

THE HIGH COURT
COMMERCIAL

[2016 No. 9981 P.]

BETWEEN

TRAFALGAR DEVELOPMENTS LIMITED, INSTANTANIA HOLDINGS LIMITED, KAMARA LIMITED AND BAIRIKI INCORPORATED

PLAINTIFFS

AND

DMITRY MAZEPIN, OJSC UNITED CHEMICAL COMPANY URALCHEM, URALCHEM HOLDING PLC, EUROTOAZ LIMITED, ANDREY GENNADYEVICH BABICHEV, YULIA BOLOTNIKOVA, BELPORT INVESTMENTS LIMITED, MILKO EMILOV MINKOVSKI, ANDROULA CHARILAOU, DMITRY KONIAEV AND YEVGENIY YAKOVLEVICH SEDYKIN

DEFENDANTS

(COSTS ISSUE BETWEEN PLAINTIFFS AND NINTH DEFENDANT)

JUDGMENT of Mr. Justice David Barniville delivered on the 17th day of January, 2020

Introduction

1. This is my judgment on a costs issue which has arisen in the context of these ongoing commercial proceedings. On the face of it, the issue appears to be very simple and straightforward. The plaintiffs brought a motion for judgment in default of appearance against the ninth defendant, Androula Charilaou ("Ms. Charilaou"). Before the hearing date of the motion, Ms. Charilaou entered an unconditional appearance which was accepted by the plaintiffs. The motion was struck out and Ms. Charilaou has agreed to pay the costs of the motion.
2. However, notwithstanding its apparent simplicity, the costs issue arising between the plaintiffs and Ms. Charilaou is somewhat more complicated and, dare I say, more interesting than many costs issues encountered by the courts. Why is that so? Although Ms. Charilaou has conceded that she must pay the costs of the motion for judgment in default of appearance on the party and party basis (with a stay on execution pending the determination of the proceedings), the plaintiffs have not accepted that concession and want more. They contend that the court should make an order for costs against Ms. Charilaou on the solicitor and client basis on the grounds that Ms. Charilaou took a deliberate decision to hold off entering an appearance to the proceedings until the last minute, as part of a deliberate strategy on her part, which caused delay in the conduct of the proceedings and considerable expense to the plaintiffs in having, unnecessarily, they say, to have documents translated into Greek for service on Ms. Charilaou in Cyprus.
3. For reasons which I set out in this judgment, I have not been persuaded by the plaintiffs that I should make an order for the costs of the motion for judgment in default of appearance against Ms. Charilaou on the solicitor and client basis. I have concluded that the costs of the motion should be awarded on the party and party basis. However, I have also concluded that it is appropriate that I expressly record in this judgment that the plaintiffs should recover the costs of serving certain documents, including the motion for judgment in default of appearance and the numerous affidavits sworn in connection with that motion, on Ms. Charilaou in Cyprus together with the costs of having those documents translated into Greek.

Background

4. These proceedings were commenced in November 2016. The central claim by the plaintiffs in the proceedings is that the defendants (including Ms. Charilaou) are co-conspirators in an alleged scheme (the “scheme”) which is intended wrongfully to deprive the plaintiffs of their shares in a Russian Company, OJSC Togliattiazot (“ToAZ”), for the ultimate benefit of the first defendant, Mr. Dmitry Mazepin. It is alleged by the plaintiffs that Ms. Charilaou has links to Mr. Mazepin and is an active participant in the alleged scheme. Ms. Charilaou denies this.
5. The circumstances which have led to the plaintiffs seeking the costs of the motion for judgment in default of an appearance on the solicitor and client basis are set out in an affidavit sworn by Ms. Karyn Harty, of McCann Fitzgerald, the plaintiffs’ solicitors, on 15th October, 2018. In short, it is alleged that Ms. Charilaou was served in Cyprus with notice of the plenary summons commencing the proceedings in February 2017 but did not enter an appearance within five weeks of service, as required by O.12, r.2(3)(a) RSC. The plaintiffs issued a motion for judgment in default of appearance against (*inter alia*) Ms. Charilaou on 6th June, 2018. That motion was listed for hearing on 27th July, 2018. Two days before the hearing, on 25th July, 2018, an unconditional appearance was filed on behalf of Ms. Charilaou by AMOSS, solicitors. Consequently, the motion for judgment in default of appearance did not proceed against Ms. Charilaou (but did proceed against a number of other defendants). The motion against Ms. Charilaou was struck out on the basis that a timetable for the exchange of further pleadings would be agreed and that the issue of costs would be dealt with at a later stage.
6. Ms. Harty’s affidavit sets out the basis on which the plaintiffs claim to be entitled to costs on the solicitor and client basis. A replying affidavit was sworn on behalf of Ms. Charilaou by Mr. Jerry Burke of AMOSS, on 22nd October, 2018. In his affidavit, Mr. Burke concedes that Ms. Charilaou must pay the costs of the motion for judgment in default of appearance on the usual party and party basis and seeks a stay on execution on foot of such order for costs pending the determination of the proceedings. Mr. Burke’s affidavit disputes the plaintiffs’ entitlement to an order for costs on the solicitor and client basis.

Commencement and service of proceedings on Ms. Charilaou

7. The proceedings were commenced by a plenary summons which was issued on 9th November, 2016, following an application for leave to issue and serve the proceedings on a number of the other defendants who are domiciled outside the EU. Ms. Charilaou is domiciled in Cyprus. The plaintiffs commenced the process of arranging service of the proceedings (in the form of the notice of concurrent plenary summons and the original statement of claim in the proceedings) on 22nd November, 2016 by a request made to the Irish transmitting agency (at the Dublin Circuit Civil Court Office), which request was forwarded by that agency to the Cypriot transmitting agency. Ms. Charilaou was then served through the Cypriot transmitting agency with notice of the concurrent plenary summons and the original statement of claim, on 24th February, 2017, in accordance with Regulation (EC) no. 1393/2007 of the Parliament and of the Council (the “Service Regulation”). There is no dispute about the service of the proceedings on Ms. Charilaou in this manner and on that date. It is also not in dispute that, in accordance with O.12,

r,2(3)(a), Ms. Charilaou had a period of five weeks after service of the proceedings to enter an appearance and that she did not do so.

8. The documents served on Ms. Charilaou on 24th February, 2017 were in English. A notice was also served on Ms. Charilaou in Greek in the form specified in Annex 2 to the Service Regulation (the "Annex 2 notice"). The Annex 2 notice advised Ms. Charilaou that she had the right to refuse to accept the documents if they were not written in a language which she understood and were not written in, or accompanied by a translation into, an official language of Cyprus (Greek or Turkish). Ms. Charilaou did not refuse to accept service of the documents on 24th February, 2017.
9. No further steps were taken in relation to the plaintiffs' proceedings against Ms. Charilaou until early 2018. At that stage the plaintiffs decided to seek to amend their statement of claim. It was necessary for the plaintiffs to bring a motion seeking leave to amend the statement of claim. That motion was issued on 22nd January, 2018. Since no appearance had been entered to the proceedings on behalf of Ms. Charilaou, it was necessary for the plaintiffs to serve the motion to amend on Ms. Charilaou in Cyprus. She was personally served with the motion papers on 5th February, 2018 pursuant to Article 15 of the Service Regulation. She was also served with an Annex 2 notice advising her of her right to refuse to accept service, as the documents had not been translated into Greek. She did not refuse to accept service of the motion papers.
10. On 22nd February, 2018, the plaintiffs attempted to serve Ms. Charilaou with another version of the proposed amended statement of claim. However, Ms. Charilaou refused to accept service on that occasion on the grounds that the documents sought to be served had not been translated into Greek. Ms. Charilaou had not previously refused to accept service on that basis and had in fact accepted service of documents on 24th February, 2017 and on 5th February, 2018, without those documents being translated into Greek.
11. As a result of the position adopted by Ms. Charilaou on 22nd February, 2018, it was necessary for the plaintiffs to have the proposed amended statement of claim, and a cover letter to Ms. Charilaou, translated into Greek. Those documents then had to be served on Ms. Charilaou. That was done on 2nd April, 2018.
12. The plaintiffs' motion to amend their statement of claim was heard and determined by the court on 10th April, 2018. There was no appearance at that hearing on behalf of several of the defendants, including Ms. Charilaou. The court was satisfied that the motion to amend the statement of claim had been properly served on (*inter alia*) Ms. Charilaou in accordance with the Service Regulation and proceeded to make an order giving the plaintiffs leave to amend the statement of claim.
13. Following the order giving leave to amend the statement of claim, the plaintiffs decided to seek judgment in default of appearance against a number of the defendants, including Ms. Charilaou. As an appearance had not been entered on behalf of Ms. Charilaou, it was necessary for the plaintiffs to serve the motion for judgment in default of appearance, together with the affidavits sworn for the purposes of that motion, on Ms. Charilaou in

