THE COURT OF APPEAL
CIVIL

Record No.: 2022 No. 126
2022 No. 127

High Court Record Number: 2014/4948P
Neutral Citation Number: [2023] IECA 297

Faherty J.
Haughton J.
Butler J.

BETWEEN/

JOSEPH KEARNS

PLAINTIFF/
APPELLANT

- AND -

ERIC EVENSON

DEFENDANT/
RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 11th day of December 2023

Introduction

1. This judgment deals with appeals brought against two decisions of the High Court (Sanfey J.) delivered on 14 May 2020 ([2020] IEHC 257) and 15 December 2021 ([2021] IEHC 790) respectively. These decisions were made in the context of protracted attempts by the plaintiff to serve notice of proceedings issued by way of plenary summons dated 30 May 2014 out of the jurisdiction on the defendant who is resident in the Isle of Man.

2. In the first of the two judgments Sanfey J. acceded to an application brought by the defendant under O.12, r.26 of the Rules of the Superior Courts to set aside service of notice

of the plenary summons and discharge an order of Eagar J. made on 2 July 2018 authorising such service. This decision was made because the summons of which Eagar J. had authorised service had expired and had not been renewed either at the time of the application to him or at the time of service. The plaintiff contended that the application was improperly brought under O.12, r.26 because the text of that rule envisages that an application will be made before a defendant enters an appearance. In this case the defendant had entered a conditional appearance, but the only issue raised on the face of the conditional appearance went to jurisdiction and not to the service of the summons. The plaintiff also contended that the application should have been brought – and refused – under O.124 which allows proceedings to be set aside for irregularity.

3. As a result of this judgment the plaintiff then made an application under O.8 seeking the renewal of the summons in July 2020. In the event that renewal were to be granted, the plaintiff also sought liberty to serve notice of the proceedings on the defendant in the Isle of Man under O.11, r.1. As will be apparent from the chronology of events set out below, if that application had been allowed it would have been the third such order permitting service out of the jurisdiction of these proceedings. However, that order was never made because, in his second judgment, Sanfey J. refused the plaintiff's application to renew the summons.

4. The appeals from both judgments were heard together by the Court of Appeal. Although the plaintiff was the appellant in both cases, having been the respondent in the first motion and the moving party in the second, I will refer to the parties throughout this judgment as the plaintiff and the defendant. This will, I think, bring greater clarity to the arguments in a case which deals fundamentally with the issuing of proceedings by a plaintiff and their service on a defendant resident outside the jurisdiction and indeed outside the area covered by what is now Regulation (EU) No. 1215/2012 (formerly Council Regulation No. 44/2001) and the Brussels and Lugano Conventions (1968 and 1988 respectively).

5. Because of the complex and protracted procedural history of this case I propose initially to set out the factual background in some detail before looking separately at the procedural history. I will then deal with the legal arguments arising in each of the appeals. The first will involve a consideration of O.8, r.1, O.12, r.26 and O.124. The second will involve a consideration of the renewal of a summons under O.8, the terms of which had been revised in the year immediately preceding the plaintiff's application.

Factual Background to the Proceedings

6. These proceedings have their origin in a dispute between the plaintiff and the defendant regarding certain investments made by the plaintiff and the Callary Pension Fund - which comprises largely, if not exclusively, the plaintiff's private pension fund - over a nine-month period between July 2011 and March 2012. The plaintiff and the defendant were friendly, although the friendship was not a longstanding one the parties having been introduced to each other in 2007 or 2008 and had been involved in some business together. The defendant is a Canadian national who resides in the Isle of Man. He also has business interests in Norway where certain members of his family reside. The plaintiff is an Irish national and a qualified chartered accountant who resides in Dublin. It seems to be agreed, or at least it is not overtly disputed, that these investments were made at a time when the plaintiff was under economic pressure and wanted to move assets off-shore in order to put them out of easy reach of his creditors. The amount invested by the plaintiff was large and his claim relates to a total sum of €965,000. This is split as between the pension fund at €490,000 and himself, personally, at €475,000.

7. The dispute between the parties centres on whether the defendant is personally liable to the plaintiff for the return of these monies. The plaintiff claims that the monies were received by the defendant and are held by him as a trustee to be applied in accordance with

the plaintiff's directions from time to time and to be returned on demand. The plaintiff also relies on an "Agreement of Understanding" dated 15 July 2011 and a further written agreement dated 13 December 2012 both of which are ostensibly signed by the defendant, under which the defendant acknowledged that he held the monies in trust for the plaintiff and guaranteed repayment of the sums which had been invested. Crucially, the second of the two agreements contains a jurisdiction clause under which the agreement was to be governed by Irish law and jurisdiction regarding any dispute was conferred on the Irish courts.

8. The defendant disputes all elements of this claim bar the fact that the sums in question were invested by the plaintiff but, on the defendant's account, these sums were not paid to nor received by him. Instead, the defendant claims that the pension fund made an investment of €490,000 in a property development in Norway through the purchase of shares in a company called Strandgaten 56 AS from a company called Massco Limited. Neither the plaintiff nor the defendant were parties to this agreement. Further, the share purchase agreement contains a jurisdiction clause under which the parties to it agreed that it would be governed by Norwegian law and that the courts in Bergen, Norway would have jurisdiction over all disputes arising in connection with it. The plaintiff made his personal investments through a company based in the British Virgin Islands (BVI) called Gorak Assets Limited ("Gorak"), of which the defendant is a director but not a shareholder. Of that investment, the sum of €120,000 was used to purchase a partly built investment property in County Roscommon which had been owned by the plaintiff and his wife. The defendant states that the balance of the investment remains in Gorak although the plaintiff claims that the defendant both refuses to account for the balance and refuses to return it to him.

9. Crucially, the defendant claims that the two agreements relied on by the plaintiff which are allegedly signed by him are forgeries. The provenance of the copies of the agreements

exhibited in the affidavits is a little unclear. It seems that the plaintiff claims the originals were given to a Mr. Derry Grant-James for safekeeping in the Isle of Man and either they or copies of them (this is unclear) were given by Mr. Grant-James to the plaintiff at a meeting in October 2013. Although the parties had been in dispute over the return of the funds since June 2013, the first mention of these agreements is made in an email to the defendant on 13 April 2014 – some 6 months after they were allegedly given by Mr. Grant-James to the plaintiff - and in a solicitor's letter the following day.

10. Mr. Grant-James swore an affidavit in which he acknowledged the meeting that took place in October 2013 but disputes the plaintiff's account of that meeting. In particular, he denies having given the agreements in question to the plaintiff. He also denies having been involved in the original deal in any way, a claim which had been made by the plaintiff in correspondence, but which is not part of the pleaded case. Aside from the parties themselves, Mr. Grant-James, who was the person who introduced them to each other, looked likely to be a key witness. There was much argument on the plaintiff's application for renewal in the High Court as to whether the defendant was potentially prejudiced because of Mr. Grant-James' inability to travel to Ireland due to age and ill health. That argument has now crystalised because Mr. Grant-James died in October 2021. In fairness to the High Court judge, this fact is not recorded in the judgment which had been prepared in September 2021 but delivery of which was postponed, at the request of the parties, in order to facilitate ultimately unproductive discussions between them.

11. The plaintiff argues that the defendant's characterisation of the investments as having been made through independent companies is misleading. He has adduced evidence of the links between the defendant and the various companies involved in the transactions. The defendant counters that these links are irrelevant in circumstances where he is not personally liable for the actions of corporate entities. In addition, he maintains that the plaintiff can

unwind his investment through those corporate entities. This in turn leads to another dispute between the parties as to the value of the County Roscommon property currently owned by Gorak which the defendant says Gorak is prepared to return to the plaintiff in satisfaction for his investment. The value the defendant's valuer places on the property is ten times that placed on it by the plaintiff's valuer. The property, which was incomplete to start with, has now been vandalised with the defendant suggesting that the plaintiff may be responsible for the damage recently caused to it. Obviously, none of these factual issues could be resolved by the High Court in the context of the applications before it but, in order to understand the difficulties which have arisen, it is necessary to appreciate both the nature of the dispute and how it potentially straddles three different jurisdictions, Ireland, the Isle of Man and Norway.

Jurisdictional Issues

12. Subtending these factual disputes is a legal dispute as to the jurisdiction of the Irish courts to entertain the proceedings. The plaintiff obviously wishes to have the case heard in Ireland and has issued these proceedings here for that purpose. He relies on the jurisdictional clause in the agreement of 13 December 2012 as conferring exclusive jurisdiction on the Irish courts in respect of a cause of action which is, fundamentally, a claim for breach of that agreement and of the earlier agreement of 15 July 2011.

13. The defendant has staunchly maintained that the Irish courts do not have jurisdiction to hear these proceedings. He is a Canadian national resident in the Isle of Man which is not part of the European Union nor subject to the Brussels or Lugano Conventions. The pension fund investment was made through a share purchase agreement entered into in Norway involving the purchase of shares in a Norwegian company and subject to a jurisdictional clause in favour of the Norwegian courts. The personal investments were made to a BVI based company and, notwithstanding that part of that investment was used to purchase

property in Ireland, the dispute does not relate to that property but to the anterior investment made in the Isle of Man in a BVI company.

14. Obviously, the extent to which these considerations are determinative of jurisdiction will depend on whether the agreement of 13 December 2012 is valid. In circumstances where the defendant contends that this and the related 2011 agreement are forgeries, he argues that the Irish courts should not take seisin of the dispute in order to determine whether the agreements are in fact forgeries. This should be determined by the courts of the country which otherwise has jurisdiction. The defendant has agreed to the jurisdiction of the courts of the Isle of Man in relation to the personal investments and contends that the Norwegian courts have jurisdiction in relation to the pension fund investment.

15. Further, proceedings have since issued in Norway in 2019 between, on one side, the pension fund and, on the other, Massco Limited and the defendant's son who is closely involved in a number of the companies in issue in these proceedings. Although correspondence from Norwegian lawyers indicated that the hearing of this case was due to take place in March 2020, this court was not advised whether the hearing had taken place as scheduled nor of any outcome to those proceedings. Notably, the Norwegian proceedings, although relating to the same investment that forms part of these proceedings, do not involve the same parties.

Procedural History

16. Given that this judgment deals in part with service out of the jurisdiction and in part with the renewal of a plenary summons, it follows that neither the factual disputes outlined above nor the jurisdiction of the Irish courts to deal with them have yet been resolved. Nonetheless, the existence of this jurisdictional dispute is central to understanding the

procedural quagmire that has developed, largely it must be said because of the actions and inactions of the plaintiff.

17. It is apparent from the factual account above that the parties had fallen out over these investments little over a year after the last of them had been made. By June 2013 the plaintiff was calling upon the defendant to return the monies to him and the defendant was denying any personal liability to do so. After extensive correspondence, both direct and through solicitors, the plaintiff issued a plenary summons on 30 May 2014. The initial demand for the repayment of the monies was made by a solicitor on behalf of the plaintiff on 15 August 2013. If that is the date on which the cause of action accrued, the time limit for bringing proceedings would have expired in August 2019. That letter asserted the existence of a trust but did not mention the existence of a guarantee. If the cause of action is taken to be the defendant's failure to repay monies on foot of an alleged guarantee contained in the disputed agreement, then a formal demand for payment on foot of the guarantee was first made in either April or May 2014 (depending on how subsequent correspondence from a different solicitor is construed) and the statute would have expired in April/May 2020. Either way, the proceedings were issued well within the six-year limitation period applicable to contractual disputes under s.11(1)(a) of the Statute of Limitations 1957.

