[2020] IEHC 253

THE HIGH COURT

[2014 No. 2586 S]

BETWEEN

ALLIED IRISH BANK PLC

PLAINTIFF

AND

BRIAN O'DRISCOLL

DEFENDANT

JUDGMENT of Mr. Justice MacGrath delivered on the 2nd day of April, 2020.

1. This is the defendant's application to set aside the renewal of a summons on the ground that the court which renewed the summons did not have jurisdiction to do so. The plaintiff opposes the application and maintains that any alleged want of jurisdiction has been cured by the entry of an appearance by the defendant to the summons. Two principal issues arise for consideration. The first is the jurisdiction of the court to renew a summons which has previously been renewed but not served within the renewed period. The second relates to the effect of an entry of an appearance in such circumstances.

2. It is important to record from the outset, that the issues under consideration concern, *inter alia*, the interpretation of O. 8, r. 1. and O. 122, r. 7 of the Rules of the Superior Courts, before they were amended by S.I. No. 482/2018 (Rules of the Superior Courts (Renewal of Summons) 2018, which came into effect on 11th January, 2019. The provisions of S.I. No. 482/2018 amend not only O. 8, r. 1 but also O. 122, r. 7 (in so far as it applies to applications made pursuant to O. 8). The amended rule was considered by Meenan J. in *Murphy and Cullen v. A.R.F. Management* Ltd [2019] IEHC 802. All references made hereunder to O. 8, r. 1 and O. 122, r. 7 are to those rules before their recent amendment, unless otherwise stated.

Order 8 of the Rules of the Superior Courts

3. Order 8, r. 1. provided:-

> *"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. After the expiration of twelve months, an application to extend time for leave to renew the summons shall be made to the Court. The Court or the Master, as the case may be, 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 six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed summons…"*

4. Order 8, r. 2 provides:-

> *"In any case 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."*

Order 122, rule 7 of the Rules of the Superior Courts

5. Order 122, r. 7, before the recent amendment, provides:-

> *"Subject to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."*

For the sake of completeness, O. 122, r. 7 as amended by S.I. No. 482/2018 now reads:-

> *"(1) Subject to sub-rule (2) and to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed.*
>
> *(2) Sub-rule (1) does not apply to any application to which Order 8 applies."*

Jurisdiction on subsequent application for renewal - summary

6. Where a "*renewed summons*" is neither renewed nor served within the extended period, what is the jurisdiction of the court if application for further renewal is brought outside the period as extended? In *Bingham v. Crowley* [2008] IEHC 453 Feeney J. held that the High Court did not have jurisdiction under O. 8, r. 1, to extend a renewed summons outside the period of renewal. In *Meagher v. Sandys* [2016] IEHC 37, Baker J. supported this view and held that this was not altered by invoking the court's general powers to extend time limits under O. 122, r. 7. She observed that the general provisions of O. 122 could not prevail because *"…such an interpretation would fail to give effect to the precise provisions which govern the relevant application, and an individual Rule which has the force of law."* However, *dicta* of Mahon J. in *Crowe v. Kitara Limited* [2016] IECA 62, which was delivered one month after the decision in *Meagher* and in which *Meagher* was considered, suggest that the position regarding the court's jurisdiction under O. 122, r. 7 was not so absolute.

Entry of appearance to a summons renewed out of time - summary

7. The second issue is the effect of an entry of appearance to a summons which is renewed out of time. In *Lawless v. Beacon Hospital* [2019] IECA 256, Peart J. held that where a summons is not served within the time prescribed by the rules, it does not become a nullity and the entry of an appearance cures any deficiency in service. The circumstances in which renewal was sought in *Lawless* were not the same those which pertained in *Bingham* and *Meagher*. *Lawless* was concerned with an application to set aside a first renewal. The Court considered the legal effect of an appearance to a summons which had been served six months out of time. In light of objections made in correspondence the plaintiff made application to renew under O. 8, r. 1. There had been an exchange of particulars/replies before the application was brought. The issue which arises in this case

is whether the entry of an appearance has the same legal effect where it is contended the court has *no jurisdiction* to renew the summons in the first place.

The proceedings

8. The plaintiff issued a summary summons on 20th October, 2014 claiming the sum of €225,000 allegedly due on foot of a guarantee executed by the defendant on 22nd May, 2006. The guarantee was executed for the purposes of securing a loan/account of Brian O'Driscoll Construction Limited ("*the company*"). It is alleged that sums due on foot of guarantee become due and payable on demand. A letter of demand in respect of the debt was served on the company on 13th January, 2009. A letter of demand in respect of the guarantee was served on Mr. O'Driscoll on 15th January, 2009. The company's debts exceed the amount of the guarantee. The liability of the defendant, if any, on foot of the guarantee is limited to the amount of the guarantee.

9. The summons was not served within the requisite twelve month period. On 30th November, 2015 application was made for an order to renew the summons and to extend the time for service. That application was grounded on the of affidavit Ms. Eileen Grady, solicitor. She averred that a summons server attended at what was believed to be the address of defendant in Moy, Kinvara, County Galway but was informed that he was residing elsewhere. On 30th November, 2015, Faherty J. made an order renewing the summons for a period of six months.

10. Attempts were subsequently made to serve the summons as renewed. Service was not effected personally on the defendant. Having made inquiries and having attempted to effect service on 18th April, 2016 at premises in Moy, Kinvara and Ballindereen, County Galway, on the following day a summons server left a copy of the summons with a person who was described as the defendant's wife and at what was described as the defendant' place of residence.

11. Procedural problems became apparent when papers were lodged in the Central Office of the High Court for the purposes of obtaining judgment in default of appearance. The papers were returned by the Central Office on 23rd December, 2016. Service was queried and it was advised that for non-personal service at least three attempts must be made to effect service at a current address and that attempts made to serve on or at an old address were not sufficient. The plaintiff was also advised that the summons required renewal.

