

THE HIGH COURT

[Circuit Court Record No. 299/2018]
[High Court Record No. 2021/127 CA]

BETWEEN

START MORTGAGES DESIGNATED ACTIVITY COMPANY

PLAINTIFF

AND

ALAN BRENNAN
AND
CAROLYN SINNOTT

DEFENDANTS

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JUDGMENT of Mr. Justice Holland delivered on the 7th of March, 2022

1. This is an appeal by the plaintiff of the order made by His Honour Judge Quinn at Trim Circuit Court on 26th July, 2021 refusing the plaintiff’s ex parte application to renew the Civil Bill in this case following its expiry and to do so for purposes of service on the first defendant.

The Facts

2. The Civil Bill was issued by Permanent TSB on 28th May, 2018 claiming possession of a house, 6 Park Dale, Grangearth, Drogheda, County Meath, comprised in folio 59509F County Meath (“the House”). Possession is claimed on foot of a charge registered on that folio. Possession had been demanded by letters dated 26 March 2018 and 6 April 2018 – the latter recording mortgage loan arrears of €66,737.22 and total debt of €328,723.78.

3. While the mortgage identified both defendants as residing at the House, the Civil Bill identified only the first defendant as residing there and the second as residing at an address in Glasnevin, Dublin. The second defendant was served before expiry of the Civil Bill. An affidavit of William Hughes, sworn 25th July, 2018, proves personal service of that Civil Bill on the second defendant.

4. Service on the first defendant was not achieved and the Civil Bill expired a year after it issued. The Ex Parte Docket grounding the application to Judge Quinn is dated 15 November 2019 – about 5½ months after expiry of the Civil Bill.

5. An affidavit of Frank McTiernan sworn 25th July, 2018 records his attempts to personally serve the first defendant at the House on 29th June, 2018. He spoke there with an occupant who declined to give his name, said he was a tenant and said that the first defendant did not live there. A neighbour told Mr. McTiernan that the house was tenanted and that she had never seen the first defendant there. Mr. McTiernan served the Civil Bill upon that occupant. An affidavit of Anton Trofinchenko, sworn 14th November, 2018, proves attempted service of the Civil Bill on the first defendant at the House by registered letter dated 23 July 2018 but that letter was returned marked “unknown at this address”.

6. Those affidavits of Messrs Hughes, McTiernan and Trofinchenko appear to have grounded an intended motion for substituted service on the first defendant on foot of an *ex parte* docket dated 19th November, 2018 which was returnable for 11th February, 2019. It is unclear exactly what happened on that return date, save that the motion for substituted service must have been adjourned by reason, it seems reasonable to infer from what followed, of the perceived necessity to further investigate the Defendant’s whereabouts and file a supplemental affidavit to inform options for the precise form of substituted service which might be required.

7. A supplemental affidavit of Shauna Flanagan, sworn 16th April, 2019 in the motion of substituted service, records that she is a researcher employed by “Aserve”, a firm of document servers. She deposes that the first defendant was still on the electoral register at the address of the House. She deposes that, from the first defendant’s Facebook profile, he appears to reside in Warman, Saskatchewan, Canada. His Facebook profile has a number of check-ins in the United States and Canada and one at Dublin Airport in 2015 when, it appears, he was on holiday in Ireland. She deposes that she attempted to contact the first defendant via telephone numbers “provided” – but she does not say when, by whom, or in what circumstances, those numbers were provided or how reliable they might have been expected to be as contact points for the first defendant. She says that one of the phone numbers was no longer assigned to any customer. She says the second number was “ringing” and the third was “not available”. It is not clear what exactly Ms. Flanagan means by these observations but she clearly failed to contact the first defendant by those means.

She summarises that her enquiries established that the defendant no longer resides in the State and possibly resides in Saskatchewan.

8. The Meath County Registrar, by order of 13th May, 2019, permitted substituted service on the first defendant. The stipulated mode of service was by advertisement in “*the local newspaper in the province of Saskatchewan*” and by prepaid post to the House.

9. It must or ought to have been apparent to the Plaintiff at 13th May, 2019 that substituted service of the Civil Bill prior to its imminent expiry was a matter of urgency.

10. The Civil Bill expired a fortnight later - by which time it had not been served on the first defendant. The Plaintiff has adduced no evidence as to what happened or did not happen or what decisions were taken as to or consideration given to the question of service in that fortnight.