18. The later date of April/May2020 is potentially significant as the defendant argues that it was open to the plaintiff to mend his hand by issuing fresh proceedings before that date but, for reasons which are unexplained, he failed to do so. As the limitation period for the institution of proceedings has now expired, the plaintiff argues that he will be seriously prejudiced if the court refuses, as the High Court did, to renew the summons which was issued well within time.

19. The plenary summons as issued in May 2014 contained an endorsement attesting to the High Court's jurisdiction to hear the proceedings pursuant to Article 5 of Council

Regulation 44/2001 (now replaced by Regulation (EU) 1215/2012). In fact, there is typographical error in the endorsement and the summons actually referred to Regulation 44/2011. This was manifestly incorrect as the Isle of Man is – or was – not part of the European Union and was not covered by the regulation cited – even allowing for the typographical error. This mistake appears to have been picked up by the plaintiff's lawyers and on 21 July 2014 an application was made to and allowed by the High Court (Hedigan J.) both to amend the plenary summons and for leave to serve out of the jurisdiction under O.11, r.1(a) or (e). As it happens, the permitted amendment was not made promptly and a further order extending the time to amend the summons was required and made on 20 October 2014 (White J.).

20. Thereafter, notice of the summons was served on the defendant in the Isle of Man at some stage in April or perhaps May 2015. Crucially, this service was effected within one year of the issuing of the plenary summons on 30 May 2014. Although the summons was amended, the erroneous endorsement was not removed so that the summons of which notice was served on the defendant pursuant to a court order still contained an endorsement under Council Regulation 44/2001 which, if applicable, would not have required the leave of the court for the purposes of service.

21. On 22 July 2016 the defendant entered a conditional appearance to the summons. The terms of this appearance, which are identical to a second appearance entered on 26 October 2018, are relied on by the plaintiff. The appearance is headed *"Memorandum of Conditional Appearance"* and on its face it states that the appearance is entered *"strictly without prejudice to the objections of the said defendant to the jurisdiction of this Honourable Court to entertain the within proceedings against him, and, further is entered strictly without prejudice to any application to contest jurisdiction which may subsequently be brought"*. At the foot of the document it is noted that the defendant *"requires delivery of a Statement of*

Claim". The conditionality of this appearance is of some significance. The plaintiff argues that it is conditional only as to jurisdiction and not as to service and relies on both the lack of any reference to service on the face of the appearance and also the fact that the defendant calls for the delivery of a statement of claim. The defendant argues that a conditional appearance cannot be parsed into separate elements in this manner. It was clear from the appearance that he was not submitting to the jurisdiction of the Irish Courts unless or until the jurisdictional issue was determined against him, which it has not yet been. The plaintiff proceeded to deliver a statement of claim on 27 July 2016 (and again on 16 November 2018).

22. On 3 October 2016 the defendant issued a motion under O.12, r.26 to set aside the order of Hedigan J. granting leave to serve notice of the proceedings out of the jurisdiction on jurisdictional grounds. That application was heard by Ní Raifeartaigh J. on 13 April 2018 and a considered *ex tempore* judgment was delivered by her some days later on 24 April 2018. Ní Raifeartaigh J. acceded to the defendant's application on the grounds of the plaintiff's lack of candour. Consequently, she did not proceed to determine the jurisdictional question. Ní Raifeartaigh J. found that in making the application for service out of the jurisdiction, an application which of necessity is made *ex parte*, the plaintiff had not disclosed sufficient information regarding the mechanisms of the transactions in issue and the involvement of Gorak and the Callary Pension Fund. Crucially, the plaintiff had not disclosed the existence of a share purchase agreement under which Norway is designated as the state of jurisdiction in a choice of law clause. In those circumstances she held that the court was not informed of matters which were important and material to the choice of law issue. Consequently, she discharged the order of Hedigan J. and set aside service of the notice of the proceedings on the defendant.

23. In light of that conclusion, Ní Raifeartaigh J.'s comments on the jurisdictional issue are *obiter*, as she herself noted. For the record, she held that O.11, r.1(a) did not apply as the

County Roscommon lands did not comprise *"the whole of the subject matter of the action"*. She expressed the view that had she not decided the motion on lack of candour grounds, she would have required to hear evidence on the disputed issues in the affidavit in order to determine the preliminary issue as to jurisdiction under O.11, r.1(e) which centres on the validity of the allegedly forged agreements. She would not have been prepared to decide the jurisdictional issue on the basis of *forum non conveniens* alone.

24. At a subsequent hearing on 5 June 2018 Ní Raifeartaigh J. stayed execution of the costs order she had made in favour of the defendant *"pending the determination of a fresh application"*. The plaintiff relies on this as indicating that all parties, including the court, were aware of the plaintiff's intention to make a further application for service out. This is potentially significant because, at the point where Ní Raifeartaigh J. set aside service of the notice of the plenary summons which had been effected in 2015, more than a year had passed since the summons had issued in May 2014. Consequently, under O.8, r.1 by then the summons had ceased to be in force. Therefore, as was subsequently contended by the defendant, *prima facie* the summons needed to be renewed before it could be served.

25. The plaintiff was not cognisant of this difficulty and proceeded to make a further application for service out. This application was grounded on an affidavit of the plaintiff which was sworn to address the issues that had been of concern to Ní Raifeartaigh J. Further, before bringing the application the plaintiff's solicitors wrote to the defendant's solicitors on 20 May 2018 offering to put them on notice of the application to serve out. The defendant's solicitors declined the invitation on the basis that they had no instructions from their client. Thus, the application proceeded before Eagar J. on 2 July 2018 on an *ex parte* basis. Eagar J. made an order under O.11, r.1(e) allowing the plaintiff to serve notice of the proceedings on the defendant in the Isle of Man. Service was duly effected through Hague Convention mechanisms on 14 August 2018.

26. On 26 October 2018 the defendant entered a conditional appearance in identical terms to that which had been filed on 22 July 2016. This was followed by a second motion to set aside the service effected pursuant to Eagar J.'s order. That motion sought relief under O.12, r.26 to set aside service of notice of the summons and discharge the order of Eagar J. Alternatively, an order was sought staying the proceedings on the ground of *forum non conveniens*. The defendant's grounding affidavit set out his perspective on the factual issues and the procedural history of the matter up to that point. The allegation that the 2011 and the 2012 agreements were forged was re-iterated. An argument was made as to the jurisdiction of the Irish courts under O.11 and a further jurisdictional argument was made on the basis of *forum non conveniens*. No issue was raised as to service. Similarly, no issue as to service was raised in a subsequent affidavit sworn by the defendant in the course of an exchange of affidavits in which the factual issues were contested between the parties.

27. The first indication that the defendant was challenging the validity of service on him due to the fact that the summons had lapsed and had not been renewed came in written legal submissions prepared by the defendant for the purposes of the hearing before Sanfey J. on 25 February 2020 but which had not been exchanged with the plaintiff in advance. The plaintiff objected to this issue being raised without it having been flagged in correspondence or in the lengthy affidavits sworn to ground the motion. As recorded in his judgment, Sanfey J. took the view that the issue came within the scope of the relief sought under O.12, r.26, that the plaintiff had sufficient time to consider the matter and, as it was an important point going to the jurisdiction of the court to make the impugned order, he would consider it.

28. It should be noted that regardless of the outcome of the defendant's application before Sanfey J., the plaintiff was certainly on notice of the difficulties arising from the fact that the plenary summons had not been renewed as of February 2020. At that point the plaintiff was still, just about, within the six-year limitation period if the cause of action is taken to have

accrued in April or May 2014. By the time Sanfey J. delivered his judgment on 14 May 2020 that limitation period may well have already expired (this is not entirely clear as the date of the formal demand has not been precisely identified by the parties). Thus, it was potentially still open to the plaintiff to issue a fresh summons for the purpose of preventing the statute running. The plaintiff did not do this but instead applied for the renewal of the existing plenary summons by way of a notice of motion issued on 19 June 2020. By then the window within which the plaintiff could have sought to mend his hand without requiring the summons to be renewed had closed. Of course, the plaintiff argues that the limitation period had already expired as of August 2019 and this issue also remains to be determined.

Judgments of Sanfey J.

29. I have above briefly outlined the outcome of the judgments delivered by Sanfey J. which are the subject of these appeals. I do not propose to analyse those judgments in detail at this point as the trial judge's conclusions on the various issues will be addressed as each of those issues is dealt with in this judgment.

30. In summary, in allowing the defendant's application to discharge the order of Eagar J. and set aside service of notice of the summons on him, Sanfey J. accepted firstly that the issue came within the scope of the relief sought in the defendant's motion under O.12, r.26. He acknowledged that the summons had not become a nullity because it had not been validly served within a year of its issue but also accepted that it was not in force for the purpose of service unless it was renewed with leave of the court, which of course it had not been. He addressed and rejected two interrelated arguments made by the plaintiff, the first to the effect that the defendant could not invoke O.12, r.26 if he had already filed an appearance and the second to the effect that the defendant's appearance was conditional as to jurisdiction only

and not as to service. He also rejected an argument that the defendant's application related to an irregularity in the proceedings and ought to have been made under O.124.

31. In delivering his first judgment Sanfey J. acknowledged that it remained open to the plaintiff to apply under O.8, r.3 for a renewal of the summons and recommended that such an application be made on notice to the defendant. The refusal of that application was the subject of the second judgment. In this judgment Sanfey J. examined the case law on both the previous and current versions of O.8 to ascertain the standard required by the new test of *"special circumstances"* the point in his analysis at which that test should be applied and the extent to which the interest of justice, prejudice and the balance of hardship form part of an analysis as to whether special circumstances exist or fall to be considered subsequently in the event that special circumstances have been established. Notwithstanding the plaintiff's characterisation of the case as a documents case, Sanfey J. concluded that the outcome would depend to a substantial degree on oral evidence regarding the relationship between the parties and the circumstances surrounding the entry by the plaintiff and his pension fund into the investments in question.

32. The delay of nearly ten-years since those events caused Sanfey J. concern in circumstances where the proceedings had not yet been validly served on the defendant. The potential unavailability of Mr. Grant-James represented a moderate prejudice to the defendant. The likely increase in that prejudice anticipated by the trial judge is now certain in light of the death of Mr. Grant-James. Sanfey J. regarded the plaintiff as solely responsible for the various errors which had led to the necessity for a series of court applications and did not attribute any responsibility for the resulting delay to the defendant. Although the plaintiff had not relied on inadvertence as a special circumstance, Sanfey J. regarded it as necessary to consider the reasons for the delay as part of the interests of justice. In this case the plaintiff's errors went beyond simple administrative mishaps and constituted a litany of

errors and a failure to observe the Rules of the Superior Courts where, from the outset, the defendant made it clear he was contesting the jurisdiction of the Irish courts to hear the case. All of this led Sanfey J. to conclude that there were no special circumstances which would justify an extension in the present case. Consequently, it was unnecessary for him to consider the plaintiff's application for leave to serve out of the jurisdiction under O.11.