Cyprus. Since Ms. Charilaou had refused to accept service of documents in English, it was necessary for the plaintiffs to arrange for the motion and affidavits (seven separate affidavits) to be translated into Greek for service upon Ms. Charilaou in Cyprus. On 9th July, 2018, Ms. Charilaou was personally served with the motion papers for the plaintiffs' motion for judgment in default of appearance together with Greek translations of the notice of motion and affidavits, as well as a covering letter from the plaintiffs' solicitors. It appears, however, that, through an oversight, Ms. Charilaou was not served with an Annex 2 notice. That notice was subsequently served, together with a further letter from the plaintiffs' solicitors, on 17th July, 2018.

14. The return date for the motion was 27th July, 2018. As noted earlier, an unconditional appearance was entered on behalf of Ms. Charilaou by AMOSS on 25th July, 2018. Conditional appearances had been entered on behalf of a number of the other defendants served with the motion in advance of the return date. The motion proceeded as against two of the defendants, the seventh defendant, Belport Investments Limited ("Belport"), and the eleventh defendant, Mr. Sedykin. Judgment in default of appearance was given against those two defendants. A written judgment was delivered on that application on 17th January, 2019 ([2019] IEHC 7)
15. As against Ms. Charilaou, the motion for judgment in default of appearance was struck out. It was agreed that the plaintiffs and Ms. Charilaou would agree a timetable for the exchange of further pleadings and discovery requests and that the issue of the costs of the motion would be dealt with at a subsequent hearing.
16. The pleadings were exchanged between the plaintiffs and Ms. Charilaou in accordance with the timetable agreed between them. A full defence was delivered on behalf of Ms. Charilaou on 22nd October, 2018. In that defence, Ms. Charilaou denies any part in the alleged scheme or conspiracy and specifically denies each of the allegations made against her in the amended statement of claim. She denies any links to Mr. Mazepin. It is pleaded in the defence that Ms. Charilaou is an employee of a law firm in Cyprus called CJV, but is not a lawyer and that she is employed by that firm as a corporate administrator. It is further pleaded that the firm provides corporate administration services to at least 3,742 companies and that, in her capacity as an employee of the firm, Ms. Charilaou is a nominee director of at least 226 companies registered in Cyprus. Ms. Charilaou admits in the defence that she executed a share purchase agreement on behalf of one of the defendants, Belport, against which the plaintiffs obtained judgment in default of appearance, which forms part of the plaintiffs' conspiracy claim, but pleads that she is a stranger to the allegation that it was a false or sham document and further that she is a stranger to the actions subsequently allegedly taken by other defendants on foot of that alleged agreement. The reply delivered on behalf of the plaintiffs to Ms. Charilaou's defence takes issue with the position maintained by her in the defence and reiterates the plaintiffs' contention that Ms. Charilaou is linked to each of the other defendants by her alleged acts and participation in the alleged scheme, through her actions as a director of Belport, and that she is objectively linked to Mr. Mazepin and the other defendants.

17. Following the exchange of pleadings, the plaintiffs and Ms. Charilaou exchanged discovery requests. For completeness, I should add that discovery was largely agreed as between the plaintiffs and Ms. Charilaou, although it was necessary for the court to deliver a judgment in respect of two categories of discovery sought by the plaintiffs against her which remained in dispute. The court delivered judgment on the disputed discovery issues on 31st July, 2019 ([2019] IEHC 611)

Other relevant developments in the proceedings

18. Since part of the case made by the plaintiffs in support of its entitlement to costs on the solicitor and client basis is that Ms. Charilaou's failure to enter an appearance until 25th July, 2018, caused substantial delay in the progress of the proceedings, it is appropriate to mention some other developments in the proceedings which may potentially be relevant to the plaintiffs' position on costs.
19. A number of the defendants, namely the first, second, third, sixth and tenth defendants (the "UCCU defendants") have challenged the jurisdiction of the Irish courts to hear and determine the plaintiffs' proceedings against them. At the time of the hearing of the issue on costs as between the plaintiffs and Ms. Charilaou in December 2018, the UCCU defendants' challenge to jurisdiction had not yet been heard and was listed to commence in March 2019. That challenge was ultimately heard by me and judgment was reserved. That judgment has not yet been delivered. Various other issues arose as between the plaintiffs and the UCCU defendants after judgment had been reserved on the jurisdiction challenge which led to a further hearing between those parties in June 2019.
20. There have been a number of potentially relevant events in the proceedings as between the plaintiffs and the fourth and fifth defendants to which reference should also be made. Those defendants brought an application to the High Court to have the plaintiffs' claims against them struck out as being frivolous and vexatious and bound to fail. In addition, the fifth defendant sought to stay the proceedings on the ground of *forum non conveniens*. Those applications were both dismissed by the High Court (Haughton J.) in November 2017 (judgment delivered on 23rd November, 2017 [2017] IEHC 721). An appeal by those defendants from the refusal to strike out the proceedings was dismissed by the Court of Appeal on 18th July, 2019 ([2019] IECA 218). In the meantime, pleadings were exchanged as between the plaintiffs and the fourth and fifth defendants and discovery requests were exchanged. Disputes arose between the plaintiffs and the fourth and fifth defendants in relation to discovery. I delivered judgment on the discovery issues as between those parties on 31st July, 2019 ([2019] IEHC 610). Further issues remain to be determined as between those parties in relation to discovery and those issues are to be heard by me in March 2020.
21. It is against that procedural history and background that the plaintiffs' application for costs on the solicitor and client basis must now be considered.

Plaintiffs' application for costs on solicitor and client basis

Submissions advanced by plaintiffs

22. Briefly summarised, the plaintiffs seek their costs of the motion for judgment in default of appearance on the solicitor and client basis. The basis upon which they claim to be entitled to costs on that basis is set out in Ms. Harty's affidavit of 15th October, 2018. It should be noted, however, that in fact the level of costs sought in Ms. Harty's affidavit was costs on the solicitor and own client basis (effectively an indemnity) rather than on the solicitor and client basis. The affidavit sworn by Mr. Burke on behalf of Ms. Charilaou in response to the plaintiffs costs application was prepared on the basis that the plaintiffs were seeking costs on the very highest level (i.e. the solicitor and own client basis). However, the plaintiffs' written submissions were prepared on the basis that the plaintiffs were seeking solicitor and client costs and it was confirmed at the hearing of the costs issue that was the level of costs being sought by the plaintiffs.
23. The plaintiffs' essential position is that, having been served with the proceedings on 24th February, 2017, Ms. Charilaou was required to enter an appearance to the proceedings in the Central Office within five weeks of that date under O. 12, r. 2(3) (a). The plaintiffs rely on the terms of that sub-rule which provides that an appearance *"shall be entered"* within five weeks after service of the proceedings. They contend that under that provision Ms. Charilaou was required to enter an appearance in the Central Office by 2nd April, 2017, but did not do so. In those circumstances, they contend that Ms. Charilaou was in default of her obligation under O. 12, r. 2(3) (a). The plaintiffs rely on the statement made on behalf of Ms. Charilaou, at para. 10 of Mr. Burke's affidavit, that he was instructed that Ms. Charilaou's decision not to enter an appearance prior to July, 2018 was a *"deliberate decision to avoid becoming embroiled in these proceedings any sooner than necessary"*. The plaintiffs contend, therefore, that Ms. Charilaou adopted and pursued a strategy not to enter an appearance or to participate in the proceedings in breach of a clear obligation to do so and that this amounts to conduct which is very serious in nature and had very serious consequences. The consequences for the plaintiffs include the fact that the plaintiffs were required to serve further papers on Ms. Charilaou in Cyprus in February and April, 2018 in connection with the plaintiffs' application for leave to amend their statement of claim. Although Ms. Charilaou did not refuse to accept service of the proceedings initially on 24th February, 2017 and did not refuse to accept service of the motion papers on 5th February, 2018, notwithstanding that they were not translated in Greek, Ms. Charilaou did refuse to accept service of further documents on 22nd February, 2018, as they had not been translated into Greek. As a result, the plaintiffs had to have the proposed amended statement of claim and cover letter translated into Greek and to arrange to have those documents served on Ms. Charilaou in Cyprus on 2nd April, 2018. Having obtained an order permitting amendment of the statement of claim on 10th April, 2018, the plaintiffs then had to serve the motion for judgment in default of appearance together with the affidavits sworn for the purposes of that motion on Ms. Charilaou in Cyprus and to have the motion and affidavits translated into Greek. The plaintiffs incurred very substantial expense arranging for those Greek translations. Ms. Harty stated, at para. 18 of her affidavit that the cost of translating the papers for the motion for judgment in default of appearance into Greek was Stg.£27,217.24.

