a defence on 8 September 2023. An attempt was made on 8 September 2023 to file the defence in the Central Office of the High Court, but this was unsuccessful.

20. On 11 September 2023, the plaintiff's solicitor caused the proceedings to be set down for trial on the basis of an assessment of damages only.

21. There then ensued an exchange of correspondence between the solicitors. In brief, the plaintiff's solicitor contended that it was not open to deliver a defence having regard to the expiration of the six week period; and the defendants' solicitor queried the circumstances in which the original order came to be amended and put forward an explanation for the delay in delivering the defence.

22. The plaintiff's side applied, on 19 October 2023, for a specially fixed trial date. The trial was scheduled for 10 October 2024. The High Court (Reynolds J.) directed that a motion to set aside the default judgment be filed within one week and provisionally listed the trial of the action for a two week hearing to allow for the contingency of the set aside motion being successful, i.e. the hearing might not be confined to an assessment of damages only. Both parties were given liberty to apply.

23. The defendants duly issued a motion on 26 October 2023. It has to be said that there is some imprecision in the terms of the reliefs sought. The appropriate application is one pursuant to Order 27, rule 15. This is not, however, the relief sought. At all events, the plaintiff's side has taken a sensible and pragmatic approach to the form of the motion. It has been confirmed, on affidavit, that the plaintiff is happy to treat the motion as an application to set aside the default judgment. See, in particular, paragraph 34 of the replying affidavit.

24. The application ultimately came on for hearing before me on 6 June 2024. Both sides had helpfully prepared written legal submissions in advance.

25. At the conclusion of the hearing, I indicated that the application to set aside the default judgment would be allowed and that a written ruling, setting out the

reasons in full, would be furnished to the parties in short course. I had also indicated earlier that I would listen to the digital audio recording ("*DAR*") of the *ex parte* application on 4 July 2023. This exercise confirmed that the judge was told, mistakenly, that the application to amend the original order was on consent.

26. The parties were offered the opportunity, if they so wished, to make further submissions on this development. A short hearing was convened on 19 June 2024 for this purpose. Counsel on behalf of the plaintiff, very fairly, acknowledged that it should not have been represented to Dignam J. that the application to amend was by consent. Counsel confirmed that the plaintiff did not now seek to stand over the amending order.

27. The parties were informed that a written judgment would be delivered on 24 June 2024 and that a date would be fixed thereafter to hear submissions on the allocation of legal costs.

(1). THE AMENDMENT OF THE ORIGINAL ORDER

28. Logically, the first issue to be addressed by the court is the status of the amending order. If the amending order is set aside as invalid, then the "*unless order*" only ever applied to the first named defendant and no default judgment can have crystallised as against the second and third named defendants.

29. This is because the original order, as perfected, refers to only one of the three defendants, i.e. the first named defendant. It seems that this discrepancy arose in circumstances where the plaintiff's counsel, when moving the consent application on 19 June 2023, had, through inadvertence, indicated that the order was as against the first named defendant alone. It was not a mistake on the part of the registrar.

30. The Rules of the Superior Courts prescribe a detailed procedure for the amendment of orders. Order 28, rule 11 provides as follows:

> "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected without an appeal:
>
> (a) where the parties consent, and with the approval of the Court, by the registrar to the Court,
>
> (i) on the application to the registrar in writing of any party, to which a letter of consent to the correction from each other party shall be attached or
>
> (ii) on receipt by the registrar of letters of consent from each party; or
>
> (b) where the parties do not consent, by the Court,
>
> (i) on application made to the Court by motion on notice to the other party or
>
> (ii) on the listing of the proceeding before the Court by the registrar on notice to each party."

31. As appears, the question of whether the other party is *consenting* to a proposed amendment of an order is crucial. If consent is forthcoming, the original order may be corrected by the registrar with the approval of the judge. It is, however, necessary to produce a copy of the letter of consent. If no consent is forthcoming, it is necessary to make an application to the judge. It is expressly provided that such an application must be made on notice.

32. Here, the plaintiff's side wished to correct an error of their own making. The proper approach to have adopted in the circumstances is as follows. The plaintiff's solicitor should have written to the defendants' solicitor requesting his consent to the making of an amendment to the original order. Depending on the response to such a request, an application could then be made to the registrar or a judge as appropriate.