Issues Arising on this Appeal

33. It is appropriate to deal with the issues arising on these appeals in the same sequence as the two applications were dealt with by the trial judge. Thus, I will firstly consider the plaintiff's appeal against the granting of the defendant's application under O.12, r.26 to discharge the order of Eagar J. and to set aside the service effected in August 2018.

34. It is not disputed that the effect of Ní Raifeartaigh J.'s order was that the summons which had been issued in May 2014 and invalidly served in April/May 2015 lapsed pursuant to the provisions of O.8, r.1. Thus, the summons was not in force at the time Eagar J. made his order nor at the time of purported service pursuant to that order. The parties were also agreed that an expired summons is not a nullity. An expired summons can be renewed but the summons in this case had not been renewed at the material time. Instead, the focus of the plaintiff's appeal was on whether the defendant should have been permitted to make this argument without express notice of it being provided in advance and on the effect of the entry of a conditional appearance on the defendant's right to challenge service.

35. Wrapped up in this appeal are a number of discrete issues. Two issues arise from the fact that the defendant had entered a conditional appearance which refers only to jurisdiction. Firstly, does the text of O.12, r.26 preclude an application under its terms once an appearance has been entered, even if that appearance is conditional? Secondly, does entry of an appearance which on its face is conditional only as to jurisdiction preclude the defendant

from relying on a complaint about defective service? Even if these questions are answered in favour of the defendant, it will still be necessary to consider whether, as the plaintiff contends, this application ought to have been brought under the regularisation provisions of O.124. Needless to say, the terms of O.124 would tend to favour resolution of the issues in favour of the plaintiff.

36. If the plaintiff succeeds on this appeal and service of notice of the summons in August 2018 is regarded as effective, that would dispose of the second appeal on the basis that it would then be unnecessary for the plaintiff to apply for a renewal of the summons for the purposes of service under O.8 nor for leave to serve out of the jurisdiction under O.11. On the other hand, if the first appeal is unsuccessful it will be necessary for the court to proceed to consider whether the trial judge was correct in holding that there were no special circumstances within the meaning of O.8, r.4 which justified an extension and renewal of the summons. The law in this area has been largely settled by the judgment of Haughton J. in *Murphy v. HSE* [2021] IECA 3 which was delivered after the initial hearing in the High Court but on which the parties were invited to make submissions before judgment was delivered. The disposal of the second appeal will depend on the application of these settled legal principles to the admittedly unusual facts of this case.

Relevant Rules of Court

37. As the issues in this appeal concern the overlap of and interaction between a number of Rules of Court relating to the issue and service of proceedings it may be of assistance to set out the relevant rules at the outset.

38. Where it is proposed to serve a summons or notice of a summons out of the jurisdiction (save in accordance with the relevant EU law instruments), leave of the High Court is required under O.5, r.14(1) for the issuing of that summons. Although the defendant did not

take a point under this rule, he noted that it had not been complied with by the plaintiff presumably because of the plaintiff's original mistaken belief that the proceedings were ones to which the Brussels Regulation applied.

39. Under O.8, r.1 a summons, once issued, remains in force for 12 months but if the summons is not served within that 12-month period an application can be made to renew it. The form of an application to renew varies depending on whether it is made during the initial 12 months prior to the expiry of the summons – in which case it is made to the Master of the High Court under O.8, r.2 – or outside that period in which case it is made directly to the High Court under O.8, rr. 3 and 4. Where the application is made to the Master, he must be satisfied that "*reasonable efforts*" have been made to serve the defendant or that there is "*other good reason*" to renew the summons. Order 8, rr. 3 and 4 impose a different and higher standard where an extension of time is required in order to renew the summons. The standard set out in O.8, r.4 is that the court must be satisfied *"that there are special circumstances which justify an extension"*. There was initially some judicial debate as to whether the special circumstances test applied only to the extension of time, with the application to renew being assessed separately by reference to the *"other good reason"* test under O.8, r.2 or whether both elements are to be assessed by reference to special circumstances. This issue has now been settled by the decision of Haughton J. in *Murphy v HSE* (above).

40. Order 8 does not specify whether the application is to be made on notice or *ex parte* but, in circumstances where the summons has not yet been served, it is reasonable to assume that in almost all cases the application will be made *ex parte*. Order 8, r.2 provides that where a summons has been renewed on an *ex parte* application *"any defendant shall be at liberty before entering an appearance to serve Notice of Motion to set aside such order"*.

41. For ease of reference the full text of O.8, r.1(1) to (4) inclusive are as follows:

"*(1) No original summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons.*

(2) The Master on an application made under sub-rule (1), if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent summons be renewed for three months from the date of such renewal inclusive.

(3) After the expiration of twelve months, and notwithstanding that an order may have been made under sub-rule (2), an application to extend time for leave to renew the summons shall be made to the Court.

(4) The Court on an application under sub-rule (3) may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive where satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order."

42. This version of O.8 was introduced on 11 January 2019 by the Rules of the Superior Courts (Renewal of Summons) S.I. 482 of 2018. The pre-existing version of O.8 was somewhat more forgiving of plaintiffs who had failed to serve proceedings within the initial twelve-month period. Whilst there was still a distinction between an application brought within 12-months (to the Master) and outside that period (directly to the High Court), the test applied in both cases was the same, namely that reasonable efforts had been made to serve the defendant or that there was other good reason for the renewal. The requirement to show special circumstances which justify the extension of time for making the application outside the initial twelve-month period was introduced for the first time in 2019. The

significance of this change is reflected in the fact that those circumstances must be stated on the face of the order.

43. In his written legal submissions, the plaintiff seems to make some play of the fact that the unamended version of O.8 would have applied at the time the second application for service out was made to Eagar J. and at the time the defendant entered his conditional appearance and that the issue was not raised by the defendant until after the rule had been changed. I fail to see how this is relevant. The onus is on a plaintiff to ensure that the summons he seeks to serve is in force and to make the appropriate application to renew it if it has lapsed. The fact that it would have been open to this plaintiff to make the application earlier under a more forgiving version of the rule is immaterial. Having failed to make such an application he must now meet the standard reflected in the rule as it currently stands.

44. Order 12 deals generally with appearances. Interestingly, although the entitlement of a defendant to enter a conditional appearance for the purpose of contesting jurisdiction has long been recognised (see the comments of Hardiman J. in *Minister for Alte Leipziger Ag* [2000] 4 IR 32 at p.47 referring to the practice adopted in *Kutchera v. Buckingham International Holdings Limited* [1988] IR 61 and the reporter's note on p.63 of that report) there is no express provision in O.12 for the entry of conditional appearance. Order 12, r.2(3) recognises that an appearance may be entered solely to contest jurisdiction under O.11A, O.11B and O.11C. Orders 11A, 11B and 11C deal with cases under Regulation (EC) 1215/2012, the Brussels and Lugano Conventions and the related Regulations (EC) 2201/2003 (since recast and replaced by (EC) Regulation 2019/1111) and (EC) 4/2009 dealing with matrimonial matters, parental responsibility and maintenance. Orders 11A, r.8, O.11B, r.8 and O.11C, r.9 each refer to the form to be used when a defendant wishes to contest jurisdiction under each of those rules. The language used in the relevant provisions of these rules and the related forms is specifically "*to contest jurisdiction*" and thus there is

no reference anywhere in the Rules to a "*conditional appearance*" as such. The relevant forms are in each case headed "*Memorandum of Appearance Contesting Jurisdiction*". The absence of an express rule on the entry of a conditional appearance to proceedings served out of the jurisdiction other than in the EU/Brussels/Lugano context has no doubt led to some of the difficulties arising in a case such as this.

45. Order 12, r.26 under which the defendant made his application to set aside provides as follows:

> *"26. A defendant before appearing shall be at liberty to serve notice of motion to set aside the service upon him of the summons or of notice of the summons, or to discharge the order authorising such service."*

46. Service out of the jurisdiction in cases not covered by Regulation 1215/2012 or the Brussels and Lugano Conventions are governed by O.11. In this case the original order authorising service out was made by Hedigan J. under O.11, r.1(a) or (e). Ní Raifeartaigh J. doubted the applicability of O.11, r.1(a) and the second order authorising service out was made by Eagar J. under O.11, r.1(e) alone. In the event that the defendant had succeeded in his application to renew the summons under O.8, his consequential application was for leave to serve out under O.11, r.1(b) or (e). Insofar as relevant O.11, r.1 provides as follows:

> *"(1) Provided that an originating summons is not a summons to which Order 11A applies, service out of the jurisdiction of an originating summons or notice of an originating summons may be allowed by the Court whenever:*
>
> *(a) the whole subject matter of the action is land situate within the jurisdiction (with or without rents or profits), or the perpetuation of testimony relating to land within the jurisdiction; or*

(b) any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action, or …

(e) the action is one brought to enforce, rescind, dissolve, annul, or otherwise affect a contract, or to recover damages or other relief for or in respect of the breach of a contract…

(iii) by its terms or by implication to be governed by Irish Law, or is one brought in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction;…"

47. Although the defendant has twice brought a motion in which the jurisdiction of the Irish courts to entertain these proceedings has been put in issue, on both occasions the court did not reach the jurisdictional issue because the defendant succeeded in establishing that the service of the proceedings upon him was invalid for other reasons. Consequently, no court has yet determined whether O.11 was correctly applied and, in particular, whether the contractual arrangements between the parties are to be governed by Irish law pursuant to the alleged agreement of 13 December 2012.

48. Finally, the plaintiff relies on the provisions of O.124 which is headed *"Effect of Non-Compliance"*. That rule provides as follows:

"1. Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.

2. *No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.*

3. *Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the notice of motion."*

49. The plaintiff contends that the defendant's real complaint is of a failure to comply with O.8 so as to procure the renewal of the summons before making the application to Eager J. and effecting service pursuant to his order. Consequently, the plaintiff contends that the proper application for the defendant to have brought was one under O.124, r.1 to set the proceedings aside on the grounds of irregularity. Were such an application to have been brought, the plaintiff contends that it would not have succeeded because it was not made within a reasonable time, because the entry of an appearance by the defendant, even a conditional appearance, was a fresh step taken after the defendant had or ought to have knowledge of the irregularity and the objection which succeeded before Sanfey J. was not stated in the notice of motion. Unsurprisingly, the defendant contends that all of this is irrelevant in circumstances where he did not make an application under O.124 but instead made an order under O.12, r.26.

Procedural Issue Raised by the Plaintiff

50. Sanfey J. regarded the defendant's point as to the non-renewal of the summons prior to the purported service of notice of it as a threshold issue which raised important questions as to the court's jurisdiction to make the impugned order. Counsel for the plaintiff argued on appeal that there was an anterior threshold issue as to whether the High Court should have entertained the defendant's argument in circumstances where it was not clearly raised in the

motion seeking relief nor flagged in correspondence prior to the hearing. He acknowledged that his objection was a technical one but regarded it as one made in response to a technical point raised by the defendant in the first instance.