24. The plaintiffs also maintain that the progress of the proceedings was considerably delayed as a result of Ms. Charilaou's decision not to enter an appearance to the proceedings until just before the hearing date of the motion for judgment in default of appearance and that her deliberate decision not to enter an appearance until then caused considerable cost and inconvenience to the plaintiffs and a delay in the proceedings.
25. It is in that particular factual context that the plaintiffs seek an order for costs in respect of the motion for judgment in default of appearance on the solicitor and client basis set out on in O. 99, r. 10(3). They rely in support of their application on the judgments of Kelly J. in *Geaney v. Elan Corporation Plc.* [2005] IEHC 111 ("*Geaney*") and of Barrett J. in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 697 ("*Dunnes Stores*"). They also rely, by analogy, on some English cases dealing with wasted costs orders (*Ridehalgh v. Horsefield* [1994] Ch 205 ("*Ridehalgh*")) and with the circumstances in which relief may be granted from the imposition of sanctions for non-compliance with rules of court, practice directions or court orders (*Denton v. TH White Limited* [2015] 1 All ER 880 ("*Denton*")). The plaintiffs further rely on the provisions of O. 63A r. 5 in support of their contention that the decision by Ms. Charilaou not to participate in the proceedings until she finally entered an appearance just before the hearing date of the motion for judgment in default of appearance, has impeded the intention that commercial proceedings are to be conducted "*in a manner which is just, expeditious and likely to minimise the costs of those proceedings*". The plaintiffs rely in this regard on the delay in the conduct of the proceedings as a result of Ms. Charilaou's decision not to enter an appearance until July, 2018 and the significant additional costs incurred by the plaintiffs in having to serve the various motions on Ms. Charilaou in Cyprus and in having to translate the documents, including the motion papers in respect of the motion for judgment in default of appearance itself, into Greek.
26. On the question of translation and the alleged right of Ms. Charilaou to have documents being served on her translated into Greek, the plaintiffs dispute Ms. Charilaou's entitlement under Article 8(1) of the Service Regulation to refuse to accept service of documents not translated into Greek. The plaintiffs dispute that entitlement on the basis of the statement made by Mr. Burke (at para. 12 of his affidavit) that Ms. Charilaou "*does speak English, but not fluently*", although Mr. Burke had maintained that it was reasonable for Ms. Charilaou to seek Greek translations, having regard to the complexity of the proceedings. The plaintiff also relies on the fact that it was not disputed that Ms. Charilaou has transacted business in English in her current and previous roles as company secretary and director of several English companies. On that basis, it is contended by the plaintiffs that Ms. Charilaou did not have an absolute entitlement to receive translated documents (or to refuse to accept service of documents which were not translated into Greek). The plaintiffs rely in support of that submission on a judgment of the CJEU in case C-14/07 *Ingenieurburo Michael Weiss und Partner GbR v Industrie und Handelskammer Berlin* [2008] E.C.R. I - 03367 ("*Weiss*").
27. The plaintiffs contend that the conduct of Ms. Charilaou in deliberately deciding not to enter an appearance until July, 2018, was part of a strategy adopted by her, which had

significant consequences, in terms of delay and additional costs to the plaintiffs, is conduct similar to that relied upon by Kelly J. in *Geaney* and by Barrett J. in *Dunnes Stores* as meriting an order for costs on the solicitor and client basis. The plaintiffs submit that the court should mark its displeasure at and disapproval of Ms. Charilaou's conduct by making an order for costs on the motion for judgment in default in appearance on the solicitor and client basis.

Submissions advanced by Ms. Charilaou

28. Ms. Charilaou accepts that she was in default by not entering an appearance to the proceedings by 2nd April, 2017, as required by O. 12, r. 2(3)(a). For that reason, she accepts that an order for the costs of the motion for judgment in default of appearance should be made in favour of the plaintiffs on the party and party basis (with a stay). She contends that it would be disproportionate for the court to order costs on the solicitor and client basis and that an order on that basis would be unjust in circumstances where she acted as many defendants do, by initially failing to enter an appearance but ultimately doing so once a motion for judgment in default of appearance has been issued. She maintains that it was reasonable for her to have taken the decision not to enter an appearance following service of the proceedings in order to avoid being embroiled in litigation any sooner than was necessary. She relies in that regard on the fact that she is not a lawyer but is an employee of a Cypriot law firm where she is employed as a corporate administrator and, in that capacity, acts as a nominal director of several companies registered in Cyprus. She has denied any involvement in the alleged conspiracy the subject of the proceedings.
29. While accepting that she was in default of the requirement under O. 12, r. 2(3)(a) to enter an appearance to the proceedings within the five week period provided for in that sub-rule, she contends that the requirement to do so is not a mandatory requirement in the sense of precluding the late entry of an appearance. She relies in support of that submission on O. 12, r. 13. She also relies on the judgment of Hogan J. in *Gokul & Ors. v. Aer Lingus plc* [2013] IEHC 432 ("*Gokul*"), a judgment on which the plaintiffs also rely. Ms. Charilaou points out that O. 12, r. 13 clearly permits the late entry of an appearance.
30. While accepting that she was in default in not entering an appearance before July 2018, Ms. Charilaou does not accept that the non-entry of an appearance until then amounts to conduct of a type which merits the marking of displeasure or disapproval by the court by making an order for costs on the solicitor and client basis. She too relies on the judgments in *Geaney and Dunnes Stores* and, in addition, on the judgments of Laffoy J. in the High Court in *Shell E&P Ireland Limited v. McGrath (no.3)* [2007] 4 I.R. 277 ("*Shell*") and of Peart J. in the Court of Appeal in *Flynn v. Breccia* [2017] IECA 163 ("*Flynn*"). Ms. Charilaou contends that her late entry of an appearance to the proceedings falls short of the sort of conduct referred to in those judgments as meriting an order for costs on the solicitor and client basis.