12. Although the *ex parte* docket which was submitted to Humphreys J. on the 13th February, 2017 was unavailable to this court, it is apparent from the grounding affidavits sworn in support of the application that an order was sought deeming personal service on Mr. O'Driscoll's wife on the 19th April, 2016 to be good and sufficient. In the alternative the plaintiff sought an order extending time to renew the summons and granting the plaintiff leave to renew the summons pursuant to O. 8, r. 1. The application was grounded on affidavits of Ms. Grady, the solicitor representing the plaintiff, and a summons server, Mr. Meade. Ms. Grady averred to the facts outlined above. On 20th October, 2014 she instructed Mr. Meade to effect service and she believed, in accordance with O. 9, r. 2 of

the Rules of the Superior Courts, that he exercised reasonable diligence in his attempts at service. The perfected order of 13th February, 2017 records that Humphreys J. ordered that the time for applying for renewal of the summons be extended to the date of the order and, pursuant to O. 8, r. 1, that the summons be renewed for a period of six months from that date. The order is silent as to the application to deem service good.

13. Following this second renewal, further attempts were made to effect personal service, but they were unsuccessful. An application was brought before Humphreys J on the 19th June, 2017 who made for an order for substituted service by ordinary pre-paid post on the defendant at Toureen West, Ballinderreen, County Galway. In his affidavit sworn in support of that application, Mr. Meade averred to his attempts to effect service on 20th April, 2017, 26th April, 2017 and 27th April, 2017. On the 21st June, 2017, the proceedings were served in accordance with the court order. An appearance was entered on behalf of Mr. O'Driscoll on 30th June, 2017.

14. On 11th August, 2017, a motion was issued by the plaintiff seeking liberty to enter final judgment. It was grounded on the affidavit of Mr. Tom Walsh, manager of the plaintiff bank, sworn on 4th August, 2017. The notice of motion was served on the solicitor on record for Mr. O'Driscoll on the 17th August, 2017. It was returnable to the Master of the High Court on 3rd November, 2017. A notice of intention to proceed was served on 7th November, 2017.

15. By letter dated 7th December, 2017 Mr. O'Driscoll's solicitor invited the plaintiff to strike out the application on the basis of a contention that, given the expiration of twelve months since last proceeding, a notice of intention to proceed should have been served prior to the issuing of the motion. Further, referring to *Bingham* and *Meagher*, he objected to the validity of the second renewal of the summons on the ground that at the time of second renewal, the summons had expired. This was repeated in an affidavit sworn by Mr. O'Driscoll on 30th January, 2018 in response to the plaintiff's motion. It seems that the plaintiff's motion was adjourned from time to time thereafter.

16. The defendant then issued a motion on 21st June, 2018, seeking to have the order of 13th February, 2017 set aside. The motion was struck out by O'Hanlon J. on 14th January, 2019 due to non-appearance because of an oversight. The motion now before the court was issued on 22nd January, 2019 and is grounded on the affidavit of Mr. O'Driscoll sworn on 21st January, 2019.

17. Mr. O'Driscoll's affidavit avers mainly to legal argument. He maintains that the summons could not have been renewed by Humphreys J. because it had expired and was thus incapable of lawful renewal on an ex parte application. It is contended that the application ought to have been made during the period of first renewal in accordance with O. 8, r. 1. and that following its first renewal, the summons expired on 3rd June, 2016. Application for renewal thereafter, including the application of 13th February, 2017, lacked validity as the summons had expired.

18. Ms. Grady, in an affidavit sworn on 2nd October, 2018, in response to the defendant's initial motion, but which was opened to the court on this motion, outlined the procedural history of the case. She avers that the address upon which the summons server attempted to effect service in April, 2016 was Tooreen West, Ballinderreen, County Galway and points out that this is the same address as provided in the affidavit sworn by the defendant in support of this application. She also draws attention to the fact that the defendant did not address the question of service, nor did he deny that the summons had come to his attention. Ms. Grady further outlined the attempts at service of the renewed summons. She states that her firm made the application for judgment to the Central Office of the High Court believing that the summons had been validly served the defendant.

19. Following a brief hearing at which the parties made oral submissions, the application was adjourned for further argument and written submissions. The parties also addressed issues concerning the status of the summons should the defendant be successful and, whether in such circumstances, the court has jurisdiction to re-enter the plaintiff's application to deem service good which was first made to Humphreys J. on 13th February, 2017.

Defendant's submissions

20. Counsel for the defendant, Mr. O'Donnell B.L., submits that, in accordance with the decision of Baker J. in *Meagher*, the court had no jurisdiction to renew the summons on 13th February, 2017 and that entering an appearance has no effect and does not prohibit the making of this application. Counsel highlights that it is no longer possible to enter a conditional appearance, following the decision in *The Governor and Company of the Bank of Ireland v. Roarty* [2017] IEHC 789, where Ní Raifeartaigh J. held that the entry of a conditional appearance is not provided for by the rules of court other than where *'country jurisdiction'* is challenged. Thus, it is submitted, given that a defendant cannot enter a conditional appearance, but must enter an appearance to prevent judgment in default of appearance being entered in the Central Office, the entry of an appearance is not a bar to this application. It is contended that the words *shall be at liberty* in O. 8, r. 2, are enabling and *permit* a defendant who has yet to enter an appearance to bring a motion. He submits that the rule must not be interpreted as prohibiting a defendant who has entered an appearance from making an application such as this. In the alternative, it is argued that that appearance ought to be set aside on the ground of mistake in accordance with the jurisdiction of the court as outlined in *Taher Meats (Ireland) Ltd. v. State Company for Foodstuffs Trading* [1991] 1 I.R. 443. No formal application by way of separate motion has been brought in this regard.