51. Importantly, the plaintiff's objection is not based on fair procedures grounds. The plaintiff accepted that although the point was not raised by the defendant until the first day of the hearing, the plaintiff was in a position to and did deal with it over the course of the three-day hearing. Rather, it is an objection in principle to the defendant being allowed to make a significant and discreet argument of which the plaintiff did not have prior notice. In his written submissions the plaintiff argues that the effect of raising the issue at the last moment was that the substantive jurisdictional issue was never dealt with which, the plaintiff contends, is a substantial injustice to him.

52. I am not satisfied that the timing of when the issue was raised has any bearing on whether, by entertaining it, the High Court caused a substantial injustice to the plaintiff. If the point was one which should have been properly considered, then, given the nature of the issue, it was inevitable that it would have to be heard and determined prior to the substantive jurisdictional issue. Further, I do not accept that the point was raised at an inappropriate stage in the proceedings. Despite the fact that they have been in existence since 2014, by reason of the various mis-steps described above, all of which are attributable to the plaintiff, the proceedings are, in fact, still at a very early stage. The defendant's motion was undoubtedly of a preliminary nature in that it sought to set aside service of notice of the proceedings on him and the order which authorised such service. The appearance entered by the defendant is a conditional one and, thus, he has not yet submitted to the jurisdiction of the Irish courts. Whilst it is possible to sympathise with the plaintiff's grievance at a new legal issue being raised on a motion which the plaintiff expected would deal solely with

country jurisdiction, this is not an issue which the defendant left in abeyance whilst the proceedings were progressed in any substantive way.

53. The real question is whether the High Court should have allowed the defendant to raise a legal issue which was not apparent on the face of the motion nor in the affidavits sworn by the defendant or the correspondence exchanged between the solicitors. In my view, the High Court was correct in permitting the issue to be raised. I agree with Sanfey J.'s characterisation of the point as an important one going to the jurisdiction of the High Court to make the order made by Eagar J. Put simply, once it was raised the issue was such an important one, I do not think that the High Court could have declined to entertain it on the ground that it had not been raised in time. Of course, if the plaintiff had been prejudiced in dealing with the issue because of a lack of notice, then the proper course would have been to adjourn the hearing to allow the plaintiff to prepare a response. However, as noted, that is not the basis upon which this ground of appeal has been pursued.

54. Further, the relief sought in the notice of motion under O.12, r.26 – i.e., the setting aside of the notice of service of the summons and the discharge of Eagar J.'s order – is not on the face of it expressly limited to jurisdictional grounds or specifically grounds relating to "*country jurisdiction*" as it has been termed by the plaintiff. The relief in question is equally appropriate where service of notice of the summons and the order authorising the same are impugned on other, non-jurisdictional grounds. Thus, the defendant was, in essence, advancing a new legal argument to support relief which was already properly claimed which came within the scope of the rule relied on. Further, for reasons discussed more fully below, I am also satisfied that the particular grounds do in fact go to jurisdiction.

55. The validity of the summons is not addressed in the defendant's affidavits. Although it might be queried as to what factual averments the defendant could have made on this

purely legal issue, I accept that if this had caused a procedural unfairness then the trial judge would be obliged to ensure the plaintiff had an adequate opportunity to deal with the issue.

56. The plaintiff is critical of the defendant, who he claims had the same information available to him as did the plaintiff, for not having appreciated at an early stage that the summons had not been renewed following the making of Ní Raifeartaigh J.'s order. I do not think that this criticism is fair. An application to renew under O.8 is normally made on an *ex parte* basis and consequently a defendant would not normally be notified of such an application. The only way a defendant would become aware of a renewal order is if it were to appear – as it should – on the face of the summons served upon him or if the order itself were to be served in conjunction with notice of the summons. However, in this case from the outset there had been multiple technical issues with the form of the summons of which notice had been served. In fact, the endorsement on the notice of the summons as served in August 2018 incorrectly records the proceedings as having issued pursuant to an order made by Eagar J. granting liberty to issue and serve notice of the proceedings. The order itself only authorises service, no liberty ever having been sought to issue the proceedings under O.5, r.14 or indeed any other order. Thus, the notice was ambiguous on its face, certainly sufficiently so for me to be reluctant to hold that the defendant should have readily inferred from the absence of any reference to an order renewing the summons under O.8 that such an order had not been obtained.

57. Finally in dealing with this issue I should note that much of the plaintiff's arguments were made by analogy with the provisions of O.124 under which a complaint about irregularity in proceedings must be made within a reasonable time, cannot be raised at all if you take a fresh step after you have knowledge of the irregularity and which requires all grounds of objection to be set out in the notice of motion. I will return to whether this application ought to have been brought under O.124. At this stage it is sufficient to observe

that I am not prepared to fix the defendant with constructive knowledge of the plaintiff's failure to renew the summons even if can be fairly inferred that a requirement to do so necessarily followed from Ní Raifeartaigh J.'s order.

The Effect of a Conditional Appearance

58. In order to understand the arguments made as to the conditionality of the defendant's appearance it is necessary to appreciate the status of a summons which has lapsed by reason of not having been served within 12-months of its issue under O.8, r.1 and which has not been renewed. It is well established that in such a case the summons does not become a *"nullity"* after the initial 12-months but that *"it shall not remain in force for the purpose of service, unless it is renewed by leave of the Court" per* Walsh J. in *Baulk v. Irish National Insurance Company Limited* [1969] IR 66. This echoes the views of Lord Denning in *Sheldon v. Brown Bayley's Steel Works Limited* [1953] 2 QB 393 who characterised the service of a writ outside the time permitted by the Rules as an irregularity rather than a nullity (at p. 401). Crucially, because it was an irregularity it could be waived by the defendant's entry of an unconditional appearance whereas if it were a nullity, it was incurably bad and the defect could not be waived at all.

59. Whilst neither of these cases featured the additional element of service out of the jurisdiction pursuant to an order made at a time the summons was not in force, at a level of principle the plaintiff contends that the entry of an appearance by the defendant cured the irregularity in service or, more accurately, by entering an appearance the defendant must be taken to have waived his entitlement to rely on the defect. The plaintiff relies on the fact that on its face the conditional appearance contests only jurisdiction and not service. As a result, the plaintiff characterises the defendant as having submitted to the jurisdiction of the Irish courts save insofar as it might be determined that Ireland does not have *"country*

jurisdiction" over the dispute in the proceedings. The defendant disputes this and points to the conditional nature of the appearance entered on his behalf. He strenuously contends that by entering a conditional appearance he has expressly not submitted to the jurisdiction of the Irish courts. Therefore, he cannot and should not be precluded from making a cogent argument as to the validity of service of the proceedings upon him in circumstances where the onus lies on the plaintiff to ensure that he is validly brought before the Irish courts. The defendant emphasises the link between service - being the action which notifies a party of a claim been made against him before the courts in a particular jurisdiction - and the jurisdiction of those courts to hear the dispute.

60. Part of the difficulty faced by a court in dealing with these opposing positions is the absence of any mechanism under the rules for entering a conditional appearance save, in certain circumstances, for the purpose of contesting jurisdiction. Even then, in cases falling outside Regulation 1215/2012, or the Brussels or Lugano Conventions, the practice of entering a conditional appearance is one deriving from the inherent jurisdiction of the court rather than from the rules. That this is so, is evident from a number of recent cases. What flows from the entry of a conditional appearance is less clear.

61. In *Bank of Ireland v. Roarty* [2017] IEHC 789 the defendants sought to set aside judgment which had been entered in default of appearance. The defendants had attempted to enter a conditional appearance in which they purported to withhold consent to jurisdiction until certain specified conditions regarding the proceedings were met. Unsurprisingly, the Central Office declined to accept this conditional appearance and wrote to the defendants indicating that the only circumstances in which a conditional appearance could be accepted was where jurisdiction, in the sense of the country in which legal proceedings should be heard, was disputed under Article 24 of Regulation (EC) 44/2001 (now Regulation 1215/2012). The Central Office also advised that there was no document known to the Rules

called a conditional appearance. This, of course, was not entirely accurate as a conditional appearance can be entered, as here, where *"country jurisdiction"* is disputed outside the scope of the relevant EU instruments and conventions. If a conditional appearance were to be entered under Orders 11A, 11B or 11C then, using the appropriate forms, it should be entitled "*Memorandum of Appearance Contesting Jurisdiction*". Ní Raifeartaigh J. agreed with the Central Office that the defendants were mistaken in their belief that they could enter a conditional appearance as *"the Rules do not provide for this procedure"*.

62. The issue was considered in some detail in the context of an expired summons by Peart J. in *Lawless v. Beacon Hospital* [2019] IECA 256. The proceedings in which the appeal arose were medical negligence proceedings in which the plaintiff's application for the renewal of a summons under O.8 as against certain of the defendants (the surgeons as opposed to the hospital) had been refused. There was a delay in serving the summons whilst the plaintiff's solicitor awaited receipt of an expert medical report and when the proceedings were ultimately served the twelve-month period under O.8 had expired and the summons had not been renewed. The surgeons entered an appearance which was marked *"under protest"*. These words were crossed out on the copy of the summons before the court, Peart J. surmising that this had been done in the Central Office *"because the Rules make no provision for an "appearance under protest""*. He continued:

> *"There is no provision in the rules for the entry of an appearance "under protest" in order to preserve any entitlement to contest the validity of service at some later stage. It is clear from the rules that if a defendant claims that the service upon him of proceedings is in some way invalid, that defendant must before entering any appearance bring an application by way of notice of motion under O. 12, r. 26 RSC to have service set aside. If such a defendant enters an appearance, the effect thereof is to waive any objection to the manner in which service has been effected, and to cure*

any such defect (see e.g. Walsh J. in Baulk v. Irish National Insurance Co. Ltd)… Entry of appearance by a defendant is an acknowledgement that the summons has been served and acts as a notification to the court that this is the case. That effect cannot be suspended or qualified in any way by entering an appearance under protest. There is no provision in the rules enabling that to be done."

63. Peart J. went on to approve a passage in Delaney & McGrath on Civil Procedure (4th Edition, Round Hall at para. 4-12*)* to the effect that an unconditional appearance constitutes a waiver of the right to object to any defect in service *"such as the service of an expired summons"*. The balance of the judgment considers whether it was reasonable for the plaintiff's solicitor to delay service whilst awaiting a medical report and then to proceed to effect service before that report was obtained. Peart J. ultimately concluded that the hardship that would be caused to the plaintiff whose claim in respect of very serious injuries would be statute barred if the summons were not renewed, justified allowing the appeal. However, Peart J. observed that in his opinion it was unnecessary for the plaintiff to have brought an application to renew the personal injury summons once the defendant had entered an unconditional appearance which cured any defect in service occasioned by the failure to have obtained an order renewing the summons. He emphasised the need for the defendants to have brought an application contesting service under O.12, r.26 prior to entering an appearance.

64. The third of these three cases is the decision of MacGrath J. in *AIB v. O'Driscoll* [2020] IEHC 253. In *O'Driscoll* a summons was renewed and then renewed a second time when service had not been effected during the initial renewal period. The defendant entered an appearance but then sought to challenge the validity of service on him on the basis that under a previous version of O.8, r.1 a second or subsequent application to renew could only be made during the *"currency of the summons"* and the summons was not in force at the time

the second renewal order was made. The plaintiff argued that the defendant was precluded from applying to set aside the renewal of the summons because an appearance had been entered by him. The defendant argued that it was not possible for him to have entered a conditional appearance since the decision in *Roarty* and he had to enter an appearance in order to prevent judgment in default of appearance being entered against him. Alternatively, he sought to set aside the appearance on the grounds of mistake as had been allowed by Costello P. pursuant to the inherent jurisdiction of the Court in *Taher Meats (Ireland) v. State Company for Foodstuffs Trading* [1991] 1 IR 443.