31. Ms. Charilaou submits that the principles governing the Court's discretion as to the level of costs to be awarded are set out in the Irish cases and that the English authorities, such as *Ridehalgh* and *Denton*, have no relevance.
32. Ms. Charilaou disputes the contention that she was responsible for delaying the proceedings and asserts that her decision not to enter an appearance until July 2018 was not part of any strategy to delay the proceedings. She points to the steps taken by her following the entry of an appearance as demonstrating that no such delaying strategy was adopted by her. She notes, for example, that once an appearance was entered, a timetable for the exchange of further pleadings and discovery requests was agreed by her with the plaintiffs and complied with. She points to the fact that, unlike some of the other defendants, she entered an unconditional appearance and did not seek to challenge the jurisdiction of the Irish courts to hear and determine the proceedings or to have the proceedings against her struck out. Her cooperation with the proceedings, once an appearance entered, she submits, is inconsistent with the adoption of a deliberate strategy to delay the proceedings. She maintains that she did what many litigants do when faced with proceedings, which is not to enter an appearance until a motion for judgment in default of appearance is brought.
33. Ms. Charilaou further rejects the contention that her failure to enter an appearance until July 2018 caused prejudice to the plaintiffs. She maintains that position for a number of reasons. First, she contends that the plaintiffs could have applied sooner than they did for judgment in default of appearance against her. Although the five-week period for the entry of an appearance under O. 12, r. 2(3)(a) expired in early April 2017, the plaintiffs did not issue their motion for judgment in default of appearance until 6th June, 2018. In those circumstances, she contends that it is wrong for the plaintiffs to complain about her delay, in circumstances where they have delayed themselves in bringing the motion.
34. Second, Ms. Charilaou relies on the fact that the plaintiffs sought to amend their statement of claim in early 2018 and that, even if Ms. Charilaou had entered an appearance in April 2017, and if pleadings had been exchanged thereafter, it would have been necessary for amended pleadings to be delivered (including an amended defence) following the amendment of the statement of claim in April 2018.
35. Third, Ms. Charilaou refers to the developments in the proceedings involving some of the other defendants to which reference has been made earlier in this judgment. In particular, she refers to the challenge to jurisdiction brought by the UCCU defendants and to the applications brought by the fourth and fifth defendants to have the proceedings against them struck out or dismissed and, in the case of the fifth defendant, to stay the proceedings on the grounds of forum non conveniens. Those applications were dismissed by the High Court in November 2017 and an appeal from the High Court's refusal to strike out the proceedings was dismissed by the Court of Appeal in July 2019. Ms. Charilaou contends that the delays occasioned by those various applications were not of her making and that the proceedings would, in any event, have been delayed by virtue of those various applications, even if she had entered an appearance of April 2017.

36. Finally, Ms. Charilaou points to the fact that having entered an unconditional appearance to the proceedings, she agreed and complied with a timetable for the delivery of further pleadings and for the exchange of discovery requests which undermines the contention that she was engaged in a cynical tactic to undermine or delay the proceedings by not entering an appearance until July 2018.
37. Ms. Charilaou further submits that she was entitled to receive Greek translations of the documents served on her and to refuse to accept service without such translations, having regard to Article 8(1) of the Service Regulation. She advances that submission on the basis that, while she does speak English, she does not speak it fluently, and that, by reason of the complex nature of the proceedings, it was reasonable for her to require that the documents being served were translated to Greek. Further, she makes the point that if the plaintiffs are correct in their contention that it was not necessary to serve translated documents on Ms. Charilaou, then why did the plaintiffs do so in April and July 2018? She contends, therefore, that she was entitled to receive the documents translated into Greek or otherwise to refuse to accept service of them.
38. For those reasons, Ms. Charilaou contends that the costs which should be awarded to the plaintiffs in respect of the motion for judgment for default of appearance should be on the party and party basis, as provided for in O. 99, r. 10(2), and not on the solicitor and client basis as provided for in O. 99, r. 10(3).

Consideration of the issues and decision

O. 99, r. 10, RSC

39. Ms. Charilaou accepts that an order for the costs of the motion for judgment in default of appearance should be made in favour of the plaintiffs. She contends, however, that the costs ordered should be on the party and party basis. The plaintiffs seek costs on the client basis. Both are provided for in O. 99, r. 10.
40. Order 99, r. 10 provides as follows:
 - “(1) This rule applies to costs which by or under these Rules or any order or direction of the Court are to be paid to a party to any proceedings either by another party to those proceedings or out of any fund (other than a fund which the party to whom the costs are to be paid holds as trustee or personal representative).*
 - (2) Subject to the following provisions of this rule, costs to which this rule applies shall be taxed on the party and party basis, and on a taxation on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.*
 - (3) The Court in awarding costs to which this rule applies may in any case in which it thinks fit to do so, order or direct that the costs shall be taxed on the solicitor and client basis.*
 - (4) ...” (Emphasis added).*

41. Order 99, r. 10(2) provides for costs to be taxed (which costs will be now be adjudicated rather than taxed under the provisions of the Legal Services Regulation Act, 2015), on the party and party basis. Order 99, r. 10(3) provides for such costs to be taxed (now, adjudicated) on the solicitor and client basis. There is a further basis on which costs may be taxed (or adjudicated) and that is the solicitor and own client basis. Where costs are awarded on that basis, the party required to pay the costs must effectively fully indemnify the other party in respect of its costs. An order for costs on that basis is extremely rare (an example of an order for costs being made on that basis is *Re National Irish Bank (No. 3)* [2004] 4 I.R. 186). The plaintiffs do not now seek an order for costs on that basis.
42. The normal basis on which costs are awarded is the party and party basis. An award of costs on the solicitor client basis is an exception to the normal position.

Relevant judgments of the Irish courts

43. There is no dispute between the parties as to the relevant judgments of the Irish courts which consider the circumstances in which it may be appropriate to order costs on the solicitor and client basis or as to the principles to be derived from those judgments. The dispute between the parties concerns the application of those principles to the particular facts of this case.
44. It is appropriate, therefore, that I first identify the relevant judgments and then seek to summarise the principles to be derived from them.
45. In *Geaney*, Kelly J. made an order for costs against the defendant on the solicitor and client basis in a motion brought by the plaintiff to strike out the defence and counterclaim of the defendant by reason of its failure to comply with an order for discovery. The evidence before the court on that application consisted of affidavit evidence and oral testimony. The court was very critical of the manner in which the defendant had sought to comply with the order for discovery. Kelly J. expressed himself to be "*not impressed*" with the defendant's attempted discharge of its discovery obligations and "*quite dissatisfied*" with the way in which the defendant's discovery obligations had been met. Kelly J. stated that he was satisfied that the defendant's approach was "*seriously substandard*". Although he did not strike out the defence and counterclaim, Kelly J. was satisfied that it was appropriate, in order to indicate the court's "*displeasure*" at the way in which the defendant attempted to comply with its discovery obligations, that an order for costs of the motion should be made on the solicitor and client basis. Kelly J. stated that he could see "*no reason why the plaintiff should find himself out of pocket as a result of having to bring [the] application ...*" (at p.21). It should be noted that such order was made following a full hearing of the plaintiff's application.
46. The next relevant judgment is that of Barrett J. in *Dunnes Stores*. In that case, the court had dismissed an application by the applicant for judicial review of a decision of the respondent to grant certain retention permission to the second notice party. That party then sought an order for the costs of the proceedings against the applicant on the solicitor and client basis. In considering that application, Barrett J. referred to some important

findings made in his principal judgment rejecting the applicant's application for judicial review. He had found that the proceedings were an abuse of process on the basis that the applicant had an ulterior motive in bringing the proceedings, was seeking a collateral advantage and had brought the proceedings for a purpose which was not recognised as legitimate. He had held that the true object of the proceedings was to enable the applicant to delay or avoid compliance with its contractual obligations and that this objective was entirely collateral to the remedy sought in the proceedings. The court had, therefore, dismissed the proceedings as amounting to an abuse of process. Those findings were considered by the court to be highly relevant when it came to determining the second notice party's application for costs on the solicitor and client basis. Having referred to the judgment of Kelly J. in *Geaney*, Barrett J. rejected the applicant's contention that its conduct was of a lesser order than the conduct criticised by the court in *Geaney*. Barrett J. stated that in *Geaney*, the defendant was defending the proceedings in a *bona fide* manner but had failed properly to discharge its obligations in relation to discovery which related to one aspect of the proceedings alone, and that that was sufficient to persuade the court to exercise its discretion to award costs on the solicitor and client basis. In contrast, the court stated that in *Dunnes Stores*, "*the entire proceedings [were] infected by the abuse of process that subtended their commencement*" and that the case for costs to be awarded on the solicitor and client basis was "*commensurately greater*" (per Barrett J. at para. 14).