21. It is also argued that, at this stage, the court does not have jurisdiction to deal with an application to deem service good. Objection is also taken to the making of such application in such manner. Although the perfected order of Humphreys J. does not reflect an express refusal of such relief, it is submitted that it is significant that it was the first relief sought by the plaintiff in its motion. Humphreys J. chose not to grant that relief and the plaintiff ought to have appealed the order instead of requesting this court to revisit it.

The matter is now *res judicata* and to permit such application at this stage would amount to an abuse of process.

22. It is also submitted that in the event of the defendant's application being successful, although the proceedings would remain in '*limbo'* and still alive, an application to have them struck out would most likely be successful.

The plaintiff's submissions

23. The plaintiff submits that while *Bingham* and *Meagher* may have relevance, an application to set aside the renewal of the summons must be brought before the entering of an appearance which was not done by the defendant. The jurisdictional issue arose only in a replying affidavit which was filed to contest the plaintiff's motion for liberty to enter final judgment. Counsel for the plaintiff, Mr. Rutherdale B.L. argues that the limitations placed on renewal of summonses are designed to prevent them from remaining in existence for many years without any attempt being made at service. That is not what occurred in this case. The plaintiff made a number of attempts at service.

24. Counsel contends that having entered an appearance the defendant has submitted to the jurisdiction of the court and cannot now apply to set aside the renewal. In this regard, reliance is placed on a number of legal texts and authorities. In Ó'Floinn*, Practice and Procedure in the Superior Courts* (2nd ed., Tottel Publishing, 2008) the author states:-

> *"if the defendant enters an appearance this amounts to a waiver by the defendant of the irregularity unless the appearance is expressly conditioned."*

25. The authors of Delaney and McGrath on Civil Procedure (4th ed., Round Hall, 2018) state at para. 2-46:-

> *"Order 8, rule 2 stipulates that an application to set aside an order renewing a summons is required to be made by a defendant before entering an appearance. Thus, if an unconditional appearance is entered, a defendant will be debarred from bringing this application unless he can satisfy the court that the appearance was entered by mistake and obtain an order from the court pursuant to its inherent jurisdiction to permit the withdrawal of the appearance. While rule 2 does not make any distinction between an unconditional and a conditional appearance, it is well established that a defendant can enter a conditional appearance which will preserve his right to subsequently bring an application to challenge the jurisdiction of the court or the service of the proceedings. There does not seem to be any reason in principle why the entry of an appearance that is stated to be without prejudice to any application that may be brought to set aside the renewal of the summons would be ineffective to preserve the entitlement of a defendant to bring such an application."*

26. Counsel also argues that any submission by the defendant regarding the possibility, or impossibility, of the entry of a conditional appearance is theoretical. It might have substance had the defendant attended the Central Office and encountered a difficulty in

issuing his motion. There is, he states, no evidence that the defendant ever sought to file a conditional appearance. Further, no application was made to withdraw the appearance, nor is there evidence that a mistake was made in the filing of the appearance.

27. It is also submitted that if Humphreys J. had refused to renew the summons, counsel would have invited him to deem service good. It is argued that it is open to this Court to consider such application. It is further argued that it must be assumed that the Central Office declined to mark judgment because while Mr. Meade made three attempts at service, only two were made at the relevant property. There is no rule requiring that three attempts be made, rather the test is one of whether due with reasonable diligence has been employed. In *Hodson v. Hanley* (1881) 15 I.L.T. 233 the court considered the refusal of the officers of the court to mark judgment on the ground that there were insufficient attempts at service, the rule of the office being that there should be three attempts to effect personal service, Lawson J. observed at p. 234 that *"[t]here is no authority for laying down any such hard-and-fast rule as that adopted in the offices."*

28. Further, it is submitted that the application ought to be refused because of delay in bringing it.

29. The plaintiff also submits that if service is set aside, the proceedings do not thereby become a nullity. Reliance is placed on *dicta* of Peart J. in *Lawless* in support of this proposition.

The power to renew and the effect of the entry of appearance - interconnected issues

30. If the entry of an unconditional appearance in the circumstances of this case cures the defendant's objection, it would seem logical to first consider that issue before considering whether the court enjoyed jurisdiction to renew the summons on 17th February, 2017. It appears, however, in view of the legal principles discussed below, that the issues may be interconnected.

Entry of Appearance.

31. It must be recalled that since the publication of the fourth edition of *Delaney and McGrath*, it has been held in *Roarty*, that there is no basis in the Rules of the Superior Courts for the entry of a *conditional* appearance, save where country jurisdiction is disputed under Article 24 of Council Regulation (EC) No. 44/2001. Ní Raifeartaigh J. stated at para. 19 of her decision:-

> *"In the present case, there is little doubt but that Mrs. Roarty was mistaken when she thought she could enter a conditional appearance in the Central Office. It is most peculiar that the Central Office appears to have accepted conditional appearances in some other cases, but the Rules do not provide for this procedure and therefore Mrs. Roarty was mistaken that she was entitled to do so as a matter of law. She was taken by surprise when the judgment was entered in default of appearance."*

32. While the primary factor under consideration by the Court of Appeal in *Lawless* was the meaning of "other good reason", particularly in the context of professional negligence

proceedings, Peart J. affirmed that the use of the words "*under protest*" by a defendant when entering an appearance was not provided for in the Rules. At para. 13 of his judgment he stated:-

> *"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 [1969] I.R. 66 at p. 71 who stated "… if [the summons] had been served after that period and a non-conditional appearance had been entered, the appearance would have cured the defect in the service"). 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."*

33. Peart J. referred to a passage from Delaney and McGrath, para. 4-12, where the authors state that an unconditional appearance constitutes an acknowledgement that the defendant is on notice of the proceedings and, therefore, constitutes a waiver of the right to object to any defect in service, such as the service of an expired summons. He noted that the authorities cited in support of this statement of principle include *Baulk v. Irish National Insurance Co. Ltd* [1969] I.R. 66, and Court of Appeal (U.K.) in *Sheldon v. Brown Bayley's Steelworks Ltd* [1953] 2 Q.B. 393. Peart J. continued:-