11. By notice of change of solicitor dated 23rd July, 2019, the present solicitors on record for the Plaintiff came on record for Permanent TSB. This roughly coincides with Permanent TSB’s agreeing to sell the mortgage and loan to Start Mortgages the present Plaintiff. A “goodbye” letter of 7 February 2020 from Permanent TSB to the defendants, exhibited to an affidavit of Eva McCarthy sworn 5 June 2020 grounding an application to substitute Start Mortgages for Permanent TSB as plaintiff, records that Permanent TSB had written to the defendants on 12 September 2019 to inform them of the agreement to sell the loan – a sale completed on 7 February 2020.

12. An *ex parte* docket seeking to renew the Civil Bill was filed on 15th November, 2019, returnable on 13th January 2020. It was filed on behalf of Permanent TSB, represented by the present solicitors on record, approximately five and a half months after expiry of the Civil Bill.

13. The *ex parte* docket seeking to renew the Civil Bill was grounded on the affidavit of Sarah Comerford sworn 15th November, 2019. She is a legal executive of the new solicitors on record and records that she has been authorised by Permanent TSB to make the affidavit on its behalf and on its behalf she prays renewal of the Civil Bill.

14. Ms Comerford gives, if anything, an even briefer account of the sequence of events than I have set out above – referring only and baldly to the failure to serve the Civil Bill, the order for substituted service and the change of solicitor. She refers to the affidavit of David Smith, Assistant Manager of Permanent TSB sworn 14 May 2018 grounding the Civil Bill for possession and the exhibits thereto. She gives no account of the affidavits of Messrs Hughes, McTiernan and Trofinchenko and Ms Flanagan - which are not mentioned either in the *ex parte* docket as grounding

the application. However, they have been opened to me and I have considered them for present purposes.

15. On foot of her limited account of the sequence of events, Ms. Comerford simply asserts as follows:-

“I say that it appears (the previous) solicitors was unable to perfect service of the proceedings upon the first defendant as the civil bill expired on 27 May 2019 prior to (the present) solicitors filing a notice of change of solicitor.”

Ms. Comerford:

- gives no description of the events relating to or explanation for the failure to effect substituted service between the order for substituted service and the expiry of the Civil Bill. Perhaps there is an explanation, but it is not before me.
- gives no description of the events relating to or explanation for the lapse of 5½ months from the expiry of the Civil Bill to the issuing of the ex parte docket for its renewal.
- in renewing the Civil Bill and does not articulate any basis on which any of the (very sparse) facts disclosed on her affidavit constitute “special circumstances” justifying renewal of the Civil Bill.

16. As stated, the *ex parte* docket dated 15th November, 2019 seeking to renew the Civil Bill was returnable on 13 January 2020. I am not told what happened on that return date. The sale to Start Mortgages had not yet completed. Indeed, I’m not told anything of what happened to the *ex parte* docket seeking to renew the Civil Bill between its issue on 15th November, 2019 and the order on foot thereof – the order under appeal – made over 1½ years later on 26 July 2021.

17. The Affidavit of Eva McCarthy sworn 5 June 2020 grounding an application to substitute Start Mortgages for Permanent TSB as plaintiff, is technically not part of the present application to renew the Civil Bill. It has been included in the documents placed before me. In ease of the Plaintiff I consider its content. It records that Permanent TSB’s sale of the mortgage and loan to Start Mortgages was, as recorded above, completed on 7 February 2020 and on 12 March 2020 Start Mortgages was registered on the folio as owner of the Charge. On 3 July 2020 an ex parte docket issued, grounded on the Affidavit of Eva McCarthy sworn 5 June 2020 and returnable on 16 November 2020, to substitute Start Mortgages for Permanent TSB as plaintiff – which order was made on 16 November 2020. That order of 16 November 2020, incorrectly as to the first defendant, records service of the Civil Bill on “the Defendant” and dispenses with re-service of the Civil Bill on “the Defendants” but directs service of a copy of the order on them.

18. The next relevant event disclosed on the papers is the order of Judge Quinn made 26 July 2021 refusing renewal of the Civil Bill – the order under appeal. The order does not so record but I infer that it was made on foot of the ex parte docket dated 15 November 2019.

The Law on Renewal of Civil Bills

Order 12 Rule 1

19. By Order 12 Rule 1 of the Rules of the Circuit Court, a Civil Bill remains in force, for purposes of service on the defendant, for 12 months from its issue. Failing such service, it is not a nullity thereafter, as this case illustrates - as it has expired only as relates to service on the first defendant. Having been served on the second defendant, the Civil Bill subsists for prosecution against her.