33. Regrettably, this was not the approach taken by the plaintiff's solicitor. Instead, the solicitor seems to have made a conscious decision not to contact the other side, and, instead, arranged for an *ex parte* application to be made to the judge who had made the original order.

34. The solicitor has since offered the following explanation for this unorthodox approach (at paragraphs 16 and 17 of her replying affidavit):

> "[…] Further, I reject the averment […] that the ex parte application constituted an amendment application pursuant to Order 28, Rule 11 of the RSC, or that it somehow rendered the Unless Order as '*unfit for purpose*'. These averments are incorrect and misconceived.
>
> The application made on 4 July 2023 was made to ensure that the terms as already agreed between Counsel on 19 June 2023 were correctly reflected on the face of the Unless Order made and there was no necessity to issue any motion on notice, or for the Defendants to be notified of this application. There is no reference to Order 28 of the RSC in the Variation Order, nor is there any reference to any application to amend the Unless Order."

35. With respect, these propositions are wrong as a matter of law and demonstrate a lack of understanding on the part of the plaintiff's solicitor of the proper procedure. The jurisdiction to correct clerical mistakes or errors is regulated by Order 28, rule 11. It follows that any application to correct the supposed error in the original order should have been made in compliance with the procedure prescribed. There are no circumstances in which it is permissible to apply to correct an order, which had been made *inter partes*, without first putting the other side on notice and seeking their consent. It is not open to a party to adopt an alternative *ad hoc* procedure which excludes the other side.

36. If and insofar as the plaintiff's solicitor seeks to draw some sort of distinction between the (substantive) amendment of an order and the mere correction of an order, this is not an answer to the objection that the procedure prescribed under

Order 28, rule 11 was not followed. The precise purpose of the *ex parte* application on 4 July 2023 had been to seek to correct what the plaintiff perceived to be a clerical mistake or error in the original order. Accordingly, it constituted an application of the very type which is governed by Order 28, rule 11.

37. It follows that the plaintiff's solicitor was obliged to notify the defendants' solicitor of her intention to apply to correct the original order and to seek his consent. It was improper for the plaintiff's side to make an *ex parte* application to the High Court. This procedural irregularity was compounded by the fact that the lawyer moving the *ex parte* application mistakenly informed the judge that the application to correct the original order was on consent. Not only was the application not on consent, the other side were unaware that any application was being made.

38. It is essential to the efficient operation of the court system that judges are able to rely upon the accuracy of a representation from counsel to the effect that there is consent from all parties to the making of an order. This allows court business to be conducted in non-contentious matters without the necessity for all sides to attend. It behoves counsel and their instructing solicitors to ensure that such a representation is not made unless there is consent.

39. It should be emphasised that there is no suggestion whatsoever that the lawyer moving the *ex parte* application intended to mislead the judge. The reference to the application to amend the original order being on consent was an innocent mistake. The mistake seems to have been a consequence of the failure, on the plaintiff's side, to appreciate the vital distinction between (i) the consent to the original order, and (ii) the consent to the making of an amendment to a perfected

order for the purpose of Order 28, rule 11(a). These are two very different things. The fact, if fact it be, that the other side might well have consented to the making of an amendment does not absolve the moving party from seeking such consent.

40. The pronouncement and perfection of a High Court order is a solemn matter. A High Court order is entitled to respect and may only be amended in accordance with the prescribed procedures. Here, the original order accurately recorded the order which had been sought from the court by counsel on 19 June 2023, i.e. an order against the first named defendant alone. The legal effect of the proposed amendment of the original order would be to enter judgment in default against two *additional* defendants, subject to the usual "*unless*" proviso. Such an amendment could not properly be made without notice to the solicitor representing those defendants. As explained earlier, the making of an "*unless order*" is not a mechanical exercise but is a judicial function which requires the court to be satisfied of certain matters: see paragraph 9 above.

41. In summary, the procedure by which the amending order in the present case was obtained was irregular. The plaintiff no longer seeks to stand over the order. The amending order will, therefore, be set aside. The practical consequence of this is that no default judgment crystallised as against the second and third named defendants.

