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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
PROBATE AND MATRIMONIAL OFFICE

Between

CIARAN McKAVANAGH

Petitioner

and

BRENDA BREWSTER

Respondent

MAGUIRE J

Introduction

[1] The application which is before the court has been brought by Ciaran McKavanagh, who I shall refer to hereinafter as “the husband.” It is against Brenda Brewster, who I shall refer to hereinafter as “the wife.”

[2] The application arises out of matrimonial proceedings subsequent to divorce. In particular, it arises out of ancillary relief proceedings between the parties. On 18 February 2013 Master Redpath, as part of a series of orders made in the course of ancillary relief proceedings, ordered the husband to pay the mortgage on the former matrimonial home. The mortgage was with the First Trust Bank. The obligation placed on the husband by the order was to pay the monthly mortgage at the rate of £450 per month. The wife and those children who were at home lived in the matrimonial home which was situated at Brett Avenue, Lurgan.

[3] The requirement to pay the mortgage was part of a more general ancillary relief order made by Master Redpath. In fact there was also an order for spousal maintenance (£400 per month) and child maintenance (£450 per month). By reason of arrears having accumulated in respect of the mortgage, on 5 March 2014 the wife issued a summons to the husband. This referred to itself as a judgment summons. It

was supported by an affidavit sworn by the wife. This was also dated 5 March 2014. The affidavit, *inter alia*, stated that:

- It was made to request a judgment summons against the husband where mortgage arrears had accrued.
- It had been personally served.
- It related to the husband's obligation to pay £450 per month into the mortgage account with the First Trust Bank.
- It was based on an averment that the husband had ignored the court order except for two payments.
- It sought a judgment order.

Hereinafter when the court refers to "the summons" it is referring to the summons and affidavit filed with it.

[4] The summons came before the court on 20 March 2014. It was asserted by the wife that personal service had been effected both at the husband's house in Craigavon and at an address he had in Switzerland. The husband did not appear and was not represented. A debt in the sum of £4,356 was proved before the court by evidence. An order that the husband should pay this amount was made. In addition an order for the payment by the husband of £131.72 in costs was also made.

The present proceedings

[5] The present proceedings are in the form of an attempt to set aside the order made by the court on 20 March 2014. These proceedings were begun on 10 June 2014 and have been adjourned on a number of occasions.

[6] The basis for the application, as presented to the court, by counsel for the husband is that the summons presented to the court on 20 March 2014 was irregular and was not in conformity with the rules of court, in particular, rule 8.29 (2) and 8.29 (4) of the Family Proceedings Rules.

[7] Rule 8.29 (2), in its material part, reads:

"An application for the issue of a judgment summons may be made:

- (a) in the case of an Order of the High Court, to the matrimonial office...

- (b) ...by filing an affidavit verifying the amount due under the Order and showing how the amount is arrived at”.

Rule 8.29 (4) states:

“Every judgment summons shall be in Form 25 and shall be served on the debtor personally not less than 10 clear days before the hearing and at the time of service there shall be paid or tendered to the debtor a sum reasonably sufficient to cover his expenses in travelling to and from court”.

[8] Counsel on behalf of the husband put his case thus:

- (i) The affidavit filed did not show how the amount claimed by the wife was arrived at in breach of rule 8.29 (2).
- (ii) The summons was not personally served on the husband as required by rule 8.29 (4).
- (iii) Due notice of 10 clear days had not been given to the husband as required by rule 8.29 (4).
- (iv) A sum reasonably sufficient to cover expenses had not been paid or tendered contrary to rule 8.29 (4).

The facts found by the court

[9] The pertinent facts about the issues above appear to the court to be as follows:

- (i) The husband claims that from 28 February 2014 he no longer resided at his address in Craigavon and that that house was empty, he having moved to an address in Switzerland.
- (ii) The court holds that this claim was untrue in that it is satisfied that his house in Craigavon continued to be used. In particular the court is satisfied that the husband’s mother signed a recorded delivery slip for the summons at the house in Craigavon on 11 March 2014 and that during the period 15-17 March inclusive the husband was living in the house. During these days, the court finds that a recorded delivery envelope containing the summons awaited him in the house.
- (iii) The court finds it very difficult to accept the husband’s evidence that he did not know about or open the recorded delivery letter above. If he knew of it, the court would have expected him to open it.

- (iv) The court also finds it very difficult to accept that the husband did not know about the summons delivered at his address in Switzerland on 17 March 2014 in view of the attestation certificate which the wife placed before the court. Again, if he did know about it, the court would have expected him to open it.
- (v) In the court's opinion the husband's evidence that he was not aware of either summons is therefore implausible given that there is proof of the summons being delivered to each address.
- (vi) The court accepts that the summons was irregular in the respects referred to at paragraph [8] above.