65. In the event, MacGrath J. did not determine the application on the basis that the defendant had no right to bring it. Equally, he did not express a concluded view on whether the appearance should be regarded as having been entered by mistake. Instead, he relied on the provisions of O.122, r.7 under which any time fixed by the Rules may be enlarged by a court to hold that although the summons was not in force at the time the second order for renewal was made, it was capable of renewal at the time that it was served. The ultimate teasing out of these strands in the judgment is a little unclear. MacGrath J. refused the defendant's application but not, apparently, on the basis that by entering an appearance the defendant had waived a defect in service which was capable of remediation (i.e., an irregularity rather than a nullity in Denning L.J.'s language). Instead, he seems to have exercised a discretion in favour of the plaintiff under O.122, r.7 in order to extend the time for the plaintiff to make an application for renewal and service of the summons. That does not seem to have been an application which was actually before the court and equally it is not clear whether MacGrath J. intended his judgment to act as the grant of an extension of time in order to make a further application or as the granting of a further application to renew the summons.

66. Two principles emerge strongly from these cases. The first is that the Rules only allow a conditional appearance to be filed where there is a challenge to what might be termed "*country jurisdiction*" – and even then the Rules do not cover all of the circumstances in which such a challenge can be brought. The second is that where a defendant wishes to raise an issue as to the validity of the service effected on them, they should issue a motion seeking to have the disputed service set aside under O.12, r.26 prior to entering an appearance. However, none of these cases deal with the particular circumstances here, namely a defendant who wishes to dispute both jurisdiction and service and has entered a valid conditional appearance for the purpose of the former. Further, the form of the service which is disputed was governed by the fact that the plaintiff was attempting to serve the defendant outside the jurisdiction so as to bring him within the jurisdiction of the Irish courts.

67. Thus, in this case the validity of the service purportedly effected on the defendant is very much tied up with the question of whether the Irish courts have jurisdiction, including the jurisdiction to determine the jurisdictional issue itself. The link is not direct in the sense that the invalidity of the summons through its non-renewal has not arisen for any jurisdictional reason but, in my view, the fact that the summons had lapsed at the time the order was made is capable of impacting on the question of whether the jurisdiction of the Irish courts has been properly invoked. An order was required under O.11, r.1 for the plaintiff to serve the defendant outside of this jurisdiction and so to bring him properly before the Irish courts and it is the validity of that order which is in question due to the non-renewal of the summons.

68. Consequently, I think the real issue with which this court must deal is the effect of the entry of a conditional appearance. In particular the court must determine whether, as contended by the plaintiff, a conditional appearance represents an acknowledgement of valid service and a submission to the jurisdiction of the Irish courts on all issues save for

jurisdiction or, as contended by the defendant, a conditional appearance cannot be broken down in this fashion and must be taken as a statement by the defendant that he is not submitting to the jurisdiction of the Irish courts for any purpose.

69. In support of this latter proposition the defendant points to a number of cases in which the entry of a conditional appearance did not operate to preclude the bringing of a motion under O.12, r.26 to set aside service outside the jurisdiction. These cases include *Minister for Argriculture v. Alte Leipziger* (above), *Kutchera v. Buckingham International Holdings* (above), *Analog Devices BV v. Zurich Insurance Co.* [2002] 1 IR 272 and *O'Flynn v. Carbon Finance Ltd* [2015] IECA 93. It is perhaps notable that although all these cases dealt with applications to set aside service under O.12, r.26, the reason each of the defendants sought to have service set aside was directly linked to the jurisdictional issue which was the subject of the conditional appearance. In other words, an application under O.12, r.26 was the procedure chosen to have the jurisdictional issue itself determined – as indeed it was here although because of the decision made as to service the jurisdictional issue *simpliciter* was not reached. One other case mentioned by the defendant in this regard does not seem to be on point. In *Fox v. Taher* (Unreported, High Court, 24 January 1996) Costello P. noted that it was of *"vital significance"* that *"no appearance was entered"*. The failure to enter an appearance of any sort had resulted in judgment being marked in the Central Office against the defendant.

70. The plaintiff was unable to point the court to any authority supporting the proposition that the entry of a conditional appearance constitutes a waiver of a defect in service. In light of the case law discussed above, it appears that the entry of a conditional appearance does not preclude an application being made under O.12, r.26 notwithstanding that the text of that rule envisages an application being made by a defendant to set aside service *"before appearing"*. Indeed, this much was implicitly acknowledged by Fennelly J. in *Analog*

Devices (above) where he distinguished between the position of the defendants on the basis that *"no question could arise regarding the service of the proceedings"* on the defendant *"which entered an unconditional appearance"*. He then proceeded to consider the application under O.12, r.26 brought by the defendant which *"entered an appearance under protest for the sole purpose of contesting the jurisdiction of the High Court"*.

71. Nonetheless there may be a broader issue as to whether a defendant who enters a conditional appearance without flagging on the face of the appearance or in correspondence that the validity of service is also disputed, is then estopped from raising the validity of service in an application brought for the purposes of challenging jurisdiction. When viewed in this manner the plaintiff's argument is really one to the effect that the defendant should be estopped from disputing service because of the entry of a conditional appearance, a point which I will consider further below.

72. The defendant strongly resisted the suggestion that the entry of a conditional appearance without mention of service could be regarded as acquiescence to such service. He argued that to be precluded from raising the question of service he would have to have expressly submitted to the jurisdiction of the Irish courts in some way which it was clear that he had not done. Further, the defendant contended that in this instance the issues raised by him regarding the validity of service are jurisdictional in nature. The exercise by an Irish court of jurisdiction over someone who is not resident here in connection with a dispute about contracts which were not made here, requires that person to be validly brought before the Irish courts. In other words, the making of a valid order under O.11, r.1 is a precondition to the Irish courts having and exercising jurisdiction over the dispute and over the defendant.

73. In my view, the entry of a conditional appearance in the circumstances of this case cannot be treated as acquiescence on the defendant's part to the service effected on him by the plaintiff. Every action taken by the plaintiff in this case has been contested by the

defendant, and so far successfully so contested. In this context, the entry of a conditional appearance cannot be read merely as the raising of a discreet jurisdictional issue but reflects a singular determination on the defendant's part not to accept personal liability in respect of the plaintiff's claim nor to accept the jurisdiction of the Irish courts to determine it.

74. A conditional appearance cannot, in my view, be treated as partial in the sense that it amounts to a submission to the jurisdiction of the Irish courts for some purposes but not for others. Unless and until the jurisdictional issue is positively determined in favour of the Irish courts, the defendant cannot be said to have accepted that jurisdiction in any form or to any extent unless he does so expressly. In circumstances where the Central Office will only accept a conditional appearance on the grounds of jurisdiction, the failure to expressly mention any other preliminary ground of challenge such as service cannot in my view be construed as a representation by the defendant that the validity of service has been accepted.

75. In any event, the omission of any express reference to service on the face of the conditional appearance has not prejudiced the plaintiff in any real way. The onus was on the plaintiff to ensure that the summons of which he wished to serve notice was in force so that it could be properly served. The failure of the defendant to flag the issue in his conditional appearance has not caused or contributed to the plaintiff's failures in this regard. The only prejudice identified by the plaintiff is that the High Court did not determine the jurisdictional issue which he had come to court prepared to argue. To my mind this is not a real prejudice. The question of valid service is naturally anterior to the question of jurisdiction and the plaintiff does not have an entitlement to have the jurisdictional issue determined against the defendant if the defendant has not been validly brought before the Irish courts.

76. Separately, it might be queried as to whether the filing of a conditional appearance which requested the delivery of a statement of claim alters these conclusions in any way or

indeed does the fact that a statement of claim was actually delivered? Interestingly, the standard forms provided at Forms Nos. 6, 7 and 8 of the Rules of the Superior Court for the purposes of contesting jurisdiction under Orders 11A, 11B and 11C do not include a paragraph requesting the delivery of a statement of claim. As previously noted, although the right to file a conditional appearance to contest jurisdiction has long been recognised, it is not expressly provided for in the Rules except in the case of the three Orders mentioned above. The absence of an applicable rule and related form no doubt led the defendant to use a hybrid of Form No. 1, which is the general appearance to be entered under O.12, r.9 and which does allow for a statement of claim to be requested and Forms No. 6, 7 and 8 which do not.

77. Requesting a statement of claim is not, in my view, inherently contrary to the notion of contesting jurisdiction as the basis on which jurisdiction is being asserted may or may not be fully apparent from the summons itself. In this case, for example, the agreement of 13 December 2012 which contains the jurisdiction clause on which the plaintiff relies is not pleaded on the face of the summons. Consequently, it is not immediately apparent from the summons itself that this is the basis upon which it is contended the Irish courts have jurisdiction. Therefore, in some cases service of a statement of claim may be necessary to establish the asserted basis for jurisdiction so that it can then be challenged.

78. Order 20 provides for the circumstances in which a statement of claim may and must be served. Under O.20, r.2 a statement of claim may be delivered by a plaintiff at the same time a plenary summons is served or at any time within eight weeks thereafter. In 2018 when notice of this summons was purportedly served on the defendant, that period stood at 21 days. Where an appearance is entered which requests the delivery of a statement of claim or a notice to that effect is served within 8 days of the entry of an appearance, then the plaintiff has 21 days from the entry of the appearance or receipt of the notice to deliver the

statement of claim. If no appearance is entered then, in principle, under O.20, r.4 no statement of claim is required. However, under O.13, r.19 the plaintiff may be required to serve a statement of claim in order to proceed to apply for judgment in default of appearance. There may be adverse costs consequences to unnecessarily requesting or delivering a statement of claim.

79. All of this suggests that the extent to which delivery of a statement of claim can be regarded as a burden imposed on a plaintiff by a defendant is variable. In circumstances where a statement of claim can be delivered without being requested and, in cases where conditional appearance has been entered, may nonetheless be required to determine the basis upon which jurisdiction is asserted, requesting or receiving a statement of claim cannot itself be characterised as submission to the court's jurisdiction by the defendant. Nor do I think that the delivery by the plaintiff of a statement of claim when requested by a defendant is a step of such moment or which entails such legal costs that it amounts to a detriment to a plaintiff which would preclude a defendant from contesting jurisdiction or service thereafter. Of course, there may well be circumstances in which steps taken by a defendant after service of proceedings do impose upon a plaintiff such a burden in terms of time or costs that it would be inequitable to allow a defendant thereafter to dispute the validity of the service of the proceedings upon him. Manifestly, that point has not been reached in this case. The issue as to service was raised by the defendant at the outset of the hearing of a motion brought by him contesting the jurisdiction of the Irish courts to entertain the claim. There has been no extended pleading in this case, no discovery, no interlocutory applications etc. and the matter is very far from trial.