42. For completeness, it should be noted that, without deciding the point, it has been *assumed* for the purpose of this ruling that an error on the part of counsel (rather than on the part of a registrar or the court) can be rectified pursuant to Order 28, rule 11. If this assumption is erroneous, and an amendment could only be made pursuant to the inherent jurisdiction of the court, it would still have been necessary to put the other side on notice of any intended application to amend.

(2). APPLICATION TO SET ASIDE DEFAULT JUDGMENT

43. Notwithstanding that the amending order has been set aside, the question of the position of the first named defendant remains to be addressed. A default judgment crystallised against the first named defendant on 5 September 2023, i.e. following the failure to deliver and file a defence by 4 September 2023.

44. Notwithstanding some imprecision in the wording of the notice of motion, both sides are content to treat the motion as comprising an application to set aside the default judgment pursuant to Order 27, rule 15(2). The current version of the rule provides as follows:

> "Any judgment by default, whether under this Order or any other Order of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit, if the Court is satisfied that at the time of the default special circumstances (to be recited in the order) existed which explain and justify the failure, and any necessary consequential order may be made where an action has been set down under rule 9."

45. It should be explained that the rule has been amended on two occasions. It is apparent from the terms of the amendments that the intent of the Rules Committee had been to introduce a "*stricter*" criterion which an applicant must satisfy before the court can exercise its discretion to set aside a default judgment (*McGuinn v. Commissioner of An Garda Síochána* [2011] IESC 33).

46. The interpretation of the amended version of the rule has been considered, in detail, in two recent High Court judgments: *De Souza v. Liffey Meats (Cavan)* [2023] IEHC 402 (Ferriter J.) and *Costern v. Fenton* [2023] IEHC 552 (O'Donnell J.).

47. The governing principles may be summarised as follows:

(1). Notwithstanding that Order 27, rule 15(2) does not address "*unless orders*" in express terms, it does allow for default judgments arising from non-compliance with an "*unless order*" to be set aside.

(2). In the case of an "*unless order*", the question of whether or not "*special circumstances*" exist is to be assessed, principally, by reference to the date upon which the extended period allowed for a defence expires. This date represents the "*time of default*" within the meaning of the rule. This is because a default judgment only crystallises in the event that the extended period expires without a defence having been delivered and filed.

(3). The focus is on the steps taken by a defendant during the period between the date of the making of the "*unless order*" and the crystallisation of the default judgment. The defendant, having been allowed the indulgence of an extended period within which to deliver and file a defence, is expected to do so on time. Normally, a default judgment will only be set aside if special circumstances arose during this period which affected the defendant's ability to comply within time.

(4). The test of "*special circumstances*" implies a higher threshold than a "*good reason*"; while it does not raise the bar to "*extraordinary*", it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present.

(5). The rationale for the amended rule is to ensure greater compliance with deadlines and court orders, and to end the old culture of a lax approach to court-imposed deadlines and indulgence of disregard for court orders

on procedural matters. This is part of a general tightening of approach to compliance with deadlines and promotes the imperative of ensuring that justice is administered efficiently and expeditiously.

(6). Generally speaking, and without laying down a hard and fast rule, a solicitor's mistake or inadvertence as to the terms or existence of an order for judgment in default (including an order in the form of an "*unless order*") will not amount to "*special circumstances*" within the meaning of Order 27, rule 15. This is subject to the caveat that the decision in each case will be fact specific.

(7). The following scenarios have been held to constitute "*special circumstances*": (i) the default judgment arose as the result of a miscommunication between the parties' respective solicitors; (ii) the defence was sent in the DX document exchange within time but did not arrive; and (iii) the defendant's counsel had been unable to attend to his practice in full because of personal family circumstances entailing the illness and death of an elderly parent.

48. The existence of "*special circumstances*" is a condition precedent to the exercise of the jurisdiction to set aside a default judgment. Once this condition precedent has been satisfied, the court moves on to consider the balance of justice. This is so irrespective of whether one characterises the test as a single composite test or a test with two limbs.