47. Helpfully, Barrett J. sought to identify and summarise the principles applicable to the making of an order for costs on the solicitor and client basis, at para. 15 of his judgment in *Dunnes Stores*. He summarised those principles as follows:

"First, in making such an order the court departs from the normal measure of costs. Second, this being so, there has to be a reason why the court departs from the usual order. Third, as indicated in Geaney, and accepted by the court as correct, the court will order costs on a solicitor and client basis when the court wishes to mark its especial disapproval and/or displeasure at how proceedings have been conducted and/or the basis on which proceedings have been brought."

48. Having regard to his previous findings that the proceedings themselves were an abuse of process, Barrett J. held that the case was very much outside the norm and was one in which it was appropriate for the court to exercise its discretion to award costs on the solicitor and client basis. It will again be seen that in *Dunnes Stores*, the court exercised its discretion to award costs on that basis following a full hearing of the proceedings and detailed findings of fact concerning the applicant's motivation and objective in bringing the proceedings in the first place.
49. In contrast, no such hearing had occurred in the next relevant judgment, that of Laffoy J. in High Court in *Shell*. In that case, the plaintiff sought to discontinue its claim against the defendants by reason of a change of circumstances which rendered the proceedings redundant. In the absence of agreement from all of the defendants, the plaintiff brought an application for leave to discontinue on certain terms. Certain of the defendants

contended that the plaintiff should be given leave to discontinue only on the basis that their costs be paid on the solicitor and client basis. The court gave the plaintiff liberty to discontinue its claims against the defendants and directed the plaintiff to pay the defendants' costs up to the date of discontinuance. However, the court refused to order the payment of those costs on the solicitor and client basis. While noting that O. 99, r. 10(3) conferred on the court a discretion, where it thought fit, to direct the costs be taxed on the solicitor and client basis, and that an order in those terms had been made in *Geaney* in order to mark the court's disapproval of the conduct of the party against which the costs were ordered, Laffoy J. stated (at para. 56):

"The basis on which it was contended on behalf of the second and fifth defendants that the plaintiff should be made liable for costs taxed on a solicitor and client basis may be summarised as follows: the plaintiff, a powerful corporation, has used this litigation to do what it wishes for its own commercial purposes, as exemplified by initiating the proceedings to enforce the legal right it claims, obtaining the interlocutory injunction, then abandoning the injunction, then re-routing the pipeline and finally abandoning its claim. In my view it would not be proper to draw any inference from the manner in which the plaintiff's claim in these proceedings has been prosecuted to date or to infer any conduct on the part of the plaintiff which merits the disapproval of the court, when the substantive issues on the plaintiff's claim have not been determined and the plaintiff's motivation has not been explored at a trial on oral evidence." (per Laffoy J. at para. 56, p. 303).

50. It can be seen from that passage from the judgment of Laffoy J. in *Shell* that the court was not prepared to make an order for costs on the solicitor and client basis in circumstances where the substantive issues in the proceedings had not been heard and determined and where there had been no hearing at which the alleged motivation of the plaintiff had been tested or explored in evidence. This is a significant distinguishing factor between that case and *Geaney* and *Dunnes Stores*.
51. The final relevant judgment is that of Peart J. in the Court of Appeal in *Flynn*. One aspect of that judgment concerned an appeal brought by a receiver from an order for costs made by the trial judge. Conspiracy claims made by the plaintiffs against the receiver were withdrawn on day 11 of the case. The receiver contended that he ought to have been awarded costs on the solicitor and own client basis and not on the party and party basis. He relied on *Geaney* and argued that costs should have been awarded on the former basis given the finding by the trial judge that the conspiracy claims (which were withdrawn during the hearing) were unmeritorious and ought never to have been made and also the fact that the claim of conspiracy was made against the receiver acting in his professional capacity. In those circumstances, it was argued that the trial judge ought to have awarded costs on the solicitor and own client basis so that the receiver would not be out of pocket in respect of the costs of the conspiracy claims. While the trial judge had stated in his judgment on costs that an award of costs on the solicitor and client basis might have been ordered, he had decided not to do so in the circumstances of the case. The Court of Appeal found that the trial judge had a discretion as to how to deal with a

question of costs and that he might well have been justified in ordering that the plaintiffs pay the costs of meeting the conspiracy and dishonesty claims on the solicitor and client basis and that had he done so, the Court of Appeal would not necessarily have interfered with the exercise of that discretion. However, the trial judge had decided not to do so and the Court of Appeal found no error of principle in that respect. Therefore, it did not interfere with the decision of the trial judge.

52. However, in delivering the judgment of the Court of Appeal, Peart J. went on to state as follows:

“It should be stated, however, that a plaintiff who seeks to bring claims of dishonesty and conspiracy against any person must be cautious, and should do so only when there is clear evidence that supports a prima facie case in that regard. That caution is all the more important where the defendant is a professional person and where the allegations relate to the manner in which he has acted in his professional capacity. Where that caution is not exercised, and groundless claims are advanced, which ultimately either fail or are withdrawn, the plaintiff is exposed to the risk that costs may be awarded against him/her on a solicitor/client basis. Whether that occurs must always be a matter for the trial judge, and an appellate court should be slow to interfere, except in the clearest of cases.” (per Peart J. at para. 63).

53. The observations made by Peart J. in *Flynn* demonstrate that there are other circumstances in which costs may be awarded on the solicitor and client basis apart from those identified in *Geaney* and *Dunnes Stores*. The court, in the exercise of its discretion, could award costs on that basis where the necessary caution which should be exercised before bringing proceedings alleging fraud, dishonesty or conspiracy are brought and also where such claims are made, without the exercise of the required caution, against a professional person in relation to the manner in which he or she has acted in a professional capacity. These observations pre-suppose a finding, on evidence, that the requisite caution was not exercised prior to the making of those claims and that some basis existed for the making of such findings.

Summary of relevant legal principles

54. It seems to me that the following principles can be derived from O. 99 r. 10 and from the judgments of the Irish courts discussed above and should inform the exercise by a court of its discretion to make an order for costs on the solicitor and client basis: -

- (1) The normal position is that where costs are awarded against one party in favour of another, those costs will be taxed or adjudicated on the party and party basis.
- (2) The court has a discretion to depart from the normal position in the particular circumstances of the case, where the court thinks fit to do so, and to direct that the costs be taxed or adjudicated on the solicitor and client basis.

- (3) There has to be a good reason for the court to depart from the normal position and to make an order for costs on the solicitor and client basis (or on the even more severe basis, the solicitor and own client basis).
- (4) The court may exercise its discretion to order costs on the solicitor and client basis where it wishes to mark its disapproval of or displeasure at the conduct of the party against which the order for costs is being made.
- (5) The conduct in question can include: -
 - (a) A particularly serious breach of the party's discovery obligations;
 - (b) An abuse of process by that party in commencing and maintaining proceedings for an improper purpose or for an ulterior motive, designed to seek a collateral and improper advantage;
 - (c) The failure to exercise the requisite caution in commencing proceedings making claims of fraud or dishonesty or conspiracy without ensuring there exists clear evidence supporting a *prima facie* case in relation to such claims;
 - (d) Any other conduct in relation to the commencement or conduct of the proceedings, or any aspect of the proceedings, which the court considers merits be marked by the court's displeasure or disapproval, such a particularly serious or blatant breach of a court order, the directions of the court or the Rules of the Superior Courts.
- (6) In considering whether the conduct of a party is such that the court should exercise its discretion to make an order for costs on the solicitor and client basis, the court should: -
 - (a) Clearly identify the particular conduct or behaviour of the party which is said to afford the basis for the court exercising its discretion to award costs on the solicitor and client basis;
 - (b) Carefully examine and consider the explanation (if any) offered by the party for the conduct or behaviour in question;
 - (c) Carefully consider and examine the consequences (if any) of the conduct or behaviour in question for the other party, whether in terms of delay or costs or any other form of prejudice to that party;
 - (d) in light of the above, determine whether, in all the circumstances, it would be appropriate and in the interests of justice to award costs on the solicitor and client basis under O. 99, r 10 (3).
- (7) While a failure to comply with the provisions of the Rules of the Superior Courts or of a direction or order of the court will normally merit the award of costs against the party in default, such costs will normally be awarded on the party and party basis. It will generally only be if the breach or failure to comply is of a particularly blatant or serious nature, having serious consequences for the other party, that the court will be justified, in the exercise of its discretion, to award costs on the solicitor and client basis (or, exceptionally, on the solicitor and own client basis).