> "*Those judgments make it pellucidly clear that an unconditional appearance acts as a waiver of any entitlement to contest the validity of service and cures any defect in service. They make clear also that a summons not served within twelve months does not become a nullity but remains a summons duly issued which is capable of being renewed, and in so far as previous authority such as the judgment of Lord Goddard in Battersby v. Anglo-American Oil Co. Ltd [1944] 2 All ER 389 had expressed the contrary view, albeit on an obiter basis, it was incorrect*." (emphasis added)

34. At para. 32 he observed:-

> *"The appellant also argued that the respondents ought to have brought a motion to set aside service of the summons under O. 12, r. 26 RSC if they wished to maintain their objection to the validity of service of the proceedings. However, the trial judge considered that a party who has been served with an expired summons could not be under any obligation to bring such an application. He was satisfied that once the party served had raised its objection in this regard with the other party 'the onus is on that [other] party to take whatever action is necessary to regularise matters*

because he or she can hardly be entitled to progress the proceedings on the basis of an expired summons'."

35. The Court of Appeal took a different view and stated at para. 33:-

> *"… Firstly, a summons which has "expired", to use the trial judge's phrase, is not a nullity. This matter is addressed also in Baulk by Walsh J. where at p. 71 he stated:*
>
> > *"In my view Order 8, r.1 of the Rules of the Superior Courts, in speaking of "no original summons shall be in force for more than 12 months from the day of the date thereof", does not mean that the summons becomes a nullity after that date but that it shall not be in force for the purpose of service after that date, unless renewed by leave of the court."*
>
> *Walsh J went on to refer to the court's power to renew the summons, and I have already referred to this statement, again at p. 71 to the effect that where service is affected after the period of 12 months but without renewal, the entry of an appearance would cure the defect in the service.*
>
> *34 . I cannot therefore agree that the defendants were not under any obligation to bring an application under O. 12, r. 26 RSC where they wished to question the validity of the service of these proceedings outside the period of 12 months from date of service absent a renewal order. They ought to have done so, as stated already, and prior to the entry of an appearance as specified by the rule."*

36. At para. 47, Peart J. stated that an application for renewal was *not* required in the circumstances:-

> *"I have addressed the appeal on its merits and on the basis of the grounds argued, but I wish to add some further remarks since for the reasons I will come to, it is my view that no application to renew the personal injury summons in this case needed to be brought in the first place once the respondents had entered what can only be regarded as an unconditional appearance. The fact that the respondents' solicitor intended to reserve their position so as to contest the validity of service by intimating in correspondence that they were entering an appearance "under protest" does not mean that the appearance in fact entered was in any way conditioned. It was not. The only appearance that could have been entered, and in fact was entered, was an unconditional appearance, and one accordingly that cured any defect in service occasioned by the failure to have obtained an order renewing the summons under O. 8, r.1 RSC."*

Again, he rejected any suggestion that the summons not served within the twelve month period became a nullity. It had not expired in that sense. He continued at para. 48:-

> *"It is simply that the summons is not in force for service until a renewal order is obtained as provided for in the rules. The rules specifically provide for renewal even outside the twelve-month period, as is clear from O. 8. r. 1 RSC itself. Thus, the*

entry of the appearance to the summons had the effect of curing any defect that may otherwise have been found in the validity of the service effected outside the twelve-month period absent a renewal order."

37. The decision of the Court of Appeal in Lawless is relevant in a number of respects:

    i. First, it reiterates that a personal injury summons does not expire in the sense of becoming a nullity upon the expiration of the twelve-month period for service.

    ii. Second, if a respondent, once served, wishes to raise an objection to the validity to service, the manner in which to do so is to bring an application pursuant to O. 12, r. 26 prior to entering an appearance.

    iii. Third, the entry of appearance cures any defect that may otherwise have been found in service effected outside the twelve-month period, absent a renewal order. In such circumstances, an application to renew the summons was unnecessary.

38. Thus, it is clear that insofar as a summons renewed *within the time prescribed in O. 8 r. 1* is concerned, the entry of an appearance cures any defect in service. Peart J. stated that the summons was not a nullity because it was *capable* of being renewed. No issue arose concerning the Court's jurisdiction to renew, rather the manner of the exercise of that jurisdiction. What then of the situation where a renewed summons has not been served within the time stipulated for renewal in circumstances where, as was held in *Bingham* and *Meagher*, the Court has *no jurisdiction to renew* under O. 8, r. 1? What is the effect of the decision of the Court of Appeal in *Crowe* in such circumstances?

The jurisdiction of the Court to renew a summons

39. In Bingham and Meagher the applicants/defendants did not enter appearances prior to bringing the motion to have the renewal set aside.

40. In *Meagher*, Baker J. held that there was no general inherent jurisdiction to engage in considerations such as had been advanced in that case, including attempts made at service, because the provisions of the Rule were clear in expressly delimiting the manner and time for the making of an application to renew on a second or subsequent occasion. In so ruling, reference was made to *dicta* of Murray J. in McG v. DW [2000] 4 I.R. 1, p. 27, that, as a general rule:-

    "Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature."

41. Further, in *Mavior v. Zerko Limited* [2013] 3 I.R 268 Clarke J. (as he then was) cautioned that to attempt to invoke an inherent jurisdiction "…*so as to go beyond delineation specified, in a constitutionally permissible way, in a statute, would be for the courts to trespass on the legislative role of the Oireachtas.*" Thus, it was held that if, in a constitutionally permissible way, the Oireachtas has defined the limits of a particular

jurisdiction then it is not for the courts to extend those limits by invoking a vague inherent jurisdiction.