49. The factor which is of most immediate relevance to the balance of justice is whether, in a case where the default judgment has been obtained regularly, the defendant has shown a defence on the merits that has a reasonable prospect of success (*Fabri-Clad Engineering v. Stuart* [2020] IECA 247). It would not be

in the interests of justice to set aside a default judgment for the purpose of allowing the defendant to contest the proceedings on the merits—with all the attendant cost and delay—unless there is a reasonable prospect of the defence succeeding.

50. Delay in bringing an application to set aside a default judgment may also be a relevant factor (*McGuinn v. Commissioner of An Garda Síochána* [2011] IESC 33).

51. More generally, the question of prejudice to the parties will rarely be decisive in an application to set aside a default judgment. This is because, absent some *additional* factor, the potential prejudice caused to a defendant in refusing to set aside a default judgment will nearly always be greater than the prejudice caused to a plaintiff were the judgment to be set aside. The prejudice to a defendant is the loss of the opportunity to resist a claim for which he may have a full defence. By contrast, the usual prejudice to a plaintiff is merely that there will be further delay in the resolution of the proceedings. Of course, in some instances, the plaintiff will have relied on the judgment or a third party may have acquired rights as a result of same.

52. In assessing the prejudice to the parties, regard must be had to the purpose of the amended Order 27. It is intended to promote compliance with procedural rules, and not intended to confer a windfall on a plaintiff by relieving them of their burden of having to establish liability.

53. The Supreme Court in *McGuinn v. Commissioner of An Garda Síochána* [2011] IESC 33 emphasised that courts lean in favour of a determination of litigation on the merits of the issues between the parties rather than preventing a party, for procedural reasons including culpable delay, from having access to the

courts when his or her rights or obligations are being determined. An application to set aside a default judgment falls to be determined on its own particular facts and circumstances in order to do justice to the parties.

54. Returning to the present case, the following is relied upon by the defendants as constituting "*special circumstances*". The solicitor acting on behalf of the defendants is a sole practitioner. During the course of June 2023, the solicitor took ill. The precise details of what occurred have been set out on affidavit and the relevant medical records have been exhibited. It is unnecessary to rehearse this evidence in full in this ruling. It is sufficient for the purpose to summarise the position as follows.

55. The solicitor became unwell on 13 June 2023 and did not attend work the following day. The solicitor was admitted to hospital on 15 June 2023 and underwent a significant heart-related surgical procedure the following day. Thereafter, he was advised by his medical team not to work the following week and to avoid stress of any kind. A medical report from the solicitor's general practitioner has been exhibited. This states that—owing to his medical conditions, the procedures undergone, and the cumulative effect of medication and stress—the solicitor was not able to work at his full capacity until the middle of September 2023. The report confirms that the solicitor's incapacity was consistent with his multiple medical and surgical disorders and the procedures performed. A separate report from a consultant cardiologist has also been exhibited. This report offers the opinion that the "*burden of illness could certainly have contributed to under-performance at work*" over the six month period between June and December 2023.

56. The solicitor has explained on affidavit that throughout the period of mid-June to September 2023 he was operating at less than full capacity. He has also explained that he was on medication which has certain side effects.

57. This medical emergency coincided with the application for judgment in default. The solicitor has explained that his counsel had contacted him on 14 June 2023 to confirm that agreement had been reached in relation to the motion for judgment in default of defence. The solicitor has averred that, had he been in his office, he would have recorded this on his case management system. This did not happen, understandably, in circumstances where he had medical difficulties.

58. The plaintiff contends that none of this amounts to "*special circumstances*". The following are the principal points made in support of this contention. First, his own counsel had contacted the solicitor both prior to, and subsequent to, the return date of the motion to confirm that same was to be dealt with on the basis of an "*unless order*". Secondly, copies of both the original order and amending order were served upon the solicitor by the plaintiff's side under cover of letter dated 14 July 2023. The solicitor has not explained why he did not read the orders. The point is also made that the draft defence had been prepared by counsel as early as July 2023 and was available for delivery. Thirdly, it is suggested that the solicitor's support staff may have failed to prioritise appropriately these proceedings and that this cannot be explained away by reference to the solicitor's medical condition. Fourthly, the solicitor appears to have attended work on a significant number of dates during the period between 19 June and 4 September 2023 and had been well enough to embark upon a foreign holiday. Fifthly, it is suggested that the solicitor's capacity to engage

with the proceedings "*became a non-issue*" after receipt of the correspondence of 4 September 2023. A notice for particulars was served in response on 5 September and the defence delivered on 8 September 2023. The plaintiff submits that this suggests that the solicitor was capable of complying with the "*unless order*" and simply failed or neglected to do so due to mistake and/or inadvertence.

