

**THE HIGH COURT**

[2021] IEHC 762  
[2018 10626 P]

**BETWEEN**

**CLAIRE GALLAGHER**

**PLAINTIFF**

**AND**

**MAIREAD SLOWEY AND MICHAEL FRIEL TRADING UNDER THE STYLE OF MICHAEL  
FRIEL G.A. SLOWEY ARCHITECTS AND SURVEYORS**

**DEFENDANTS**

**EX TEMPORE JUDGMENT of Ms. Justice Emily Egan delivered on the 24th day of  
November, 2021**

**Introduction**

1. This is an application by the first named defendant ("the first defendant") to set aside renewal of a personal injury summons (hereinafter the "summons") granted by Murphy J. on 12th October, 2020 following an ex parte application to renew the summons, as provided for by O.8, r.1 of the Rules of the Superior Courts ("the Rules").

The first defendant is the daughter and executrix of the estate of the late Gerard Slowey (who died on 17th December, 2016). These are professional negligence proceedings in which the plaintiff alleges negligence, breach of duty and breach of contract in the performance of professional services by Mr. Slowey, architect, in connection with the design and construction of the plaintiff's dwelling house. In this respect, the second named defendant is also sued as successor to the practice of G.A. Slowey Architectural Design Services. It does not appear that the second named defendant, who has entered an appearance, was served with the motion papers herein. To date, no statement of claim has been delivered as between the plaintiff and the second defendant.

For reasons that I will shortly explain, I refuse the first named defendant's application to set aside renewal of summons. In addressing my reasons, I will set out; firstly, the salient facts, secondly, the submissions of the first named defendant, thirdly, the relevant legal principles and fourthly, my analysis of the application of these principles to this case.

**Salient facts**

2. The proceedings relate to the construction of the plaintiff's dwelling house in 2003 or 2004 in respect of which I understand that the plaintiff retained Mr. Slowey as an architect on the project. Mr. Slowey issued a certificate of completion on the 30th September, 2004.
3. It appears that, in or about 2014, the plaintiff noticed cracks appearing on the walls of the house. The plaintiff avers that, pursuant to investigations commissioned on her behalf, it became clear that the damage to the building emanated from a failure by Mr. Slowey (who had by then died) to ensure that the foundations were adequate and suitable for the nature of the soil on which the house was built, being peat soil. In this regard, the plaintiff had instructed Barry McCullagh, architect and surveyor to inspect the premises, pursuant to which, in January 2017, he produced a report provisionally attributing the cracking to "*the removal of foundation support*". However, the McCullagh report emphasised that further investigation would be required to conclude that defects

existed at foundation level; and to determine the subsoil supporting the house. The McCullagh report states, that only when this investigation has been completed, could the cause of the damage be clarified and repair works commenced.