42. In *Crowe v. Kitara Limited* [2015] IEHC 422; *Crowe v. Kitara Limited* [2016] IECA 62, renewal applications by several plaintiffs were considered. Plenary summonses were issued on 9th November, 2012 claiming damages for negligence, nuisance and breach of duty regarding alleged defects in an apartment block. In the case of two of the plaintiffs, Ms. Crowe and Mr. O'Neill, orders for renewal were made on 3rd February, 2014, but not served on the sixth defendant until two days before the expiration of the prescribed six month period. In the case of another plaintiff, a Mr. Gibbons, the summons was renewed on 10th March, 2014, but not served until 12th September, 2014, three days after the renewal had expired. A successful application was made to further renew the summons on 22nd September, 2014. The defendant made application to have all renewals set aside. The application was refused in respect of Ms. Crowe and Mr. O'Neill, both of whose summonses had been served within the extended time permitted on first renewal. The renewal of Mr. Gibbons' summons, which had expired for a second time before being renewed again on 22nd September, 2014, was set aside, Moriarty J. describing the reasoning of Feeney J. in *Bingham* as being unassailable.

43. All parties appealed. All appeals were dismissed. Mahon J. stated at para. 45 that it was not possible to identify any reasonable excuse for the failure to serve the summons prior to the 9th September, 2014 or to identify a good reason to justify a second six – month renewal of the summons. He was satisfied that it was clear that O. 8, r. 1, of itself, did not permit a second (or subsequent) six-month renewal of a summons unless applied for within the life of the previous renewal. In Mr. Gibbon's case this did not happen.

44. Of particular importance, therefore, is the manner in which the Court of Appeal dealt with the renewal of Mr. Gibbon's summons. The Court's decision was delivered approximately one month after that of Baker J. in *Meagher*. The court referred to *Meagher* and Mahon J. addressed the issue at para. 50 of his judgment:-

> *"Does Order 122, r. 7 permit a court to extend the time in which to apply for a second (or subsequent) renewal of a summons at a time when the currency of the summons has already expired, and in circumstances where such renewal is not permitted under Order 8, r. 1? Order 122, r. 7 was utilised in this case to enable the renewal of Mr. Gibbons' summons on 22nd September, 2014 some days after the expiration of the previous six month renewal period. In other words, the court permitted the renewal of the summons notwithstanding that the requirement in Order 8, r. 1 to the effect that the application to be made during the currency of the summons, by extending the time for so doing pursuant to Order 122 r. 7."*

45. While the court did not expressly comment on whether *Meagher* was correctly decided on this point, at paras. 58 to 62 Mahon J. stated as follows:-

> *"Order 8, r. 1 provides in very specific terms the time periods in which a court may renew a summons. Compliance with that rule is clearly in the interests of the*

administration of justice and the efficient processing of claims through the courts. It is also undoubtedly designed to ensure that parties against whom proceedings have been instituted, and who may know little or nothing of that fact, are protected from the prospect of such proceedings being resurrected long after their institution, and (as in this case) at a point outside the limitation period. This is especially so in cases where the subject matter of the proceedings is professional negligence.

59 In my view the provisions of Order 8, r. 1 clearly and unequivocally set down time limits for the renewal of summonses (subject to certain criteria being satisfied). Such time limits, and the provision that the renewal of a summons should only be permitted in circumstances where the summons is current and subsisting, are eminently reasonable and fair, and well capable of compliance, particularly by litigants who have the benefit of legal representation.

60 However, O. 122, r. 7 cannot be ignored. In its ordinary meaning it provides the jurisdiction "to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time… and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed". It seems to me quite clear that the power to enlarge time appointed by the rules is provided and provided without limitation. It appears to me that the judgment of Clarke J. in Kavanagh is also authority for this position.

61 Having so stated, I am, however, firmly of the view that the power to extend time provided for by Order 122, r. 7, particularly insofar as it relates to the renewal of summonses is a power which should only be utilised in very limited circumstances and where there are compelling reasons for so doing. In his judgment, Moriarty J. referred to the application of Order 122, r.7 in a manner which was, in effect, in conflict with Order 8, r. 1 being applied in the event of limited technical defects or the like. Possibly such an approach might be unduly limited, but if it is, it is not far off the mark." (emphasis added)

46. The court could find no justification or excuse for the revival of Mr. Gibbons' summons after the renewal period had expired.

47. Thus, it is clear that the jurisdiction of the court under O. 122, r. 7 was invoked, albeit the application was refused. It would appear, therefore, that the Court enjoys jurisdiction under the provisions of O. 122, r. 7 to extend the time for renewal of a summons after the expiration of the period for service as provided for on first renewal. The inquiry of the court, therefore, as to whether it should exercise that jurisdiction, is to consider whether the case is one of "*very limited circumstances and where there are compelling reasons."*

Discussion

48. In *Lalwess*, Peart J. did not agree the defendants were not under any obligation to bring an application under O. 12, r. 26 RSC where they wished to question the validity of the service of proceedings outside the period of 12 months from date of service absent a

renewal order. He stated that they ought to have done so, as stated already, and prior to the entry of an appearance as specified by the rule.

49. To adopt and adapt dicta of Feeney J. in *Bingham*, it seems to me that if the court is obliged to give effect and meaning to the wording of O. 8, r. 1, it must equally give effect to the meaning and wording of O. 8, r. 2, as interpreted by Peart J. That rule has thus been interpreted as meaning that a defendant who wishes to make application to set aside a summons which has been renewed on an *ex parte* application must do so before entering the appearance. On the face of it, therefore, the entry of appearance cures any defect or irregularity in service.

50. The point which is made in this case, however, is that there was no jurisdiction to renew the summons and therefore, nothing to which to appear.

51. In Crowe, Mahon J. observed that the power to enlarge time appointed by the O. 122, r. 7, is "*provided and provided without limitation*". Although the court did not exercise its jurisdiction to extend the time in Crowe, nevertheless, in my view, this court is bound by that ruling. Even if one were to consider the observations of Mahon J. as obiter, which I do not, in my view this court ought not to depart from it given the unequivocal manner in which it was expressed. That being the case, it appears to me that such summons must, in the words of Peart J. in *Lawless*, be *capable of being renewed,* at least under the provisions of O. 122, r. 7. which, before its recent amendment, provided for an extension of time within which to make such application. If there was ever any doubt about the position prior to Crowe, the decision of the Court of Appeal must have consequences for the legal effect of the entry of appearance to a summons which has been renewed after expiry.