Discretion

[10] The above conclusion at paragraph [9](vi) above, however, is not the end of the matter as the court, it is agreed by both parties, retains discretion as to whether or not it should set aside the order it granted, notwithstanding the irregularities found above.

[11] In considering what it should do the court will have regard to the overall circumstances, but, in particular, it will have regard to the following:

- (i) The fact that the rules have not been complied with. The court in this regard places less weight on non-compliance with the provisions about tendering or paying expenses than it does to other irregularities. As regards this irregularity, the court entertains no serious doubt that the husband, at all material times, had the resources to enable him to attend court if he wished to do so. The court also places limited weight on the irregularity that the summons did not set out how the amount claimed was arrived at as the nature of the alleged default was made clear and the husband would himself have had knowledge about what he had or had not paid into the relevant account. The failure to effect personal service is a significant failure, as is the lack of notice given.
- (ii) The fact that the rules are there to be obeyed.
- (iii) The length of time which had elapsed since the order was made. The order was made on 20 March 2014 whereas these proceedings were begun on 10 June 2014. In between time there were proceedings before the Master in the Enforcement of Judgment's Office ("EJO") but it appears to be the case that when those proceedings first came on the husband made the case that he was in the course of seeking to advance these proceedings viz that he was seeking to initiate proceedings aimed at setting aside the judgment. In fact no such proceedings were issued until several months had passed following the first hearing before the Master. The court notes that the prospect of proceedings to

set aside the order does not seem to have prevented the Master continuing with his task. As a consequence, there is an order, the court understands, securing the sum of the debt against the husband's Craigavon property. The court is of the view that while the husband did not act with all promptitude to initiate these proceedings, any delay was not substantial and the proceedings were initiated within a reasonable time.

- (iv) Whether the husband took any fresh step which might tend to show he had accepted the impugned order after he had become aware of the irregularities. As he tried to put off the EJO proceedings in order to advance this application, the court concludes that the husband did not take any fresh step of the sort referred to.
- (v) Whether either party has come before it with unclean hands. In this regard, the court is satisfied that the wife (who has not been legally represented in these proceedings) did not intentionally run roughshod over any of the rules and that such breaches of the rules as occurred on her part were accidental. On the other hand, the court does have a concern that the husband has not been frank with the court in the respects referred to above. At the same time, the court acknowledges that service in both cases was not personal service, as it should have been, and in both instances, there was not the 10 days clear notice required by the rules. However, if the husband knew about one or other or both of the summonses, he could, with relative ease, have sought an adjournment of the proceedings.
- (vi) Whether the husband would have had any defence to the proceedings in any event. In this regard it was acknowledged by the husband's counsel that there were arrears on the mortgage deriving from the husband's failure to comply with the Master's order. Counsel did not seek to quantify these. The court has some difficulty in seeing what the husband's defence would have been in the circumstances of this case but must acknowledge that often strong cases can on examination be answered in whole or in part. The situation, moreover, is not static and, as the court understands it, further arrears may have been accumulated since the court's order of 20 March 2014.
- (vii) Whether the interests of justice would be better served by leaving the order of 20 March 2014 intact than by engaging in a process now, at a substantially later date, of unravelling not just the order itself but the steps taken since to enforce it.

Conclusion

[12] The court considers that in all of the circumstances of this case it should exercise its discretion to set aside the order which it made. It reaches this conclusion reluctantly. While the husband's case has been put before the court in the way set out above, the court is of the view that in reality a judgment summons was not the

appropriate way forward in this case and it is satisfied that the order it made on 20 March 2014 is not an order it should have made under the auspices of a judgment summons. A judgment summons is directed at a situation where the judgment creditor is seeking to commit the debtor to prison, which the court is now, as a result of exchanges between the wife and the court in these proceedings, satisfied was not the wife's intention in this case. What the wife referred to in her affidavit as a "judgment order", which the court takes to be a reference to the sort of order actually made, is not an order the court could properly have made. The order made was therefore erroneous in a substantive and not just procedural sense. In these circumstances it would be wrong for the court to exercise discretion not to set it aside.

[13] In the circumstances of this case I make no order as to costs as between the parties in respect of this application. I take this course because, as noted above, the court feels that the husband was not frank with it in the respects the court has alluded to above.

[14] Accordingly, I set aside the order made by the court on 20 March 2014.