Summary of Conclusions on Order 12, Rule 26

(a) A conditional appearance represents a positive statement by the party filing it that they have not submitted to the jurisdiction of the Irish courts. Consequently, a conditional appearance cannot be parsed into components so as to treat a defendant who has entered it as having submitted to the jurisdiction of the Irish courts in respect of some issues but not in respect of others. This is especially so as the Rules do not permit any issue other than service to be identified on the face of a conditional appearance;

(b) Although the text of O.12, r.26 suggests that an application under that Rule must be brought before an appearance is entered, there is an established practice before the Superior Courts, supported by case law, allowing such applications for the purposes of challenging jurisdiction following the entry of a conditional appearance;

(c) Unless a defendant expressly represents otherwise, a conditional appearance does not amount to submission to the jurisdiction of the Irish courts in any way and any issue relevant to jurisdiction may be raised by the defendant;

(d) It is open to a defendant to raise an issue as to service under O.12, r.26 when a conditional appearance has been filed if the validity of the impugned service is a precondition to the court validly assuming jurisdiction over the defendant and over the dispute the subject of the proceedings;

(e) The omission of any reference to service from the face of a conditional appearance or from correspondence exchanged between the parties' solicitors does not amount to a representation upon which a plaintiff can rely to contend that the defendant has waived any defect in service particularly where the defect in issue is closely related to the court's jurisdiction over the proceedings;

(f) Neither a request for a statement of claim on the face of a conditional appearance nor the delivery of a statement of claim pursuant to that request alter the above conclusions.

80. It follows from the foregoing that in my view the trial judge was correct both in allowing the defendant to raise an issue as to the validity of the service effected upon him at a time when the summons was not in force and in determining that issue as he did. I do not regard this issue as having been raised by the defendants at a late stage. Clearly this was a point which neither side had adverted to until shortly before the hearing of the motion. Nonetheless, the point when raised went to the validity of a High Court Order and whether that Order could or should have been made had all of the relevant information been brought to the attention of the High Court judge by the plaintiff. It is immaterial that the plaintiff's failure in this regard was inadvertent. Eagar J. could not have made an order allowing for service of notice of a summons out of the jurisdiction at a time when the summons was not in force and, presumably, would not have made that order had he known the summons had lapsed. This is a fundamental antecedent flaw which the High Court had to address once it was raised by the defendant.

Should the Defendant have Moved Under Order 124?

81. The plaintiff contends that once an appearance was entered, even conditionally, the defendant's application ought to have been brought under O.124 rather than O.12, r.26. Order 124 deals with the *"Effect of Non-Compliance"* and provides that non-compliance *per se* does not render proceedings void unless a court so directs. However, O.124, r.1 also acknowledges that proceedings can be set aside, in whole or in part, as being irregular. There is no definition of what constitutes *"irregular"* save that irregularity flows from non-compliance with the Rules. It is probably reasonable to assume that the distinction drawn by

Lord Denning in *Sheldon v Brown Bayley's Steel Works* (above) between a defect that causes an irregularity and thus is capable of being cured and a defect amounting to a nullity which is incapable of being cured is applicable here. In addition, I think that O.124, which has been characterised as conferring a broad discretion on the High Court, can be characterised generally as being framed in ease of the party responsible for the irregularity.

82. The plaintiff relied in particular on three elements of O.124. These were firstly the obligation to make any application to set aside proceedings *"within a reasonable time"*, secondly, the fact that a party is precluded from applying to set aside proceedings if they have taken *"any fresh step after knowledge of the irregularity"* and, thirdly, the fact that under O.124, r.3 the *"several objections intended to be insisted upon"* must be set out in the notice of motion grounding the application to set aside for irregularity. The plaintiff contends that the defendant has not acted within a reasonable time, had effective knowledge of non-renewal of the summons from 2018 but did not raise it until 2020 after a number of fresh steps had been taken and did not set out non-renewal of the summons as a ground in his notice of motion. This last objection is undoubtedly correct as a matter of fact but will only be relevant if the defendant was obliged to proceed under O.124 rather than O.12, r.26 as the latter rule does not contain any equivalent stipulation.

83. I am not satisfied that either of the other complaints are valid even if the defendant were bound to proceed under O.124. There is no definition of what constitutes a reasonable time so that what is reasonable must be assessed in the context of all of the circumstances of the particular case. Here the case is still at a very preliminary stage. The defendant has disputed both service of the proceedings on him and the jurisdiction of the Irish courts to entertain the plaintiff's case. The jurisdictional issue has yet to be determined even at first instance. Leaving aside the length of time the application has taken to progress through the courts, it is hard to see how raising an issue of this nature in the context of a preliminary

application regarding jurisdiction could be characterised as involving any unreasonable delay.

84. The plaintiff also points to alleged delay by the defendant at an earlier stage in the proceedings namely between service of notice of the proceedings on the first occasion in April 2015 and the bringing of the first motion to set aside in October 2016 (some 18 months) and a similar but shorter delay between the service of notice of the proceedings on the second occasion in August 2018 and the second motion to set aside in February 2019 (6 months). In circumstances where the first order allowing service out of the jurisdiction and the service of notice of the proceedings pursuant to that order was set aside by Ní Raifeartaigh J. on the grounds of the plaintiff's material non-disclosure, I do not think that the plaintiff can rely on any delay by the defendant prior to that point as being relevant to this application. Further, I do not think that the period of six months between August 2018 and February 2019 is a delay of such magnitude that, had the defendant brought his application under O.124, it could be said not to have been made within a reasonable time.

85. There was some dispute between the parties as to when the defendant could be said to have had knowledge of the irregularity in circumstances where both parties accepted that they were actually unaware of the issue until shortly before the hearing of the motion (in the case of the defendant) and the hearing itself (in the case of the plaintiff). The plaintiff contends that the defendant had exactly the same knowledge and information available to him as did the plaintiff, namely the inference to be drawn from Ní Raifeartaigh J.'s order that once the service effected on the first occasion was set aside, the summons necessarily lapsed and would require to be renewed. This may well be so but even if the defendant were to be fixed in April 2018 with knowledge that renewal would be required, it cannot be inferred from that fact alone that the defendant had or ought to have had knowledge that the plaintiff had failed to seek renewal.

86. It seems that many aspects of service in this case were slipshod. Apart from the errors made on the first occasion (the inclusion of a certification under the Brussels Regulation and the failure to amend the plenary summons to remove it before notice of the summons was served), on the second occasion the endorsement on the notice of the summons suggested that Eagar J. had granted leave to issue and serve notice of the summons rather than just to serve it. Counsel for the defendant accepted that in normal course an order renewing a summons (or notice of that order) would be served with a summons itself such that the absence of such an order might suggest that the summons had not been renewed. However, in this case a number of orders were made at various stages including an order extending the time within which to serve the summons on the first occasion and orders amending the summons, none of which were served on the defendant. Consequently, where the plaintiff had established a pattern of not serving ancillary orders – or at any rate of not doing so consistently – the defendant could not be expected to infer from non-service of a renewal order that the service had not, in fact, been renewed.

87. I agree with the arguments made by the defendant in this regard. I think it would place too high an onus on a party to fix them with knowledge of irregularities in proceedings arising as a result of the other party's default solely on the basis of the non-service of an order which ought to have been made and, if made, which ought to have been served. The primary onus lay on the plaintiff to ensure that the summons of which notice was served was valid and to have applied for renewal of the summons to this end. The defendant is not obliged to second guess the plaintiff's actions and certainly cannot be fixed with knowledge of a default on the plaintiff's part of which the plaintiff himself was unaware.

88. In any event, the defendant argues that he was not obliged to bring his application under O.124 as O.124 is designed to deal with defects in the proceedings themselves rather than with service of proceedings which are ostensibly regular. For example, in *Abama v.*

Gama Construction (Ireland) Limited [2015] IECA 179 the plaintiff sought and obtained leave to serve the proceedings out of the jurisdiction under O.11 in circumstances where they could have also invoked O.11A or O.11B. Because they had not invoked these orders, they had not included the necessary endorsement on the summons. The Court of Appeal held that the summons could be amended under O.124, r.1 to include the omitted endorsement. The summons constituted the proceedings for the purposes of the rule, the defect rendered the summons irregular and was capable of being amended in this manner. Analogous comments were made by Finnegan P. (albeit not in a context where O.124 was invoked) in *McKenna v. JG* [2006] IEHC 8 in holding that commencing proceedings by summary summons which should have been commenced by plenary summons did not render those proceedings a nullity. The plaintiff places particular reliance on the *obiter* comments of the same judge in *McK v. MB* [2005] IEHC 164 to the effect that *"service outside the period of 12 months from the date of issue is not a nullity but an irregularity"* to which O.124, r.2 could apply. However, the problem here is not simply service of a lapsed summons, but service of a lapsed summons on foot of a court order which necessarily presumed that the summons was in force.

89. The defendant notes that he is not seeking to have the proceedings set aside. He is seeking primarily to have service of notice of the proceedings on him set aside and the order pursuant to which such service was purportedly affected discharged. Subsequently, he will contend that the summons should not be renewed. The proceedings will remain extant but in the absence of service they will be of no benefit to the plaintiff. The difference may be theoretical, but it is nonetheless real. It reflects the core difference between O.124 and, for example, O.12, r.26 which is that the former deals with defects which are largely procedural in nature whereas the latter can deal with defects going to jurisdiction. Indeed, I note with some interest that all of the cases cited to the court on Order 124 were cases in which the

court amended the proceedings or dealt with the irregularity in a manner which facilitated the plaintiff's progression of the proceedings. In none of the cases cited were the proceedings set aside and it is not clear from the case law that the order is widely used, if at all, for this purpose.

90. The starting point for dealing with this issue must be to recognise that the procedures provided for under the Rules are not strictly demarcated such that the availability of relief under one rule must necessarily mean that no relief can be available under any other rule. There are many instances of overlap. Alternative relief is frequently sought under different rules in a single notice of motion and relief may be granted by a court under more than one rule. Of course, there are rules specifically designed to deal with certain situations and a failure to invoke or to comply with those rules may have serious consequences for the litigation.

91. However, there are also rules which are more general in nature and which provide *"catch all"* remedies with the potential to apply across a range of circumstances and procedures. Order 124 falls into this category as indeed does O.122, r.7 under which the time fixed by the Rules for the doing of any thing or the taking of any step may be enlarged – save, interestingly, the time fixed under O.8. Whilst broad rules of this nature undoubtedly serve an important purpose (as was recognised in the case of O.124 by Smyth J. in *Earl v. Cremin* [2007] IEHC 69), it is difficult to see that they could be treated as providing an exclusive basis for taking a step that can equally well, if not better, be accommodated under another rule.

92. In this case it might well have been open to the defendant to make an application to set aside the proceedings under O.124 but it does not follow from this that it was not open to him to make the application actually made under O.12, r.26. If it was open to the defendant to make the application under O.12, r.26, the court cannot refuse relief on the

grounds that he would not have qualified for different relief under a different rule. I have held earlier that it was open to the defendant to make this application under O.12, r.26. There is ample case law demonstrating the willingness of courts to consider issues concerning the service of proceedings under O.12, r.26 where a conditional appearance has been entered to challenge jurisdiction. In circumstances where O.12, r.26 provides a specific rule under which an application can be made to set aside service of a summons or notice of the summons and to discharge the order authorising such service I am not prepared to hold that in this case the defendant was bound to move under the more general provisions of O.124 and seek to have the proceedings themselves set aside. Insofar as the plaintiff's case in premised on O.12, r.26 not being available to the defendant because a conditional appearance had been entered, I have considered and dealt with this earlier in my judgment.