52. It would also seem to follow that, although the jurisdiction of the court under O. 122 may not have been expressly invoked before Humphreys J., this is not centrally relevant if, in truth, the summons did not become a nullity and an appearance on an unconditional basis was entered. In the light of *Crowe*, I can see no reason to draw a distinction between the circumstances that arose in *Lawless* and the circumstances of this case.

53. In my view, analysis of the authorities on which the general principle of the effect of the entry of appearance is based supports this conclusion. In *Baulk*, the court considered the provisions of O. 8, r. 1 and O. 108, r. 7 (S.I. No. 72/1962). The general rule, O. 108, r. 7 provided:-

> *"The Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."*

54. Order 8, r. 1 under consideration in this case differs somewhat from the provisions of the 1962 Rules which were applicable in *Baulk* and which provided:-

> *"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 court for leave to renew the summons: and the court, 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 six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed summons. The summons shall in such case be renewed by being stamped with the date of the day, month and year of such renewal; such stamp to be provided and kept for that purpose in the Central Office and to be impressed upon the summons by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in the Form No. 4 in Appendix A, Part I; and a summons so renewed shall remain in force and be available to prevent the operation of any statute whereby a time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original summons."*

Perhaps of some significance is that the above earlier version of O. 8, r. 1 did not provide for an application to court outside the twelve month period *i.e*. after the time for service had expired. It did, however, provide for renewal from time to time before the renewal period expired. This is similar to the situation under O. 8, r. 1 of the rules under consideration. It would appear, therefore, on the face of it, that a number of differences exist between the rules of court as applied in *Baulk* and those which are applicable in this case. In *Baulk* application was made to renew the summons after the twelve month period had expired. The jurisdictional point was not debated. Counsel for the defendant conceded that the court had jurisdiction to make the order by extending the time under the general extension provisions of the then O. 108, r. 7. The focus of the submission was that the court should not do so because to make such order would destroy "*an absolute statutory defence which is at present available to the defendants*." It was held that O. 8, r. 1, in speaking of "*no original summons shall be in force for more than twelve months from the day of the date thereof",* did not mean that the summons became a nullity after that date but that it shall not be in force for the purpose of service after that date, unless renewed by leave of the court.

55. Walsh J., with whom Ó'Dalaigh C.J. concurred, stated at p. 70:-

> *"There is authority for the proposition that where the main reason for a renewal is to prevent the time running out under the Statute of Limitations that the court ought not to renew it. The most notable case is Battersby v. Anglo-American Oil Co. Ltd. 14 That decision, however, appears to have proceeded on the assumption that the effect of failure to serve the summons within the time stipulated by the rules of court in some way made the summons a nullity. That approach was not applied in Sheldon v.Brown Bayley's Steel Works Ltd. and Dawnays Ltd. ([1953] 2 Q.B. 393) where it was pointed out that the summons is not a nullity in those circumstances because it is something which can be renewed and, if renewed, it is*

something which is just as effective as it was before the period for service had expired. For example, if it had been served after that period and a non-conditional appearance had been entered, the appearance would have cured the defect in the service." (emphasis added)

56. Those sentiments were expressed in the context of a rule which did not expressly provide for renewal after the period for service had expired. Beyond this time the court's general powers under O. 108, r. 7 had to be invoked.

57. While McLaughlin J. dissented, he did not suggest that the court did not enjoy such jurisdiction, rather he did not agree with the manner in which the majority proposed to exercise it.

58. In *Sheldon*, Denning L.J. drew a distinction between the concepts of irregularity and nullity. He observed at p. 401 as follows:-

> *"On October 13, 1952, they entered an unconditional appearance, but they soon afterwards came to know what the first defendants had done, and then they also applied to have the service of the writ set aside. The question is whether they are prevented from so doing by reason of their unconditional appearance. This depends on whether the service of a writ, after the 12 months permitted by the rule has expired, is a nullity or an irregularity. If it was an irregularity, then the irregularity was waived by the unconditional appearance; but if it was a nullity, then it could not be waived at all. It was not only bad, but incurably bad."*

He continued:-

> *"In determining the question, it is important to notice that even after 12 months have expired, the writ can be renewed. This is not done under Ord. 8, r. 1, for that only permits renewal before the 12 months have expired. It is done under Ord. 64, r. 7, which is the general rule permitting enlargement of time. It was first done in 1877 by Sir George Jessel M.R. in In re Jones.. which has been accepted as good law ever since. Now, if a writ can be renewed after the 12 months have expired, that must mean that it is not then a nullity.*
>
> *There are other reasons, too, why the writ cannot be considered a nullity. Suppose a defendant, who is served after the 12 months, deliberately enters an unconditional appearance and goes to trial. It may be that it is a case where no statute of limitation avails him and he does not think it worth while to object to the service of the writ, because he knows that it would only mean the issue of a fresh one. Could he thereafter turn round and say that all the proceedings were void on the ground that the writ was a nullity? Clearly not. That shows that the service out of time was only an irregularity which could be waived."*

59. To conclude he stated *"[w]hen the rule says that, after 12 months, the writ is no longer in force, it only means that it is no longer in force for the purpose of service: see In re Kerly, Son & Verden."*

60. Having regard to the above, it is equally arguable that the summons under consideration is not a nullity but an irregularity. I believe this to be consistent with *dicta* of Clarke C.J in *Kavanagh v. Healy* [2015] IESC 37, where he referred to O. 122, r. 8. This provides that *"[t]he time for delivering, amending, or filing any pleading, answer, or other document may be enlarged by consent in writing, without application to the Court, 'may be enlarged by consent in writing, without application to the Court'*." Clarke C.J. also noted the absence of a requirement in O.122, r. 7, that the consent of the applicant be forthcoming before such an enlargement of time can be ordered. The time for consenting is not constrained by O. 122, r. 8. It seems to me that the rules, when read in this context, are more in keeping with the concept of irregularity where something is not done in time, rather than nullity.