4. The plaintiff instructed Canny Corbett, Solicitors ("Canny Corbett") to ascertain who was representing the estate of Mr. Slowey and to enter into correspondence in relation to this potential cause of action. James Canny of Canny Corbett avers that he had to write to all of the solicitors in the Donegal area to ascertain who might represent the estate of Mr. Slowey. One such solicitor was Ms. Moya O'Donnell, Solicitor ("Ms. O'Donnell"), and Mr. Canny exhibits his correspondence with her over the period June to November 2017. In this correspondence, Canny Corbett first enquire as to whether Ms. O'Donnell acts on behalf of the estate of Mr. Slowey. When this was confirmed, Canny Corbett furnished Ms. O'Donnell with a copy of the McCullagh report and requested that she identify the insurer covering the late Mr. Slowey's previous practice. Ms. O'Donnell replied querying the basis of the plaintiff's claim, bearing in mind the passage of time since the construction of the dwelling. This query was not specifically replied to by Canny Corbett who instead wrote a reminder letter again, requesting details of the relevant insurance company and indicating that the plaintiff was becoming increasingly upset at the delay in dealing with her claim. Ms. O'Donnell replied that, having taken her client's instruction, Ms. Slowey could not see how a claim could be made against the estate of her late father. Canny Corbett sent a further letter on 28th November, 2017 indicating that counsel had been instructed to draft proceedings, and requesting that Ms. O'Donnell revert with confirmation that she had authority to accept service of the proceedings. There does not appear to have been any reply to this letter.
5. The essential basis for the application to renew the summons before Murphy J. was that, as a result of this correspondence, the first defendant was aware of the proceedings and, that, because Ms. O'Donnell declined to accept service, it had not yet been possible to serve the first named defendant. In this respect, the plaintiff averred to four unsuccessful separate attempts to serve the first named defendant at what was presumed to be her residence in Donegal. The plaintiff's summons server avers that, during one such attempt at service, he was informed by a relative of the first named defendant living nearby, that Ms. Slowey worked in Dublin although he was unsure of her address. He was also told that the first defendant returned to the Donegal premises only on an intermittent basis. It was further averred that the plaintiff had no knowledge of the first named defendant's address or place of employment.
6. Murphy J. granted an order pursuant to O.8 r.3 of the Rules; (a) extending the time for applying for renewal of the summons; (b) renewing the plenary summons for a period of three months from the 12th October, 2020; (c) directing that service could be effected by ordinary prepaid post at the Donegal premises; and (d) directing service of a courtesy copy of the summons on Sweeney McHugh Solicitors ("Sweeney McHugh"). The precise rationale for serving Sweeney McHugh is not clear from the papers which were before Murphy J. as it appears therefrom that Ms. O'Donnell was the first defendant's solicitor.

However, the involvement of Sweeney McHugh becomes clear later in the sequence of events.

7. Subsequent to this, the proceedings were served, as directed, both by ordinary prepaid post at the Donegal premises and also by way of courtesy copy to Sweeney McHugh.
8. After service, the first defendant acted quickly in issuing the current motion to set aside the order renewing the summons. The motion issued in January 2021 with an initial return date of April 2021. Thereafter, Mr. Canny swore a replying affidavit in July 2021. The first defendant took objection to the contents of this affidavit on the basis that it contained hearsay and other inadmissible evidence. The plaintiff herself swore a further replying affidavit on the 18th November, 2021. I should say that this further replying affidavit of the plaintiff was sworn very late in the day which is somewhat unsatisfactory. However, the first defendant did not indicate that she could not deal with the application as presented and no adjournment was sought to enable any reply to be furnished.
9. Ms. O'Donnell, appears to have been struck off the role of solicitors on an unknown date and the first defendant came to be represented by Sweeney McHugh. The first named defendant's grounding affidavit exhibits correspondence passing between Canny Corbett and Sweeney McHugh over the period September 2018 to June 2019. In the initial letter, Canny Corbett referred to their previous correspondence with Ms. O'Donnell, and stated that they are in receipt of a copy of the grant of probate which identifies that Sweeney McHugh extracted the grant of probate. Canny Corbett sought confirmation that the plaintiff's claim was included as a debt or claim against the estate and that Mr. Slowey's professional indemnity insurer had been notified of the claim. Finally, Canny Corbett state that they had instructed counsel to draft proceedings and would be obliged if Sweeney McHugh would confirm they had authority to accept service.
10. There was no response to this letter and two reminder letters issued later in September 2018. In October 2018, Sweeney McHugh confirmed that they acted on behalf of the first defendant and furnished a copy of their letter of the 6th December, 2017 to an insurance broker. This letter notified the broker of the proceedings and further indicated that, whilst it had initially been understood that the matter was statute barred, the plaintiff's solicitors had indicated that the plaintiff only became aware "*in the last three years*" of the significance of the cracks in the building. No reply from the broker was exhibited.
11. Canny Corbett replied to this letter requesting details of the relevant insurer and asking whether Sweeney McHugh had authority to accept service of the proceedings. No response was received to this letter and Canny Corbett issued two reminder letters in December 2018.
12. Sweeney McHugh responded on the 21st December, 2018 confirming that there was "*an indemnity in place*" and that they did not have authority to accept service of the proceedings. The nature of the indemnity was not clarified.