55. I propose to apply these principles in considering and determining the plaintiff's application for costs against Ms. Charilaou of the motion for judgment in default of appearance on the solicitor and client basis against Ms. Charilaou.

English cases

56. While the plaintiffs relied on the principles set out in the decision of the Court of Appeal of England and Wales in *Ridehalgh*, in relation to wasted costs orders, and in *Denton*, in relation to the circumstances in which relief may be granted by the imposition of sanctions for noncompliance with rules of court, practice directions or orders, it seems to me that is unnecessary to consider these cases in the context of the plaintiffs' application for two reasons.
57. First, the principles to be applied in considering an application for costs on the solicitor and client basis can be derived from the Irish judgments referred to and discussed earlier.
58. Second, the English cases concern the exercise of quite different and distinct jurisdictions existing under the relevant provisions of English rules of court and English statutory provisions.
59. *Ridehalgh* concerned wasted costs orders, which can be ordered under a particular legislative regime in England and Wales (under the Courts and Legal Services Act 1990). While the Irish courts have an inherent jurisdiction to award costs personally against a legal representative of a party, as recognised in O. 99, r. 7, the plaintiffs have made clear that they make no criticism of Ms. Charilaou's Irish legal representatives and are not seeking any wasted costs orders against them. It is, in my view, unnecessary to consider the wasted costs jurisprudence in determining the plaintiffs' application in the present case.
60. The decision of the Court of Appeal of England and Wales in *Denton* concerned the exercise of a particular jurisdiction conferred on the English court by the Civil Procedure Rules, in particular, CPR 3.9. While there may be some similarity between the issues which fall to be considered under that provision in determining whether to grant relief from the imposition of sanctions and the issues which may be considered by a court in determining whether to make an award of costs on the solicitor and client basis, I do not regard it as particularly helpful to consider the principles applied by the English courts in determining whether to grant relief from sanctions under a particular provision of the CPR which has no equivalent under the Rules of the Superior Courts in this jurisdiction. For those reasons, I will consider the plaintiffs' application on the basis of the principles derived from the Irish judgments.

Application of principles and analysis

61. At the core of the plaintiffs' case on costs is the contention that Ms. Charilaou was in default of her obligations to enter an appearance within the five week time period referred to in O. 12, r. 2 (3)(a) that such default arose as a result of a deliberate decision by Ms.

Charilaou to delay entering an appearance until the last minute as part of a strategy adopted by her to delay the proceedings and that that default led to significant delay in the conduct of the proceedings and significant additional costs which would not have been incurred by the plaintiffs had Ms. Charilaou entered an appearance within the required period.

62. I first consider the conduct relied upon by the plaintiffs, namely Ms. Charilaou's default in entering an appearance as a result of a deliberate decision by her not to do so until it was absolutely necessary to avoid judgment. Ms. Charilaou accepts that she was in default in not entering an appearance within the five week period referred to in O. 12, r. 2 (3)(a) and that such default arose as a result of a deliberate decision on her part not to become embroiled in the proceedings until it was necessary to avoid judgment. She denies that this was done on foot of any strategy to delay and prolong the proceedings.
63. There is no doubt that Ms. Charilaou was in default of her obligation under O. 12, r. 2 (3)(a) to enter an appearance to the proceedings within five weeks of the service. As noted in "Delany & McGrath on Civil Procedure" (4th ed) (2018), the entry of an appearance is a *"very important step in proceedings"* as it *"constitutes an acknowledgment by the defendant of their existence and generally indicates an intention to defend"* (at para 4.01, p.205). O. 12, r. 2 (3)(a) does impose an obligation on a party served to enter an appearance within five weeks after service of the proceedings. That provision says that an appearance *"shall be entered"* within that period. It imposes a mandatory obligation to enter an appearance within that period. However, the failure to enter an appearance within the period does not give rise to a jurisdictional bar on a defendant in seeking to enter an appearance after that time period in order to defend the proceedings. O. 12, r. 13 makes it clear that, except in the case of an action for the recovery of land, a defendant *"may appear at any time before judgment"*. It further provides that *"at any time after the time limited for appearance"*, the defendant is not entitled to any further or additional time for delivering its defence or for taking further action, unless the court otherwise orders. O. 12, r. 13 clearly provides that a defendant may enter an appearance at any time before judgment. The rule clearly envisages the defendant being in a position to enter an appearance *"after the time limited for appearance"*. A defendant is, therefore, entitled under O. 12, r. 13 to enter an appearance notwithstanding that the five week period referred to in O. 12, r. 2(3) has expired.
64. Reading the provisions of O. 12, r. 2(3)(a) and O. 12, r.13 together, clearly leads to the conclusion that notwithstanding the default on the part of Ms. Charilaou in not entering an appearance within the five week period, it was nonetheless open to her to enter an appearance at any time up to judgment, including on 25th July, 2018. It is fair to record that it is not at all uncommon for a defendant not to enter an appearance within the required period and then subsequently to enter such appearance once a motion for judgment in default of appearance has been brought. The normal sanction for that default is an order for costs on the normal, party and party basis.

65. Both parties rely on the judgment of Hogan J. in the High Court in *Gokul* in support of their respective positions on the extent of the obligation to enter an appearance under O. 12, r. 2(3). That case concerned the issue as to whether the court had jurisdiction to extend the time for the entry by a respondent of an appearance required under O. 12, r. 2(2A)(a) to proceedings by way of a statutory appeal from a decision of the Labour Court. O. 12, r. 2(2A)(a) required that any such appearance had to be entered within eight days of the service of the originating notice of motion commencing the statutory appeal. O. 12, r. 2(2A)(a) provides that such a respondent “*shall enter*” an appearance within that period. The respondent failed to enter an appearance within that period. The issue in the case was whether that omission was fatal to its right to defend the proceedings and to be heard on the appeal. The appellants placed emphasis on what Hogan J. described as the “*undeniably mandatory nature*” of the language contained in the relevant sub – rule. However, he concluded that, for various reasons, including the fact that the rules of court had to be read subject to a specific rule of general application contained in O. 122, r. 7, giving a general power to extend the time as stipulated by the rules, the failure to enter an appearance within the stipulated period was not fatal.
66. I would observe in passing that no mention was made in the judgment in *Gokul* of the provisions of O. 12, r. 13, notwithstanding that that provision may well have been applicable, having regard to the fact that the definition of “*defendant*” (which is the word used in O. 12, r. 13) is defined in O. 125, r.1 as including “*every person . . . served with notice of, or entitled to attend, any proceedings*”. On the face of it, in light of that definition, O. 12, r. 13 may well have applied to the statutory appeal at issue in *Gokul*. In any event, although not referring to that provision, the court in *Gokul* held that a failure to enter an appearance within the period referred to in the sub – rule did not amount to a “*jurisdictional bar*” to the further defence of the proceedings (per Hogan J. at para. 19). While Hogan J. expressed that conclusion in the context of a situation where “*through some mischance or oversight a purely formal and essentially administrative step described with the rules had not been complied with within the prescribed time period*”, and while the plaintiffs point out that the decision by Ms. Charilaou in the present case was a deliberate decision and not a mere oversight, it seems to me that the logic of the conclusion reached by Hogan J. applies equally to the case of a deliberate decision not to enter an appearance within the prescribed period. That too would not give rise to a jurisdictional bar to the further defence of the proceedings, leaving aside altogether the provisions of O. 12, r. 13 which entitle a defendant to enter an appearance at any time until judgment.
67. Hogan J. did add that the court does have the power to strike out proceedings “*for persistent or contumelious default, or where the delays have been prejudicial, either to those of other litigants or to the public interest*” and that that jurisdiction remained entirely unaffected by the decision in the case (para. 20). While arguing that the delay on the part of Ms. Charilaou in entering an appearance has been prejudicial to them, the plaintiffs have, quite rightly, not gone so far as to make the case that Ms. Charilaou was precluded from defending the proceedings and so those observations of Hogan J. do not appear to me to be of particular relevance to the present application. I acknowledge that

at the conclusion of his judgment, Hogan J. did state that the “(relatively) small delays as there have been [in that case] have been harmless and non – prejudicial to the other party” and that the plaintiffs contend that the delays have been greater and have been prejudicial in the present case. I will turn to the question of delay and prejudice in a moment, but observe that, as a matter of principle, the court in *Gokul* held that failure to enter an appearance within the time required under the sub – rule at issue did not amount to a jurisdictional bar to the party in default defending the proceedings. Moreover, there is nothing in the judgment which bears on the question of the appropriate order for costs to be made in a case such as the present one.