61. That there is no provision for the entry of a conditional appearance, save as in the very limited circumstances as outlined in *Roarty* does not, it appears to me, create a difficulty. It is clear from *dicta* of Peart J. in *Lawless* that the appropriate procedure to be employed by a person who wishes to set aside a summons and who contends it ought not to have been renewed is to bring an application under O. 12, r. 26.

62. In summary, there is no jurisdiction under O. 8, r. 1. to renew a summons after a previous renewal has expired. On the basis of Crowe, the court has power to extend the time for renewal of such summons under O. 122, r. 7, but only in very limited circumstances or where there are compelling reasons for the exercise of that jurisdiction. Thus, a summons which has not been served, or renewed, within the time prescribed by a previous order for renewal does not become a nullity, even after the expiration of the time prescribed in the order granting the renewal. The combined effect of *Lawless* and *Crowe* is that because such a summons is capable of renewal, the entry of an appearance cures any irregularity.

Exercise of discretion under Order 122, rule 7

63. In the event that the court is incorrect in its conclusion on the effect of the entry of appearance, I should now consider whether the circumstances of this case warrant the exercise of the court's jurisdiction under O. 122, r. 7.

64. It is not evident that O. 122, r. 7 was expressly invoked before Humphreys J. on the 17th February, 2017. The perfected order refers to the provisions of O. 8, r. 1 but not O. 122, r. 7. It is to be noted, however, that there are two parts to the order, the first part extends the time to the date of the order for applying for renewal without making specific reference to any rule; the second part expressly refers to O. 8, r. 1. Mr. Rutherdale B.L. relies on *Crowe* where O. 122, r. 7 was invoked.

65. An application under O. 8, r. 2, is not an appeal from an order permitting the renewal of a summons. In view of the obligation on the court to ensure compliance with fair

procedures, a defendant/moving party is not only entitled to adduce evidence of additional facts and circumstances but can also simply rely on the facts and circumstances which were before the court on the *ex parte* application and make submissions thereon; see per Feeney J. in *Bingham* and *per* Finlay Geoghegan J. *Chambers v. Kenefick* [2007] 3 I.R. 526. In *Moynihan v. Dairygold Co-Operative Society* [2006] IEHC 318, Peart J. described the application to set aside as being "*akin to a hearing de novo*." See also *Delaney and McGrath* at para 2-46. I therefore approach this application on this basis.

66. If this were an application where the renewal was made pursuant to O. 8, r. 1, on an application under O. 8, r. 2, the Court would first have to consider whether there was a good reason to renew the summons, but good reason must be considered in the context of the overall justice of the situation. Reasonable effort to serve is one of a number of potential good reasons. Good reason need not be referable to service of the summons. Further, *per* Feeney J. at para. 23 of *Bingham*, if the court is satisfied that there are facts and circumstances which constitute a potential good reason, including reasonable efforts to serve such summons, the Court must consider whether it is in the interests of justice between the parties to make an order for the renewal of the summons. The issue of whether, absent renewal, the action will become statute barred pursuant to the Statute of Limitations, must be considered in the light of the interests of both parties; see *Roche v. Clayton* [1998] 1 I.R. 596, *per* O'Flaherty J. at p. 600, when after considering *Baulk*, he stated *"[t]he Statute of Limitations must be available on a reciprocal basis to both sides of any litigation."* See also *O'Brien v. Fahy* (Unreported, Supreme Court, 21st March, 1997) and *Delaney and McGrath on Civil Procedure* (4th ed., Round Hall, 2018) at para 2-58.

67. It seems to me that in considering the exercise of its jurisdiction under O. 122, r. 7, the guiding principles cannot be any less restrictive. If anything, the standard is higher and the court can only exercise such jurisdiction in very limited circumstances and where there are compelling reasons to do so. The court should, on such analysis, it seems to me, be no less mindful of where the interests of justice lie.

68. Bearing in mind these principles, it appears to me that the following factors ought to be taken into account:

    1) The summons was issued on the 20th October, 2014, on the face of it, within three months of the expiry limitation period.

    2) A letter of demand was served on the defendant on the 15th January, 2009 and the potential for proceedings was flagged from an early stage.

    3) It is evident from the affidavit of Ms. Grady sworn in support of the initial application to renew the summons that the plaintiff experienced difficulties in attempting to trace the whereabouts of the defendant.

4) The first application to extend time for the renewal of the summons was made on the 30th November, 2015, outside the initial twelve month period, albeit within a relatively short period.

5) The address which the defendant had for the plaintiff was Moy, Kinvara, Co. Galway. This address appears to be the same as that which appears on the guarantee and the address on which the letter of demand was served some years earlier. Ms. Grady avers that a summons server, Mr. Keane, was instructed to serve the summons and deposes in her affidavit sworn on 6th November, 2015 in support of the first application to renew the summons, that he confirmed with neighbours, the local post office and shop that the defendant was no longer residing at that address, but no forwarding address was provided.

6) A second summons server, Mr. Meade, attended at Moy, Kinvara, County Galway, on the 18th April, 2016. He established that the defendant was no longer living at that address. A second attempt was made on the same day to locate the defendant at another address in Kinvara, with a similar outcome. He was advised that the defendant had moved to rented accommodation at Tooreen West, Ballinderreen, County Galway. On 18th April, 2016, he attended at that address, but the defendant is stated not to have been available. He called again on the following day, 19th April, 2016, when he was advised "*by the defendant's wife, Brid McNamara*" that he was not at home. He then served the summons by leaving a copy with her.