13. Canny Corbett wrote again to Sweeney McHugh in February 2019 once more requesting the name of the insurance company providing run off cover. Reminder letters issued later in February, March and May of 2019, in which Canny Corbett requested Sweeney McHugh to confirm they had authority to accept service of the proceedings on behalf of the estate, failing which they would be required to personally serve the first named defendant. There was no response to these letters and, shortly afterwards, personal service was first attempted at the Donegal premises. As this was unsuccessful, a further letter was sent by Canny Corbett to Sweeney McHugh in June of 2019 indicating that service had been attempted on the Donegal premises but that the house was unoccupied. The letter pointed out that the summons server had been informed that the first defendant worked in Dublin and asked Sweeney McHugh to either confirm the Dublin address so that personal service could be effected, or to confirm that they had authority to accept service. By letter dated the 13th June, 2019 Sweeney McHugh stated that, having taken their client's instructions, they were satisfied that no liability existed on behalf of the estate and that they did not have instructions to accept service or enter an appearance. They further indicated that they were not in the position to confirm their client's address for "*GDPR reasons*".
14. Subsequent to this letter, the plaintiff's solicitors attempted unsuccessfully to serve the first defendant at the Donegal address on three further occasions in July, October and December of 2019. The summons which had issued in December of 2018 expired in December of 2019 roughly contemporaneously with the plaintiff's final attempt to serve.
15. It is not at all clear what steps were taken by the plaintiff between this time (December 2019/January 2020) and September 2020, on which date the papers were drawn up for the application to renew the summons. There is therefore a nine-month hiatus after the expiry of the summons and no information on affidavit explaining why this was so. Counsel for the plaintiff, whilst accepting that he could not advance evidence which was not on affidavit, stated that this hiatus might be explicable, at least in part by the impact of the pandemic.
16. Finally, the plaintiff's final replying affidavit exhibited a report of April 2017 from OSG, loss adjusters for the insurance company providing the plaintiff's home insurance. The OSG letter discusses a potential subsidence claim and refers to an inspection of the property in March of 2017 by Aidan O'Connell Associates Limited Engineering and Project Manager Consultants. The OSG letter summarises the view of Aidan O'Connell & Associates that there may be a separate cause, quite apart from foundation movement, for certain cracks on the property. The letters also state, however, that the cracking is most likely attributable to defective construction/design and that further investigations were necessary to confirm the position. Although further investigation was clearly required, it would be hard to say that the contents of this letter did not provide a reasonable basis for the plaintiff's decision to at least commence proceedings against the defendants. I note that this letter was not furnished to either of the defendants and only came to light in the context of the application to set aside renewal of the summons.

### **Submissions of the first named defendant**

17. The first defendant claims that the plaintiff has been guilty of inordinate and inexcusable delay in bringing forward the proceedings and points to the long passage of time since the property was built, since the cracks first came to light, since the death of Mr. Slowey and indeed since the commencement of the proceedings in December 2018. In this respect the first defendant states that she has been prejudiced by this delay and that she is unable to locate any documentary evidence which would assist her in defending the claim. She also avers that, in light of the passage of time, she is prejudiced in her ability to pursue other potential professionals such as builders or surveyors.
18. The first defendant further argues that as the proceedings were commenced just prior to the expiry of the two year limitation period following the date of the death of the late Mr. Slowey, the renewal of the summons has denied her the right to rely upon the Statute of Limitations.
19. The first defendant emphasises that Mr. Slowey died in December 2016, that a grant of probate was issued in July of 2018 and that the current proceedings are therefore holding up the conclusion of matters in this regard.
20. The first defendant also submits that the plaintiff has made only a bald assertion that she has a good cause of action and has not exhibited any definitive expert report subtending the professional negligence claim against either of the defendants.
21. With respect to service, whilst the first defendant confirms that she owns the property in Donegal, she states that it ought to have been apparent to the plaintiff from at least June of 2019 that this was not the appropriate address for service. She states that the plaintiff ought to have been aware that she lived and worked in Dublin and that even a cursory search would have revealed her contact details in Dublin. Furthermore, the first defendant is critical of the lack of any explanation either as to why an application for substituted service was not made after June 2019 or as to why the plaintiff waited until October 2020 to bring forward the application to renew the summons.
22. The first defendant is tentatively critical of the fact that the correspondence with Ms. O'Donnell exhibited in Mr. Canny's grounding affidavit was without prejudice correspondence. I note, however that both parties made arguments before the court in relation to this particular correspondence and I find that any objection in this regard has been waived.