59. With respect, these submissions seek to elevate the standard to be met by a solicitor beyond that mandated by Order 27, rule 15. The "*special circumstances*" criterion does not require that the personal circumstances of the lawyer be such that they were physically incapable of complying with the time-limit. Rather, the question is whether the failure to comply was caused by special circumstances other than mistake or inadvertence. Here, the evidence establishes that whereas the medical emergency and surgical procedure occurred in mid-June 2023, the practical consequences of same continued to reverberate throughout July and August. The solicitor was not able to attend to his practice with his usual diligence.

60. The facts of the present case are analogous to those in *De Souza v. Liffey Meats (Cavan)* [2023] IEHC 402. There, the High Court (Ferriter J.) accepted that the difficult personal circumstances of counsel constituted "*special circumstances*" for the purpose of Order 27, rule 15. See paragraph 65 of the judgment as follows:

> "[…] However, there does seem to me to be a very particular feature of the facts here, namely, the fact that the defendants' counsel was not in a position to attend to his practice with anything like the same degree of focus in the period from 23 May 2022 to 31 July 2022, given that his mother was very ill in that period and, in fact, died on 28 July 2022 and that his father was also in ill health in that period. While this is not a case where the counsel in question was not practicing

> at all in that period, it does seem to me to amount to a special circumstance which led to a position where the defendants' solicitor did not push for a defence from him before the end of July in those circumstances and where the counsel was not in a position to prioritise finalisation of the defence in that period owing to those exceptional personal circumstances."

61. As appears, the fact that the lawyer's personal circumstances did not prevent him from attending to his practice *at all* did not preclude a finding that "*special circumstances*" existed.

62. Order 27, rule 15 is flexible enough to accommodate unexpected personal circumstances. As explained in *De Souza v. Liffey Meats (Cavan)*, the rationale for the amended rule is to ensure greater compliance with deadlines and court orders, and to end the old culture of a lax approach to court-imposed deadlines. This rationale would not be advanced by an interpretation of the rule which would result in a party being penalised for the fact that their lawyer suffered a medical emergency and was not able to attend to their practice in full for a short period of time. Different considerations would apply if the lawyer were to be out of work for an *extended period*: he or she would be obliged to make alternative arrangements to ensure that their caseload was properly managed.

63. The fact that by July 2023 the draft defence had been prepared by counsel, on the basis of papers briefed to him on 6 June 2023, is, if anything, a factor in favour of the solicitor. It demonstrates that the solicitor had been diligently attending to the proceedings prior to the medical emergency in mid-June 2023 by briefing counsel in ample time to prepare the defence for delivery in the extended period likely to be allowed by the court. It is reasonable to assume that "*but for*" the medical emergency the defence would have been delivered and filed on time.

64. It is correct to say, as the plaintiff does, that the solicitor was in a position to respond promptly to the letter of 4 September 2023. This fact does not, however, support the inference that the solicitor must equally have been able to attend to his practice in full during July and August. The first week of September, traditionally, marks the resumption of work for many legal practices following the summer holiday season. It seems likely that, even if not prompted by the letter of Monday 4 September 2023, the solicitor would have attended to the delivery and filing of the defence that week.

65. In summary, the medical emergency suffered by the defendants' solicitor in June 2023 and his restricted ability to work in the weeks prior to 4 September 2023, constitute "*special circumstances*" which explain and justify the failure to deliver and file a defence by 4 September 2023. The condition precedent to the exercise of the court's discretion under Order 27, rule 15 has been met.