68. While it is not at all uncommon for a defendant not to enter an appearance until it is necessary to do so to prevent judgment in default of appearance being granted, the plaintiffs have contended that because these proceedings are in the commercial list, and because of the objective underlying the powers of the court under O. 63A, r. 5 to ensure that the proceedings are determined “in a manner which is just, expeditious and likely to minimise the cost of those proceedings”, the court should look more critically at the conduct of a defendant who acts in this way in commercial proceedings. I agree that it may well be relevant to the court’s assessment as to the appropriate level of costs which may be awarded in a particular case that the proceedings are commercial proceedings subject to the particular provisions of O. 63A. However, I do not accept that the mere failure to enter an appearance within the five week period provided for in O. 12, r. 2(3)(a), whether as a result of a deliberate decision or otherwise, itself should lead the court to make an order for costs on the solicitor and client basis simply by virtue of the fact that the proceedings are commercial proceedings. While an order for costs on the party and party basis will normally be made in such cases, in the exercise of the court’s discretion, the question as to whether costs on a more severe basis should be considered will depend on the application of the various principles discussed earlier, including the delay and prejudice cause to the opposing party by reason of the default, whether or not the proceedings are commercial proceedings. I will turn to those issues in a moment.
69. The discretion of the court as to whether to award costs on the solicitor and client basis will, of course, be informed by the explanation offered by Ms. Charilaou for her default in entering an appearance within the required time period. It is fairly stated on her behalf by Mr. Burke (at para. 10 of his affidavit) that Ms. Charilaou’s decision not to enter an appearance was a “deliberate decision to avoid becoming embroiled in these proceedings any sooner than necessary”.
70. While I must, of course, be careful not to make any findings on this application which might be relevant to the substance of the case which the plaintiffs make against Ms. Charilaou (and I do not do so), I must also bear in mind that the position advanced by Ms. Charilaou in response to this application is that she is not a lawyer and is employed as a corporate administrator by CGV, a Cypriot law firm, and that in that capacity she acts as a nominee director of several companies registered in Cyprus. Certain allegations are made against Ms. Charilaou in relation to her alleged role in the alleged scheme and conspiracy the subject of the proceedings. While not in any way intended to downplay or

understate the alleged significance of Ms. Charilaou's role in the alleged scheme, as maintained by the plaintiffs, I do not believe that it is unfair to observe that Ms. Charilaou does not appear to be the main or primary intended target of the proceedings. The claim advanced by the plaintiffs is an enormous claim and the issues raised are extremely complex. Having regard to the particular position of Ms. Charilaou and her alleged role in the alleged conspiracy, I would be slow, in the absence of a full hearing on the basis of oral evidence which has been tested by cross-examination, to find that Ms. Charilaou's decision was motivated by some deliberate strategy to prolong or delay the proceedings. I am prepared to accept, for the purposes of this application, that her decision not to enter an appearance until it was necessary to do so in order to avoid judgment in default of appearance, was not, a totally unreasonable one. It is, I believe, open to me to take into account the fact that, Ms. Charilaou did ultimately enter an unconditional appearance, did not seek to challenge the jurisdiction of the Irish Courts or apply to strike out the proceedings against her and agreed with the plaintiffs, and complied with, a timetable for the exchange of pleadings and discovery requests. Those actions are not consistent with a deliberate strategy improperly to delay or prolong the proceedings for the plaintiffs' point of view.

71. As regards the delay caused to the plaintiffs as a result of Ms. Charilaou's default in entering an appearance as a result of her deliberate decision not to do so, I accept that it is appropriate for me to consider whether and to what extent Ms. Charilaou's default caused significant delay to the plaintiffs in progressing the proceedings. Some delay has undoubtedly been caused to the plaintiffs as a result of Ms. Charilaou's default. However, it is, I believe, relevant that the plaintiffs could, had they considered it appropriate, moved much more quickly to seek judgment in default of appearance against Ms. Charilaou. It was open to the plaintiffs to seek to do so that any time after 2nd April, 2017. They did not, however, bring their application for judgment in default of appearance until 6th June, 2018, fourteen months later. I appreciate that many other events were occurring in the proceedings and the plaintiffs' attention may have been directed in other areas during that period, in addition to their consideration of the position of Ms. Charilaou. The plaintiffs were involved in the applications brought by the fourth and fifth defendants to strike out the plaintiffs' claim and, in the case of the fifth defendant, to establish that Ireland was not an appropriate forum for the proceedings. The hearing of those applications took place in October, 2017 and judgment was delivered on 30th November, 2017 and the appeal was determined by the Court of Appeal in July, 2019. In addition, the plaintiffs have had to deal with the failure by a number of the other defendants to enter appearances within the required time period and the subsequent challenge to jurisdiction brought by the UCCU defendants. While some responsibility for a delay in the proceedings can be attributed to Ms. Charilaou's decision not to enter an appearance until July, 2019, she is by no means solely responsible for the delay.
72. It is also relevant to the question of delay, and any responsibility on the part of Ms. Charilaou for that delay, that the plaintiffs decided to amend their statement of claim in early 2018 and brought a motion seeking leave to amend the statement of claim in

January, 2018 which was dealt with by the court on 10th April, 2018. While ultimately the amendments made to the original statement of claim were not particularly extensive, had Ms. Charilaou entered an appearance by that stage and delivered her defence, it would have been necessary for her to have delivered an amended defence to the amended statement of claim delivered by the plaintiffs. This is another relevant factor to consider in terms of the alleged responsibility of Ms. Charilaou for the delay in the progress of the proceedings by reason of her failure to enter an appearance until July, 2018. In my view, while Ms. Charilaou was in default of her obligation to enter an appearance within the time required under O. 12, r. 2(3) (a) and while she must bear some responsibility for the delay in the conduct of the plaintiffs' claim against her, she is by no means responsible for the entirety of the delay in the conduct of the proceedings, bearing in mind the actions and conduct of some of the other defendants.

73. In addition to relying on delay, the plaintiffs also rely on the additional costs incurred by them in having to serve documents on Ms. Charilaou in Cyprus and in having to arrange for the translation of some of those documents. Had Ms. Charilaou entered an appearance within the five week period of service, it would not have been necessary for the plaintiffs to serve the motion seeking leave to amend the statement of claim on Ms. Charilaou in Cyprus on 5th February, 2018, to attempt to serve the further version of the amended statement of claim on her in Cyprus on 22nd February, 2018 or to have that version of the amended statement of claim and the cover letter translated into Greek and served on Ms. Charilaou in Cyprus on 2nd April, 2018. Had Ms. Charilaou instructed solicitors to enter an appearance on her behalf at any time between 2nd April, 2017 and early February, 2018, it would not have been necessary for the plaintiffs to incur the additional costs of serving and translating those documents. Further, having obtained leave of the court to amend the statement of claim on 10th April, 2018, had Ms. Charilaou instructed solicitors to enter an appearance on her behalf before the motion for judgment in default of appearance and supporting documents were served on her in Cyprus on 9th July, 2018, the plaintiffs would not have had to incur the cost of translating those documents and serving them in Cyprus on 9th July, 2018.
74. I accept that the additional costs of translating and serving these documents in the period between January, 2018 and July, 2018 were incurred by the plaintiffs as a result of Ms. Charilaou's failure to enter an appearance within the required time period under O. 12, r. 2(3) (a). It was confirmed at the hearing of the plaintiffs' application for costs that an ordinary order for costs on the party and party basis would not necessarily cover all of the costs incurred in translating the documents and serving them on Ms. Charilaou in Cyprus.
75. While the plaintiffs have sought to cast some doubt on Ms. Charilaou's entitlement to be served with Greek translations of the documents in question or to refuse to accept service of the documents under Article 8(1) of the Service Regulation unless translated, I do not agree that the plaintiff's doubts are well placed.
76. Under Article 8 of the Service Regulation, the addressee of the document being served may refuse to accept the document *"if it is not written in, or accompanied by a translation*

into, either of the following languages: (a) a language which the addressee understands; or (b) the official language of the Member State addressed ...".