### **Legal principles**

23. O.8, r.4 of the Rules provides as follows: -

*"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."*

24. The special circumstances test applies both to the application for an extension of time within which to apply for renewal and to the renewal application itself.
25. The requirement to demonstrate special circumstances justifying the renewal of the order imposes a higher test than the previously imposed test of demonstrating a "good reason". Whilst the requirement for special circumstances does not raise the bar to demonstrating something "extraordinary", the wording of the order nonetheless suggests that some facts or circumstances beyond the ordinary or usual need to be present, in order for the renewal to be granted. Whether special circumstances can be said to arise will ultimately depend on the particular facts in each case.
26. In considering whether or not to grant an order renewing the summons, or indeed to set aside such renewal, the court should consider whether it is in the interests of justice to do so and this entails considering any general or specific prejudice or hardship alleged by the defendant and balancing that against the prejudice or hardship which may result for the plaintiff if renewal is refused.
27. In *Sheila Murphy v. Health Service Executive* [2021] IECA 3, Haughton J. referred to the well-known extract from the judgment of Finlay-Geoghegan J. in *Chambers v. Kenefick* [2005] IEHC 526 which describes the approach the court should take under the original O.8 in deciding whether or not there is "other good reason" to renew.

*"[8] ...Firstly, the court should consider is there good reason to renew the summons. Secondly, if the court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Thirdly, in considering the question of whether it is in the interest of justice as between the parties to renew the summons because of the identified good reason, the court will consider the balance of hardship for each of the parties if the order for renewal is or is not made."*

Haughton J. noted that *Chambers v. Kenefick* had been followed on many occasions and went on to state:

*"[76] ...In my view this is not a second tier or limb to the test. The need for the court to consider under sub-rule (4) the interests of justice, prejudice and the balancing of hardship is in my view encompassed by the phrase "special circumstances [which] justify extension". Thus there may be special circumstances which might normally justify a renewal, but there may be countervailing circumstances, such as material prejudice in defending proceedings, that when weighed in the balance would lead a court to decide not to renew. The High Court should consider and weigh in the balance all such matters in coming to a just decision."*

28. In *Murphy*, Haughton J. also emphasised the importance of ensuring that there was a reasonable ground for commencing professional negligence litigation and noted the clear duty upon counsel not to settle such proceedings unless satisfied that appropriate expert evidence is or would become available to support such a claim. Haughton J. also endorsed the permissibility of issuing a protective writ to avoid a claim becoming statute barred and, recalled that in *Mangan v. Dockeray & Ors* [2020] IESC 67 the Supreme Court had recently confirmed that the requirement for reasonable grounds to commence such proceedings could be satisfied other than by way of a formal expert report.