Renewal of Summons Under Order 8

93. Although renewal of the summons under O.8 is the subject of a separate and indeed longer High Court judgment than that dealing with the issues I have just covered, this issue played a minor role in the appeals before this Court. In fairness, this may well have been in part because of the delivery of two judgments by the Court of Appeal since this matter was initially argued in the High Court. These have resolved many of the uncertainties arising from the new text of O.8 adopted in January 2019 which were the subject of argument before Sanfey J. The judgments in question are those of Haughton J. in *Murphy v. HSE* [2021] IECA 3 and of Noonan J. in *Nolan v. Board of Management of St. Mary's Diocesan School* [2022] IECA 10.

94. In *Murphy v. HSE* Haughton J. reviewed a range of High Court decisions as to how the revised text of O.8 was to be interpreted. These included the decisions of Meenan J. in *Murphy and Cullen v. ARF Management Limited* [2019] IEHC 802; O'Moore J. in *Ellahi v.*

The Governor of Midlands Prison [2019] IEHC 923; Hyland J. in *Brereton v. National Maternity Hospital* [2020] IEHC 172; Barr J. in *O'Connor v. HSE* [2020] IEHC 551 and Simons J. in *Downes v. TLC Nursing Home Limited* [2020] IEHC 465. Haughton J. considered that the approach adopted in some of these cases to the effect that O.8 created a two-tier approach under which the court must firstly consider whether there were special circumstances which justify the extension of time to make an application and then consider whether there was a good reason to allow the renewal of the summons was incorrect. He stated as follows:

> *"59. The second point is that sub-rule (3) refers to an "application to extend time for leave to renew the summons". It does not refer to an application seeking an extension of time to bring an application for leave to renew, or seeking leave to bring an application for leave to renew. To read these words into sub-rule (3) is to introduce words that simply are not there. Had the legislature intended to impose a two-tiered test for renewing the summons – special circumstances in respect of the extension of time for the application and 'good reason' for renewal of the summons – it would have done so explicitly. Nowhere in either sub-rule (3) or (4) is there mention of a twofold test, and nowhere is the term "good reason" used in connection with the court application.*
>
> *60. Nor can the wider phrase "application to extend time for leave to renew" cast doubt on this. The term "leave to renew" is also used in sub-rule (1) in respect of the application to the Master, and refers to the permission of the Master or the court, as the case may be, that leads to the renewal of the summons in the Central Office by stamping in accordance with sub-rule (5).*
>
> *61. Accordingly sub-rule (3) entitles a plaintiff to bring an application for renewal, and does not impose a preliminary hurdle of persuading the court to extend time for*

making such an application, whether on showing 'special circumstances' or on satisfying any other test.

62. This is reinforced by the wording in sub-rule (4) –

> *"(4) The Court on an application under sub-rule (3) may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive where satisfied that there are special circumstances with justify an extension, such circumstances to be stated in the order."*

This deals with the substantive application for renewal. The first phrase references "an application under sub-rule (3)" and therefore refers back to the "application to extend time for leave to renew". The legislature has clearly applied a single test to this substantive application – the court must be "satisfied that there are special circumstances which justify an extension". There is no reference to a second test, or any requirement to satisfy the court of "good reason".

95. Haughton J. then looked at what *"special circumstances"* required in the context of O.8, r.4. He held, firstly, whether special circumstances arise must be decided on the facts of a particular case, there being no hard and fast rules. Secondly, the test was higher than that of *"good reason"* which applies to renewal of a summons before the Master of the High Court where the application is made before the initial twelve-month period expires. Thirdly, he held that whilst the use of the word *"special" "does not raise the bar to "extraordinary", it none the less suggests some fact or circumstance that is beyond the ordinary or the usual needs to be present."*

96. He agreed with the analogy drawn by Hyland J. in *Brereton* with the use of a similar concept in the context of applications for security for costs and subject to the important proviso that the court must consider and balance the interests of each of the parties in a fair and proportionate manner. Haughton J. put it thus:

"The court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused."

97. At a later point Haughton J. identified that the need for the court to consider the interest of justice, prejudice and the balance of hardship arises from the phrase *"special circumstances* [which] *justify extension".* Thus, while special circumstances might normally justify renewal, there may be countervailing circumstances such as material prejudice to the defendant which, when weighed in the balance, would lead a court to decide not to renew.

98. Finally, and importantly in the context of this appeal, Haughton J. noted that once a trial judge is satisfied that special circumstances exist, the jurisdiction to grant leave to renew is discretionary. He concluded that *"this court, in reviewing a decision to renew a summons, should afford the trial judge a margin of appreciation and should not interfere with the decision unless the trial judge has erred in principle or there is a clear error of fact or breach of the rules of natural justice."*

99. The comments of Haughton J were adopted and upheld by Noonan J. in *Nolan v. St. Mary's* (above). Counsel for the plaintiff in that case had argued that the judgment in *Murphy* meant that whether special circumstances existed was to be considered in tandem with the question of prejudice, there been no second limb to the test. Noonan J. rejected this as an mis-interpretation of *Murphy*. He stated:

"25. ... Haughton J. recognised that special circumstances alone are not enough and placed emphasis on the requirement for those circumstances to justify extension. His reference to there not being a second tier or limb to the test refers to the fact that special circumstances <u>and</u> the justification for renewal are not two separate and

distinct matters, but fall to be considered together in the analysis of whether it is in the interest of justice to renew the summons. Prejudice is a component of that analysis.

26. However, before that analysis can be arrived at, it must be established that there are special circumstances. This follows from the court's approval of the Chambers approach and accords with common sense. The plaintiff's contention that the court is required to consider prejudice from the outset is to put the cart before the horse and would lead to a result diametrically opposed to the clear intent of the new rule."

100. From these judgments it appears that the onus is on a plaintiff to establish that there are special circumstances which may potentially justify the renewal of the summons. However, in considering whether those circumstances do provide such justification, the Court must consider and weigh in the balance any countervailing circumstances for prejudice asserted by the defendant. This is not a two-stage process and certainly not a process at which different tests apply at each stage but is part of a broader consideration as to whether it is in the interests of justice that the summons be renewed in the particular case.

101. An overarching feature of these applications is, as I explained in *Klodkiewicz v. Palluch* [2021] IEHC 67 (albeit a case dealing with the old text of O.8), that in almost all cases where a renewal of a summons is sought, the expiration of a limitation period which would preclude the institution of fresh proceedings is an issue for the plaintiff. This fact alone cannot constitute special circumstances which justify renewal of the summons, as renewal would then become virtually automatic in every case. It is, however, a factor which may be considered as part of the court's overall analysis as it goes to the hardship that will likely be suffered by a plaintiff if the summons is not renewed.

102. In the context of this appeal and recognising the caution that the Court of Appeal should exercise in interfering with the decision of a trial judge made in the exercise of his or her discretion, I should state at the outset that I think the judge was entirely correct in his

understanding of how, in light of the recently delivered decision in *Murphy v HSE*, he should approach the requirement of special circumstances under O.8. At para. 52 of his judgment he stated that:

> *"It is clear that the correct approach is to consider, not just any specific circumstances proffered as excusing the delay, but whether or not there are "special circumstances which justify an extension" by reference to the wider circumstances of the case, and in particular the interests of justice."*

This statement should be read in the context of his observation in the previous paragraph that a consideration of whether or not there are special circumstances is not separate from the consideration of the interests of justice, prejudice and the balance of hardship. Although the decision in *Nolan v St. Mary's* was not delivered until after Sanfey J.'s decision, I think it implicit that the extent to which the existence of special circumstances is linked to a consideration of the interests of justice, prejudice and the balance of hardship focuses on the extent to which the special circumstances proffered by the plaintiff justify the extension of leave to serve the summons in light of these factors. This broader, holistic consideration does not remove from a plaintiff the *prima facie* obligation to identify those special circumstances nor reduce the threshold from that identified by Haughton J. in *Murphy v HSE*.

103. The issue of delay was of some concern to Sanfey J. both because of the length of the delay and the fact that the plaintiff did not rely on or proffer reasons excusing that delay as *"special circumstances"*. Notwithstanding that he felt the plaintiff's inadvertence to the need to renew the summons could not constitute special circumstances in light of the very considerable delay which had already occurred, Sanfey J. proceeded to consider both the reasons for and the effects of the delay particularly from the perspective of the interests of justice and the balance of hardship. He focussed on the delay between the point at which an

application to renew the summons was made to Eagar J. in July 2018 and the date of the motion before him, June 2020, a period of two years. If anything, I think regard should be had to the longer period between the expiry of the summons and the bringing of the motion, a period of five years. Because of the time taken with the various applications, as I write this judgment the summons is now nine years old and has been expired without renewal for a period of eight years.

104. The plaintiff contends that all bar one of the factors which Hyland J. found constituted special circumstances in *Brereton* are also present in this case. These include an intention to serve the summons within time; a failure to do so through inadvertence; the defendant's knowledge of the intended proceedings from an early stage; a lack of significant prejudice to the defendant or, at any rate, a failure by the defendant to identify any such prejudice and the fact that the plaintiff's case will likely be statute barred if the summons is not renewed. Given that each application to renew a summons falls to be dealt with in light of the particular facts and circumstances of the case, care should be taken in treating factors which were relevant to one case as a check list for another. That said, the comparison here is somewhat artificial when the delay between the expiry of the summons and the application for renewal in *Brereton* was some ten weeks whereas the equivalent delay here is in excess of five years. The plaintiff acknowledges that the shortness of the delay *per se*, a factor which went towards the existence of special circumstances in *Brereton*, does not apply here. The plaintiff does not address whether the weight to be attached to factors which Hyland J. saw as flowing directly from the relatively short delay, such as the lack of prejudice, should be different given the significantly longer period in issue here.

105. In addition, the plaintiff makes a convoluted argument linking the defendant's failure to raise the expiry of the summons until the first day of the hearing and the changes to O.8 which occurred between the date of Ní Raifeartaigh J.'s order and the time the motion was

heard. The plaintiff points out that the requirement to show special circumstances introduced in the new text of O.8 in January 2019 did not apply at the time the summons should first have been renewed (presumably post-April 2018), nor at the time the second application for service out was made in July 2018 or the time that the defendant filed his conditional appearance in October 2018. This, it is contended, of itself, constitutes special circumstances which justifies the renewal of the summons.

106. I cannot see the logic of this argument. The need to renew the summons did not arise because the defendant raised the point. It arose once the initial service effected pursuant to Hedigan J.'s order was set aside by Ní Raifeartaigh J.. At that point, the summons had not been validly served and as it was more than twelve months since the date on which it was issued, it expired under the then extant version of O.8 and required renewal. It was open to the plaintiff to seek renewal at that point and to have availed of the lower *"good reason"* threshold, but the plaintiff did not do this. I accept the plaintiff's failure in this regard was entirely due to a failure to appreciate that the summons required renewal. However, the defendant has also acknowledged that he did not immediately realise the summons both required renewal and had not been renewed. There is certainly no basis for suggesting that the defendant deliberately withheld knowledge of this issue from the plaintiff, much less that he did so in the expectation that the law would change and make it more difficult for the plaintiff to successfully apply for renewal. Consequently, the court must apply the law as it currently exists to the plaintiff's application. I am not prepared to treat the fact that an application could have been, but was not, made earlier under a more favourable legal regime as a special circumstance justifying renewal.