77. In Weiss, the CJEU gave a preliminary ruling on a number of questions concerning the interpretation of Regulation (EC) no. 1348/2000 which was repealed and replaced by the Service Regulation. In considering what was meant by the term "*document to be served*" under Article 8(1) of Regulation 1348/2000 (the term is also used in Article 8(1) of the Service Regulation), the CJEU has stated that the term had to be interpreted as meaning "*the document or documents which must be served on the defendant in due time in order to enable him to assert his rights in legal proceedings in the state of transmission*" and that "*such a document must make it possible to identify with a degree of certainty at the very least the subject matter of the claim and the cause of action as well as the summons to appear before the Court or, depending on the nature of the pending proceedings, to be aware that it is possible to appeal*" (para. 73).
78. In considering the question as to whether the document being served is written in a language which the addressee understands, the CJEU stated that "*the degree of knowledge of a language required for correspondence is not the same as that needed to defend an action*". The Court continued:
- "However, that is a matter of fact to be taken into account by the Court in determining whether the addressee of a document served is capable of understanding the document so as to be able to assert his rights."* (para. 87).
79. The CJEU went on to state that the national court must "*take account of the extent to which an individual domiciled in the Member State of transmission would understand a judicial document written in the language of that State*" (para. 87). However, in the present case the Member State of transmission is Ireland. Ms. Charilaou is not domiciled in Ireland but in Cyprus so those latter observations are not of assistance. Ultimately, as I understand it, the CJEU was confirming that it is a matter of fact for the national court to determine whether the document being served is written in a language which the addressee understands, unless it is in the official language of the Member State addressed. I am not prepared to conclude on the basis of the evidence available to me on this application that Ms. Charilaou was capable of understanding the documents served on her in February 2017 and February 2018 and would have been capable of understanding the further documents (consisting of the motion for judgment and supporting affidavits) served on her in July 2018, had they not been translated into English. Having regard to the nature of the documents being served and the obvious complexity of the proceedings, and having regard to the proficiency in the English language enjoyed by Ms. Charilaou, I am unable to conclude on the evidence that Ms. Charilaou would clearly have understood the documents being served without those documents being translated into English. However, it is unnecessary for me to make any definitive finding of fact on that point. This is because, although Ms. Charilaou accepted service of documents served in English in February 2017 and in February 2018, she declined to accept service of documents in English on 22nd February 2018 and those

documents and subsequent documents (including the motion for judgment and supporting affidavits) were translated by the plaintiffs into Greek and served on Ms. Charilaou. What is relevant, however, is that had Ms. Charilaou entered an appearance within the required time period or in any event prior to February 2018, it would have been unnecessary for the plaintiffs to have had to serve in Cyprus or to have the documents translated, as they would simply have been served on her solicitors in Ireland.

Decision on the application for costs

80. Applying the principles derived from the Irish judgments referred to and discussed earlier, I have concluded that, while Ms. Charilaou's decision not to enter an appearance following service of the proceedings until 25 July, 2018, just before the hearing of the motion for judgment in default of appearance, amounted to a default on her part and a breach of the requirement under O. 12, r. 2(3)(a) to enter an appearance within five weeks of service, the explanation given by her for that decision (to avoid becoming embroiled in the proceedings until it was absolutely necessary to do so), is not totally unreasonable. While that decision contributed to some delay in the progress of the proceedings, the actions and conduct of other defendants have also contributed to the delays. Some of the actions of those defendants may have been justified and I express no view on whether or not they were, in this judgment. Further, Ms. Charilaou's default did require the plaintiffs to incur significant expenditure on serving documents concerning the amendment of the statement of claim and to the motion for judgment in default of appearance on Ms. Charilaou in Cyprus and in having those documents translated. I am not satisfied that it is open to me to conclude on the evidence that Ms. Charilaou's decision not to enter an appearance until July 2018 was part of a deliberate strategy to delay the proceedings. The conduct of Ms. Charilaou following the entry of an appearance on her behalf is not, however, consistent with the existence of such a strategy. Further, I would be very reluctant indeed to make a finding to that effect against Ms. Charilaou without oral evidence which has been tested by cross-examination.
81. I have concluded that, in all the circumstances, it would not be in the interests of justice and would be unfair to Ms. Charilaou to accede to the plaintiffs' application to make an order for the costs of the motion for judgment in default of appearance against Ms. Charilaou on the solicitor and client basis. I am satisfied that, with the important qualification which follows, the appropriate order to make is an order for costs on the party and party basis.
82. The important qualification is that I am satisfied that it is appropriate that I expressly order that as part of the costs to be adjudicated, Ms. Charilaou should bear all of the costs incurred in (a) serving the motion papers issued in January, 2018, seeking leave to amend the statement of claim on Ms. Charilaou in Cyprus on 5th February, 2018; (b) attempting to serve the further version of the plaintiffs' amended statement of claim on Ms. Charilaou in Cyprus on 22nd February, 2018; (c) translating into Greek and serving the amended statement of claim and cover letter on Ms. Charilaou in Cyprus on 2nd April, 2018; and (d) translating into Greek and serving the notice of motion and affidavits

grounding the motion for judgment in default of appearance on Ms. Charilaou in Cyprus on 9th July, 2018.

83. Had Ms. Charilaou instructed solicitors to enter an appearance on her behalf prior to 5th February, 2018, those costs would not have been incurred. I see no reason why the plaintiffs should be left out of pocket in respect of the cost of translating and serving those documents. In my view, Ms. Charilaou should bear those costs. While Ms. Harty has mentioned figures in respect of the cost of translating some of these documents and while those figures have not been disputed in behalf of Ms. Charilaou, it seems to me that it would be more appropriate to leave those figures for agreement between the parties or for adjudication by the legal costs adjudicator.
84. I am disallowing any costs associated with the service of the annex 2 notice and letter on 17th July, 2018, in circumstances where, through oversight, that notice was not served on Ms. Charilaou when the other documents in connection with the motion were served on 9th July, 2018. I do not see why Ms. Charilaou should bear those additional costs.
85. While Ms. Charilaou has argued that there should be a stay on execution on foot of the order for costs pending the determination of the proceedings in the High Court, I do not accept that that would be appropriate in the circumstances. I see no reason why a stay should be imposed in respect of the costs ordered. While it may be appropriate, in certain cases, to grant such a stay, I do not believe that it is appropriate in the circumstances of this case where the plaintiffs have undoubtedly incurred significant costs in serving documents on Ms. Charilaou in Cyprus and in translating those documents into Greek in the period after February 2018. Those costs would not have been incurred if Ms. Charilaou had entered an appearance within the time period provided for in O. 12, r. 2(3)(a). I refuse to grant a stay on the terms requested.

Conclusion

86. I will therefore make an order for the costs of the motion for judgment in default of appearance against Ms. Charilaou such costs to be adjudicated on the party and party basis, subject to the further terms set out at para. 82 above. I refuse to grant any stay on execution on foot of that order for costs. I will hear counsel in relation to any further issues in connection with the order to be made.