**Application of the legal principles to the present case**

29. The first defendant argues that the plaintiff has been guilty of inordinate and inexcusable delay in commencing and prosecuting these proceedings. It is undoubtedly true that a significant period of time has passed since this house was built. However, it appears at least arguable that the defects alleged in the premises were latent defects which only came to light after 2014. The proceedings were commenced within six years of that date and whilst this delay is regrettable, it is not necessarily legally impermissible, particularly when a complex claim requires to be investigated.
30. The first defendant also points to the fact that Mr. Slowey died in December 2016 and that the summons was issued only a matter of days prior to the expiry of the resulting limitation period. This is correct. Again, however, as the proceedings were commenced within this limitation period, this factor cannot, without more, mandate either a refusal to renew or an order setting aside this renewal.
31. In this respect, it is important to remember that this is not an application to strike out the plaintiff's claim for inordinate and inexcusable delay or pursuant to the interests of justice. Therefore, whilst I fully accept that the plaintiff's delay is of relevance to the exercise of this court's discretion in relation to the current application, it is not determinative.
32. Having said that, the authorities clearly establish that a party who has waited until the eleventh hour to issue proceedings has a greater obligation to prosecute the proceedings with diligence. In this regard, I find that, at least to the point of the hiatus between December 2019/January 2020, and the application to renew the summons in September/October 2020 the plaintiff's claim had been prosecuted with reasonable diligence.
33. I note that Mr. McCullagh's report is dated January 2017. Thereafter, the letter from OSG is dated April 2017. As these initial reports were only available in 2017, no real criticism could attach to the plaintiff for not instituting proceedings prior to December of 2018. Proceedings such as this are complex and ought not be commenced without due consideration and a proper basis.
34. In any event, I am not satisfied that the first defendant has been prejudiced by the passage of time since the commencement of the proceedings in December 2018, which of course postdates the date of the passing of Mr. Slowey in December 2016. The only

specific prejudice averred to in this regard is a rather vague assertion of lack of access to documentation required to investigate the claim. Yet no details whatsoever have been provided as to any attempts made by the first defendant to access the practice records, whether from the second named defendant or otherwise. In terms of the availability of oral evidence, it goes without saying that once the late Mr. Slowey passed away in December 2016, any ability to take instructions from him was irretrievably lost. From that time, which predated the commencement of proceedings, both of the defendants would, in any event, have had to rely upon the practice files and other documents in order to respond to the plaintiff's claim. I also note that, fortunately, steps were taken to notify the insurance broker prior to the commencement of the proceedings, in December 2017. Overall, it is difficult to see how the first defendant's ability to defend the proceedings has been prejudiced by passage of time or to understand how the circumstances pertaining in December 2017 (after the passing of Mr. Slowey) differ from those pertaining in December 2018 (when the proceedings were commenced) or indeed in October 2020 (when the renewal order was granted).

35. As regards the first named defendant's submission that the plaintiff has not exhibited any definitive expert report subtending the professional negligence proceedings against either of the defendants, I fully accept that it is not clear whether the plaintiff has obtained other necessary reports on foot of the further investigations recommended by Mr. McCullagh and by Aidan O'Connell & Associates. If the plaintiff has not pursued these further investigations or obtained further expert reports indicating a reasonable basis for these proceedings, then that is certainly something of which both defendants can legitimately complain in due course. However, there is, in my view, no obligation on the plaintiff to put such reports before the court in the context of the present application. The reason such reports are often put before the court in applications to set aside renewal of a summons is because the plaintiff wishes to demonstrate to the court why further expert reports in relation to liability or causation were required thus explaining the delay in serving the summons. Such reports are not generally put before the court for the purpose of demonstrating that the plaintiff has a good cause of action as that is not what is in issue in applications such as this. In the present case, the plaintiff and her solicitors have averred that there is a reasonable basis for the claim and such reports as have been exhibited before the court suggest that there is potentially some substance to these averments. In these circumstances, whilst I offer no view whatsoever on the likely outcome of the proceedings, I would certainly not be prepared to find that any contended weakness in the plaintiff's underlying claim would in of itself provide a reason for setting aside the renewal of the summons.
36. I find that the plaintiff's solicitor made genuine attempts to serve the first named defendant between the date of issue of the summons and the end of 2019. Although it may be understandable that the first defendant was reluctant to accept service of the proceedings, I do not think that it is entirely reasonable to instruct one's solicitor not to accept service of proceedings, and then in the context of an application to set aside renewal of the summons to rely upon the delay occasioned as a result thereof. Quite simply, any delay occasioned as a result of the non-service of the proceedings has been



substantially contributed to by the first named defendant's own approach. The plaintiff emphasises that, whilst the first defendant urges this court to conclude that she ought to have been fully aware that the first defendant lived and worked in Dublin, the latter's grounding affidavit in fact avers that she resides at an address in Celbridge, Co. Kildare. No suggestion was made at the hearing before me that the first defendant did not reside at this Celbridge address in 2019/2020. An impression, therefore, that the first defendant resided in Dublin over the period in question would probably not have hugely advanced the position in relation to service.