7) It is also perhaps of some significance that following the renewal of the summons by Humphreys J. on 17th February, 2017, attempts were made to serve at the address at Tooreen, Ballinderreen on 20th, 26th and 27th April, 2017. In an affidavit sworn on the 29th May, 2017, in support of an application for substituted service of the summons as renewed on the second occasion, Mr. Meade avers that he spoke to a person at that who described himself as the defendant's landlord. He informed Mr. Meade that the defendant resided at that address but was not at home. Mr. Meade then received a call from the defendant's wife/partner who informed him that she would request the defendant to contact him and that she requested that the summons be served elsewhere. On 26th April, 2017 he attended at the same address and met with Ms. McNamara, who informed him that the defendant was not at home. There appears to be no issue but that the summons was served in the manner permitted by the order for substituted service made on 19th June, 2017. An appearance was entered to the summons on 30th June, 2017. The address upon which service was effected was Tooreen West, Ballinderreen, County Galway which appears to be the same address at which previous attempts at service were made in April, 2016.

8) It seems that both the summons server and the solicitor acting for the plaintiff considered that the mode of service in April, 2016 was effective.

9) Following the return of papers from the Central Office of the High Court and within a short period the plaintiff made the application to Humphreys J.

10) In that application the plaintiff sought alternative orders, the first being to deem service good, and the second seeking to renew the summons. The fate of the application to deem service good is not expressed on the face of the order. There is no express order that that application was refused. It may be that it was left in abeyance or that it was considered unnecessary in the light of the order that was made.

11) If the defendant is successful on this application, the issuing of fresh proceedings will likely be faced with a plea that it is statute barred. In accordance with *dicta* of O'Flaherty J. in *Roche v. Clayton* [1998] 1 I.R. 596 while not determinative, it is a factor to be considered.

12) Again, while not determinative, and perhaps of lesser importance, in his affidavits sworn on 30th January, 2018 the defendant does not take issue with any averment concerning his alleged address at any given time or the evidence of attempts at service or service on his wife/partner. He raises two issues only, that a notice of intention to proceed was not served prior to the original application and the legal issue concerning the renewal of the summons. In his further affidavit sworn on 21st January, 2019 in support of this application, once again no issue is taken with the facts.

69. Taking all of the above into consideration, I am satisfied that the defendant was aware from a very early stage that he was likely to face proceedings if he did not comply with the demand letter. The plaintiff changed address during this period and difficulties were encountered in locating him. The address in respect of which the order for substituted service was made and the address upon which the proceedings were subsequently served pursuant to that order, is the same as that upon which the plaintiffs sought to effect service in April, 2016 and again in April, 2017.

70. Although the plaintiff may be said to have contributed to the predicament in which it now finds itself by the rather late institution of proceedings, the facts are that the plaintiff made attempts at serving the summons at the Ballinderreen address during the period of first renewal. It is also noteworthy that a copy of the summons was left with a person described as the defendant's wife at that address. Whether the defendant received it or whether the mode of service was ineffective as a matter of law (upon which I express no conclusion), it is a factor which ought to be considered in weighing the balance of justice particularly in the light of his interaction with the person at that address, Ms. McNamara, in 2016 and again in 2017.

71. Although it is submitted that the application should be dismissed on the ground of delay and that there should be a "*cut off point*", I do not believe it is necessary to decide the application on this ground. To a certain extent the submissions of the plaintiff may be said to reflect a potential evil identified by Denning L.J. in *Sheldon*, where he stated:-

"If the court accepted the plaintiff's evidence that the writ was served by post on October 1, 1952 and should have reached that the second defendants on October 2, 1952, before the 12 months have expired. It was delayed in the post and did not in fact reach them until October severed 9052, after the 12 months had expired. The delay was a matter known to them and not the plaintiff. If they choose to waive any objection to it, they should be held bound by their waiver. They should not be allowed to turn around and say that the writ itself was in nullity. If they could say so now, they could also say so at a much later stage, even after the trial. I cannot believe that to be the law."

72. In any event, in this case, no orders were made before this application (or at least the first application) was brought.

Conclusion on the application of Order 122, rule 7

73. Taking all of the above factors into consideration, I am satisfied that this is one of the limited situations in which the court ought to exercise its jurisdiction under O. 122, r. 7, to extend the time in which to make application for renewal and service of the summons, and that there are compelling reasons to do so. The plaintiff made several attempts at service. No significant issue of fact averred to in the affidavits of Ms. Grady or Mr. Meade has been contested. The address in respect of which the order for substituted service was made and the address upon which the proceedings were subsequently served pursuant to the order for substituted service, was the same address upon which the plaintiffs had sought to effect service on in April, 2016 and again in April, 2017. Although not the only matter to be considered, given that the statute must be viewed on a reciprocal basis, it is likely that if the claim is to be recommenced, it will be faced with a plea that it is statute barred, a plea which may be successful. The defendant was aware of his potential liability and that a claim might be made from an early stage. The balance of justice favours the exercise of the court's jurisdiction in favour of the plaintiff.

74. In argument it was urged by counsel for the defendant, in the alternative that the appearance should be set aside on the grounds of mistake. No mistake is identified on affidavit but it must be acknowledged, however, that a formal application was not before the court. It is nevertheless suggested that a difficulty would have been encountered in attempting to enter a conditional appearance and that the bringing of this motion, in itself, is supportive of his position that a mistake was made. The plaintiff also seeks to re-enter the application first made to Humphreys J. on 17th February, 2017 to deem service good. I note that during the course of the application the plaintiff prepared such a motion, and sought to make it on an ex parte basis, but did not formally proceed with it in the light of the defendant's contention that it should be made on notice. Given the mutual objections of the parties to the making of these two applications on such informal basis, I do not propose to express any concluded view on them as neither application was before the court.

Decision

75. I must refuse the relief sought by the defendant. I will hear the parties in respect of any further application which they may wish to make in light of the above conclusions.