107. I should also point out that the plaintiff did not make the case on appeal that the earlier "*good reason*" test would have been satisfied. Even if I were wrong in the foregoing conclusion that a change in the law raising the threshold applicable to the grant of relief does

not constitute a special circumstance, I do not think I could treat it as such in the circumstances of this case unless I were satisfied that the plaintiff would definitively have succeeded under the old rule.

108. A related point is made by the defendant to the effect that it was open to the plaintiff to issue fresh proceedings after Ní Raifeartaigh J. had set aside service of the original summons. In fact, the defendant indicated that he expected fresh proceedings in light of an averment made by the plaintiff in an affidavit sworn in 2017 to the effect that he would be prepared to sever the issues concerning the pension fund investment in Norway from the balance of the proceedings which he wished to have decided in Ireland. At that point the defendant presumably expected that new or amended proceedings would be served on him concerning the personal investment only. This did not happen.

109. Further, the defendant contends that it was open to the plaintiff to issue fresh proceedings on a protective basis when the point was first raised in February 2020. The plaintiff disputes this saying that the first demand for repayment was made in solicitor's correspondence dated 15 August 2013 and, consequently, the limitation period expired in August 2019. The difference between the parties on this point arises from the fact that mention was not made of the agreements dated July 2011 and December 2012 under which the defendant allegedly provided a personal guarantee in respect of the investment until a demand was made on foot of those guarantees in April 2014. Thus, the date on which the cause of action accrued may vary depending on whether it is characterised as a direct demand for repayment of the monies invested or as a demand on foot of a personal guarantee in respect of the monies invested. Obviously, this is not an issue which can be determined in the context of this application. Nonetheless, I think regard can be had to the fact that subsequent to Ní Raifeartaigh J.'s order the plaintiff had the opportunity to start afresh and to issue new proceedings. There may well have been costs consequences for the plaintiff in

doing so but it would nonetheless have afforded an opportunity for the plaintiff to proceed unincumbered by the various errors which had by then already occurred.

110. At the same time, the reason it was open to the plaintiff to do this is that the original proceedings were issued well within the six-year time limit for proceedings for breach of contract, whether that is measured as running from 2013 or 2014. Therefore, in overall terms the impact of the delay on the defendant is somewhat mitigated by the fact that the plaintiff had acted promptly in the institution of proceedings in the first place.

111. There are essentially three strands to the case made by the plaintiff on special circumstances. These are firstly the intention to serve the summons within time – as evidenced by the fact that service was originally effected in April 2015 – and the failure to do so through inadvertence; secondly the lack of prejudice to the defendant due to his knowledge of the proceedings and the detail thereof from an early stage and, thirdly, the fact that the plaintiff's claim will likely be statute barred if the summons is not renewed.

112. I have some difficulty with the way in which the plaintiff has characterised the first of these. Whilst the desire of the plaintiff to downplay the problems are understandable, I cannot see how the lack of candour identified by Ní Raifeartaigh J. in the plaintiff's original application for service out can be treated as simple *"inadvertence"*. The failure to appreciate that the summons required to be renewed before the second application for service out can be characterised as inadvertence. However, a third application to serve the defendant out of the jurisdiction, which is the underlying purpose in seeking to have the summons renewed, arises because of the defects in both earlier applications, only one of which can be truly characterised as being due to inadvertence.

113. Cases where summonses have been renewed following a failure to serve in time due to inadvertence have generally involved either a genuine oversight, usually coupled with a short period of delay, or circumstances such as those in *Chambers v. Kenefick* [2007] 3 IR

526 where the plaintiff's solicitor mistakenly thought that a summons had been served when, in fact, only a copy had been sent to the opposing side. No authority was opened to the court where the earlier service of a summons was set aside due to a lack of candour, much less where this was then treated as simple inadvertence. Unfortunately for the plaintiff, in my view the analysis must have a less benign starting point. The plaintiff's intention to serve the defendant within time was undone because of serious shortcomings in the way in which the plaintiff approached the application before Hedigan J. As a result of that, renewal of the summons was required.

114. There are two elements to the second strand, namely the extent to which the defendant had knowledge of the proceedings from an early stage and the extent to which the defendant will be prejudiced if the summons is renewed. The defendant does not dispute the fact that he had notice of the proceedings from an early stage nor that he was aware of the details of the claim as a result of earlier service, including the delivery of a statement of claim. He counters that the plaintiff was equally aware from the outset that the defendant would not voluntarily submit to the jurisdiction of the Irish courts so there was a heightened onus on the plaintiff to ensure the defendant was validly brought before the courts in this jurisdiction. However, the sharpest disagreement between the parties is on the respective prejudice and hardship which links the second to the third strand of the plaintiff's argument.

115. Undoubtedly the plaintiff will suffer if renewal of the summons is refused, and the claim is statute barred. This hardship may not be as dramatic as in other cases. There are already proceedings in being in Norway (perhaps even concluded). Although these are between different parties, they concern the same investment made by the plaintiff's pension fund in a Norwegian company which the plaintiff alleges to be the subject of a personal guarantee given to him by the defendant. If the pension fund were to succeed to any extent in the Norwegian proceedings this would reduce or perhaps even eliminate any potential

liability on the part of the defendant pursuant to the personal guarantee (which liability is, of course, disputed by the defendant). Further, from the outset the defendant has agreed to submit to the jurisdiction of the Manx courts as regards the plaintiff's personal investment. The plaintiff believes that a right of action before the Manx courts is worthless as the defendants does not have assets in the Isle of Man. There is no information before the court as to the applicable time limits for bringing proceedings in the Isle of Man and whether that time limit has now expired. Given the absence of this information and the fact that there is a very live dispute between the parties as to the jurisdiction of the Irish courts, I would not be minded to treat a potential cause of action in the Isle of Man as significantly minimising any hardship to the plaintiff. I do, however, regard as relevant the fact that the plaintiff's pension fund has availed of a right to sue before the Norwegian courts in respect of the investment made there which amounts to just over half of the total sum in issue in these proceedings.

116. The prejudice relied on by the defendant is two-fold. It is now over twelve years since the first of the investments was made and, even if the summons were to be renewed, the proceedings still have not been validly served. There remains a significant jurisdictional issue to be determined - and possibly even a preliminary issue as to whether the Irish courts should determine the jurisdictional issue – before the proceedings proper can get under way. If the plaintiff succeeds the case will likely be heard some fourteen or fifteen years after the dates of the events giving rise to the proceedings. This inevitably has an impact on the ability of witnesses to give clear and cogent evidence of these events.

117. More specifically, the defendant relies on the absence of Mr. Grant-James as a witness. The matter was heard by Sanfey J. before the death of Mr. Grant-James. Sanfey J. did not regard Mr. Grant-James' non-availability as having been definitively established, particularly in light of the increased use of remote platforms for the taking of evidence from

witnesses outside of the jurisdiction or who are otherwise unable to attend court. Nonetheless, he accepted that there was a risk that the delays in the proceedings would have impinged adversely on Mr. Grant-James' ability to give evidence and that this difficulty might increase. He characterised the resulting prejudice to the defendant as *"moderate but not insignificant"*. Obviously, the death of Mr. Grant-James significantly increases the level of prejudice likely to be suffered by the defendant. The plaintiff claims that the agreements upon which he relies to evidence the personal guarantee allegedly given by the defendant were in the safe keeping of Mr. Grant-James who then gave them to him at a meeting in the Isle of Man in October 2013. Mr. Grant-James disputed this account on affidavit. If the plaintiff's account of how he came to be in possession of the copies of the agreements on which he relies were not to be accepted, this would in turn cast doubt on the veracity of the agreements themselves and would tend to support the defendant's contention that they are forgeries. The non-availability of Mr. Grant-James will undoubtedly deprive the defendant of the benefit of evidence on which he would have relied at trial.

Conclusions on Renewal

118. The circumstances of this case are highly unusual. Two previous orders granting the plaintiff leave to serve notice of the summons on the defendant out of the jurisdiction have been set aside by the High Court. On the first occasion service was set aside because the order authorising it had been made in circumstances where, due to a lack of candour on the plaintiff's part, there was material non-disclosure when the application was made to the High Court. On the second occasion the order was made at a time when the summons had lapsed and had not been renewed. At all times the defendant not merely refuted personal liability for the matters pleaded against him, but strenuously disputed the jurisdiction of the Irish courts to hear the plaintiff's claim. In those circumstances, I share the defendant's view that

there is a heightened onus on the plaintiff to ensure that the procedures provided under the Rules of the Superior Courts are properly followed in attempting to bring the defendant before the Irish courts. Unfortunately, to date there has been a significant failure on the plaintiff's part to ensure that the applications made by him were procedurally correct. Whilst on one occasion this can be attributed to inadvertence, on the other occasion it was due to a lack of candour. The net result is this application to renew was made in excess of five years after the summons expired.

119. The trial judge was clearly live to the differences between the old and new text of Order 8 and took considerable care, to the extent of inviting the parties to make submissions on the decision of the Court of Appeal in *Murphy v HSE* delivered after the original hearing, to ensure that his judgment fully and correctly applied the new test of *"special circumstances"* to the application before him. The plaintiff has not identified nor indeed really attempted to identify any legal error or error of principle made by Sanfey J. in his understanding of this test nor the manner in which he applied it. While the Court of Appeal has jurisdiction on appeal to review a discretionary decision of the High Court, it should be slow to interfere with the exercise of discretion by the trial judge unless it is clear that an injustice may result. In my view, this is not such a case. The trial judge was acutely conscious that considering whether the special circumstances advanced by the plaintiff justified the renewal of the summons necessarily required the interests of justice, potential prejudice and the balance of hardship to be considered at the same time. He carefully weighed these respective factors before concluding that the length of the delay coupled with the plaintiff's repeated failures to observe the Rules of Court and the prejudice likely to be suffered by the defendant meant that that plaintiff had failed to establish special circumstances which justify an extension under Order 8, Rule 4. Since the date of that decision, the extent of the prejudice likely to be suffered by the defendant has increased due

to the death of Mr. Grant-James thus reinforcing the correctness of the decision made by Sanfey J.. In summary, this is not a case in which I think it is appropriate for the Court of Appeal to embark upon the re-exercise of discretion but, even if it were so, I would reach the same conclusion as the trial judge.

120. In all of the circumstances the appeals brought by the plaintiff should be dismissed.

121. In circumstances where the plaintiff has not succeeded in either of his appeals my provisional view is that the defendant should be entitled to an order for the costs of both appeals. If the plaintiff wishes to contend for an alternative order, he has liberty to file a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the defendant will have a similar period to respond likewise. In default of such submissions being filed, the proposed order will be made in the terms suggested above.

122. As this judgment is being delivered electronically, Faherty and Haughton JJ. have indicated their agreement with it and the orders I have proposed.