66. Turning, then, to the balance of justice, same lies in favour of setting aside the default judgment for the following reasons. First, the plaintiff has been aware from the very outset that the defendants intended to challenge her assertion that a default judgment had arisen. This issue was ventilated in the correspondence in September and October 2023 and the defendants issued their motion on 26 October 2023. This is not a case, therefore, where a plaintiff had reason to rely on the default judgment not being challenged. Secondly, the plaintiff has been aware since 8 September 2023 of the grounds upon which the defendants intend to oppose her personal injuries action. The delay in delivering a defence is a matter of days. Thirdly, the defence discloses a defence on the merits that has a reasonable prospect of success (as required by *Fabri-Clad Engineering v. Stuart* [2020] IECA 247 and related case law). The defence is not a boilerplate

defence. In particular, it contains specific pleas (especially at paragraphs 12 to 17) in relation to the potential relevance of the plaintiff's previous medical history, and her personal circumstances, to the choice of medical procedures available and their prospects of success. Fourthly, the defendants moved promptly to issue their motion. It was reasonable for the defendants to have first engaged with the plaintiff's solicitor, for a period measured in weeks, before issuing a motion on 26 October 2023. It made sense to seek to resolve the matter amicably prior to having recourse to the court.

67. There is a tension between the objective of promoting compliance with court-imposed deadlines and court orders on procedural matters, on the one hand, and the objective of ensuring that litigation is determined on its substantive merits, on the other. On the facts of the present case, the proper balance is struck by allowing the first named defendant to address the claim against it on the merits. An order setting aside the default judgment will allow the proceedings to be determined on the merits. The plaintiff is not prejudiced by this. If, as she asserts, the defendants were guilty of negligence in the provision of medical services to her, she will have an opportunity of establishing this at trial. Importantly, no time has been lost in this regard. The trial of the action has already been specially fixed for October 2024 and the listing can accommodate a hearing on liability and quantum. Moreover, in circumstances where no default judgment ever crystallised against the second and third named defendants, the plaintiff would likely have faced a trial on liability in respect of those defendants. The fact that the plaintiff did not secure a default judgment against all defendants meant that the question of liability was not foreclosed entirely.

68. For completeness, the plaintiff's contention that there had been a pattern of delay on the part of the defendants is not well founded. It was reasonable for the defendants to have sought copies of the medical records prior to the preparation of their defence. The defendants are not obliged to disclose, at this stage of the proceedings, the content of any expert report that they may have obtained which reviews those medical records. At all events, it appears from the content of paragraphs 12 to 17 of the defence that the medical records may have been relied upon to formulate certain pleas.

(3). CALCULATION OF TIME PERIOD

69. For completeness, it is necessary to say something about the calculation of the time period for "*unless orders*". This issue might well have been determinative of the set aside application in the present case but for the fact that the amending order itself is now to be set aside.

70. There is a distinction between the date upon which a judgment or order takes effect and the date upon which it is formally recorded in a perfected order. A judgment or order takes effect from the date it is pronounced by the court. This is so notwithstanding that the spoken order might not be formally drawn up, i.e. perfected, for a number of days thereafter. In urgent cases, such as, for example, an application for an interim injunction, the moving party will often be given liberty to notify the other side of the making of the order by telephone or email, in advance of the order being perfected. The other side will be expected to comply with the order in the interim.

71. The date of perfection of an order has significance in certain contexts. The most obvious of which is the making of an appeal. The twenty-eight day period

prescribed for the making of an appeal to the Court of Appeal, for example, runs from the date of the perfection of the order of the High Court.

72. The date of the perfection of the order is also significant in cases where the order requires the party to take a *procedural step* within a specified period of time. For example, the time period prescribed for the making of discovery of documents pursuant to Order 31 will normally run from the date the order is perfected and not the date upon which the court pronounced its judgment directing that discovery should be made.

73. Of course, it is open to the court to direct that the specified period runs from the earlier date of the pronouncement of judgment. Where this occurs, this will be made clear in the wording of the perfected order. Generally speaking, however, in the absence of an express indication to the contrary, the time specified for taking a procedural step will be understood to run from the date of perfection. This is especially so where the party requires a copy of the perfected order to carry out the procedural step. Relevantly, a party will not be able to comply fully with an "*unless order*", i.e. by filing a copy of the defence in the Central Office of the High Court, without producing a copy of the perfected order to the relevant official.