37. It is clear from the correspondence placed before the court that, from June of 2017 onwards, the plaintiff's solicitors were corresponding with the legal representatives of the first defendant informing them of the possibility of a claim. Even though the report from OSG was not previously furnished, the first defendant has had the report of Barry McCullagh for a considerable time. Although I accept that the report is not definitive, it would in my view have provided a reasonable basis upon which to undertake initial enquiries in relation to the potential defensibility or otherwise of the likely claim. Thus, although the first defendant was perhaps not aware of "the proceedings", (in the sense that the summons itself was not served on her solicitors until after the order of Murphy J.) from June of 2017, she was clearly aware of the intention to bring proceedings and of the general nature of the proceedings.
38. The Statute of Limitations is argued by both sides in this case as providing a basis for the renewal, or alternatively non-renewal, of the summons. The plaintiff argues that if the summons is not renewed she will face the ultimate sanction of her action being statute barred. The first named defendant on the other hand, argues that the fact that she will be denied the opportunity to argue that the proceedings are statute barred is prejudicial to her, and is a factor of relevance. It is clear from the authorities that the availability of the Statute of Limitations is a matter which can be argued by both parties on a reciprocal basis in applications such as this. In the present case however, I think that the interests of justice dictate that the relevance of the Statute of Limitations inures more to the benefit of the plaintiff than the first named defendant. The plaintiff commenced proceedings with reasonable diligence within the statutory limitation period and her inability to serve same at least up until the end of 2019 was due to circumstances largely outside her control. Although I accept that the plaintiff could have made an application for substituted service during the course of 2019, I think that her continued efforts to attempt service at the only address of which she was aware could not be fairly characterised as either unreasonable or lacking in diligence.
39. Both parties relied upon *Brereton v. Governors of the National Maternity Hospital* [2020] IEHC 172. The analysis of Hyland J. in that case has recently been approved in Murphy (op cit.) Both judgments refer to a spectrum of delay ranging from the extreme down to the minor. A period of over two years (or indeed even five years) running from the date of expiry of the summons was characterised as extreme delay. A period of six to nine months was characterised as moderate delay, and a period of two and a half months as minor delay (in each case running from the date of expiry of the summons).

40. In this case, the relevant delay is nine months from the date of expiry of the summons. In my view, this delay can be categorised as moderate. The fact that this particular delay is unexplained on affidavit has given me significant pause for thought. However, I think it would be unrealistic of the court not to take judicial notice of the extreme disruption to, *inter alia*, the conduct of litigation, for a period of some months commencing in mid-March of 2020. Bearing this in mind, it seems to me that the delay in this case ought not be such as to disentitle the plaintiff to renewal which would effectively end the proceedings.
41. It also seems to me that I am entitled to treat the first named defendant's chosen response to the plaintiff's efforts to serve as a relevant consideration. Thus, it was clear from Mr. Canny's correspondence that the plaintiff's understanding was that the first named defendant had a residence either in Donegal or at an unidentified Dublin residence (in which city she also worked). Yet no steps were taken to correct the plaintiff's misapprehension as to the defendant's residence, which appears to have been in Kildare. In my view, this somewhat undermines the first named defendant's arguments because, had she in any way clarified the position, it is likely that the delay in service would have been substantially less.
42. Bearing all of these considerations in mind, setting aside renewal of the summons would not, in my view be in the interests of justice. I therefore exercise my discretion to refuse the reliefs sought by the first named defendant. I would however emphasise that it is essential that these proceedings are now brought forward with expedition. Should further delay occur, then it goes without saying that a different approach might be taken in respect of any future application to strike out the proceedings, either on grounds of delay or pursuant to the inherent jurisdiction of the court.