74. I turn now to apply these principles to the circumstances of the present case. The operative part of the original order provides that the time for the delivery of a defence be extended "*by six weeks from the date hereof*". The original order continues then with the so-called "*unless*" proviso:

> "And in such event that the said Defence has not been delivered and filed within the aforesaid time, IT IS ORDERED AND ADJUDGED that the said Plaintiff do recover against the said Defendant such amount as the court may assess in respect of the Plaintiff's claim herein for damages and the costs of suit to date – such costs to include

> the costs of this Motion and of the assessment to be adjudicated in default of agreement between the parties and that such assessment be had before a Judge without a jury and be set down for hearing accordingly"

75. It is accepted by the plaintiff that the earliest date upon which the six week period began to run must be the date upon which the order was perfected. It will be recalled that the order was pronounced on 19 June 2023 but was not perfected until 21 June 2023. It is also accepted by the plaintiff that, in calculating time, allowance must be made for the month of August by analogy with Order 122, rule 5.

76. The complicating factor in the present case is that the original order had purportedly been amended. Had this amendment been validly made, a question would have arisen as to whether the six week period should be calculated from the (subsequent) date upon which the amending order was perfected. As explained earlier, the form of the amending order is irregular in that the proper approach is that the amendments be highlighted—by way of deletion or underlining—in a revised version of the original order. The date upon which the amendment is made should also be indicated.

77. The crucial factor in the present case is that a copy of the order was necessary for the purpose of filing the defence in the Central Office of the High Court. In cases where an "*unless order*" has been made, there is a procedural requirement not only to deliver a defence, i.e. by serving it upon the other side, but there is also a requirement to file a copy of the defence in the Central Office. A copy of the defence will not be accepted by the Central Office unless a copy of the "*unless order*" is produced. The practical effect of treating the six week period as running from the date of perfection of the original order would have been that the second and third named defendants would not have had the benefit of a six

week period during which they could have filed their defence in the Central Office. Indeed, if the amending order had not been perfected until a date subsequent to the expiration of the six week period, compliance with the "*unless order*" would have been impossible if time ran from the date of the original order.

78. It follows, therefore, that the six week period specified under the "*unless order*" (as amended) would have run from the date of perfection of the amending order. On this analysis, the period would not have expired until mid-September 2023 and the defence, which was delivered on 8 September 2023, would have been within time and should have been accepted by the Central Office of the High Court.

79. Of course, this analysis has been overtaken by events. The practical consequence of the amending order being set aside is that the six week time period must now be taken as running from the date of the perfection of the original order.

80. Finally, having regard to the Draconian consequences which flow from a failure to comply with an "*unless order*", there may be some merit in making express reference in such orders to the precise date upon which the defence must be delivered and filed. The current practice of specifying a time period only, without identifying the end date, is apt to cause confusion especially in cases, such as the present, where the parties intended that the time period should be suspended for the month of August. It would have been simpler for all if the original order had expressly stated that the defence was to be filed and delivered by a precise date. Of course, it might be necessary to include some wording to address the contingency of there being a delay in the perfection of the order,

e.g. the defence is to be delivered and filed by such and such a date, or within X weeks of the date of the perfection of this order, whichever date is earlier.

CONCLUSION AND PROPOSED FORM OF ORDER

81. The judgment in default against the first named defendant will be set aside pursuant to Order 27, rule 15. There were "*special circumstances*" in existence which explain and justify the failure to deliver and file the defence within the time specified under the "*unless order*". These "*special circumstances*" comprise the medical emergency suffered by the defendants' solicitor in June 2023 and his restricted ability to work in the weeks prior to 4 September 2023. These "*special circumstances*" will be recited in the order of the court. An ancillary order will be made extending the time for the delivery and filing of a defence. I will discuss the precise form of the order with counsel.

82. The order of 4 July 2023, which purports to amend the original order, will be set aside for the reasons explained at paragraphs 37 to 42 above. The practical consequence of this will be that no default judgment crystallised as against the second and third named defendants.

83. The proceedings will be listed before me, on a date in July convenient to the parties, to hear submissions on the final form of the order and on the allocation of legal costs. I will also make such case management directions as are necessary to ensure that the proceedings are ready for hearing on 10 October 2024 as scheduled.