20. Also by Order 12 Rule 1, if any defendant shall not have been served, a plaintiff may apply, ex parte, to the County Registrar within that 12 months for an order renewing the Civil Bill for 3 months. The County Registrar may order renewal *“if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason”*.

21. However if the 12 months has expired without service or renewal of the Civil Bill, by Order 12 Rule 1(3) and (4) any application to renew must be made to the Court. The Court may order renewal for 3 months *“where satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order.”* Notably the options of merely proving reasonable efforts at service or other good reason is not available to a plaintiff in such a circumstance and their omission from Rule 1(4) implies that merely proving reasonable efforts at service or other good reason is not itself a special circumstance.

22. Order 8 of the Rules of the Superior Court as to renewal of summonses is essentially the same as Order 12 Rule 1 RCC as to renewal of Civil Bills [save that the Master, not the County Registrar, deals with pre-expiry renewal applications]. Again, in a post-expiry application for renewal, the Court must be *“satisfied that there are special circumstances which justify an extension”* and the case law on renewal of summonses applies in the present circumstance..

23. As with any ex parte order, a renewal order is subject to the possibility of being set aside inter partes. Many of the cases arise not, as does the present, in a motion to renew but in a motion to set aside renewal. But the same principles apply – albeit on different evidential matrices given the motion to set aside is inter partes. In the renewal application the Plaintiff, in seeking to satisfy its onus in seeking renewal, has the benefit of the absence of evidence from the defendant ending against renewal.

24. While in what follows, I will refer to delays of various periods between expiry of the summons (here the Civil Bill) and the making of the renewal application, for reasons which appear below, that is only one, if often an important, part of the analysis.

Lawless v Beacon Hospital

25. It bears remembering that **Lawless v Beacon Hospital**¹ decided that the old “good reason” test did not mean that the plaintiff must prove good reason for not having served a summons in time. It meant good reason to renew the summons. The newer “*special circumstance*” test applicable after expiry of the summons is explicitly the same in this respect – Order 12 Rule 1 requires that the Court be satisfied of and state in its order “*special circumstances which justify an extension*”.

Murphy v HSE

26. In **Murphy v HSE**² Haughton J., dealing with an application to set aside renewal, analysed the differences between the bases on which the motion is decided pre-expiry by the Master on a “good reason” basis and post-expiry by the Court on a “special circumstances” basis. Haughton J., agreeing with Hyland J. in **Brereton**³, considered that the obligation to identify the special circumstances in the renewal order is a most unusual requirement in the architecture of the RSC. As to the “special circumstances” requirement, Haughton J. made some “general observations”, some of which I summarise as follows:

- Whether special circumstances arise must be decided on the facts of a particular case, and it would be unwise to lay down any hard and fast rule.
- “Special circumstances” is a higher test than that of “good reason”. The word “special” does not mean “extraordinary” but does suggest that some fact or circumstance beyond the ordinary or the usual needs to be present. (See also **Klodkiewicz v Palluch**⁴)
- Agreeing with Hyland J in **Brereton**, the requirement is analogous to that onus imposed by caselaw on a plaintiff to show special circumstances why security for costs should not be granted once a defendant shows a prima facie entitlement to security - the essence of the order is to advance, not hinder, the interests of justice and the Court must fairly and proportionately balance the respective interests of the plaintiff and the defendant.
- The Court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused. The consideration of the interests of justice, prejudice and the balancing of hardship is encompassed by the phrase “special circumstances [which] justify extension”.

¹ [2019] IECA 256 (Court of Appeal (civil), Peart J, 15 October 2019)

² [2021] IECA 3; 15th January 2021 Haughton J.

³ **Brereton v The Governors of the National Maternity Hospital, HSE and Ors** [2020] IEHC 172

⁴ [2021] IEHC 67

27. Haughton J. considered that this last point reflects the principle enunciated by Finlay Geoghehan J. in **Chambers v Kenefick**⁵, in describing the approach under the original O. 8 to deciding “other good reason”:

“[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.”

As will be seen, the “two limb” test is superseded by a “holistic” one.

28. As to the balancing analysis, Haughton J. said:

“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.”

29. Haughton J. said that inadvertence or inattention by legal advisors, for example in serving the summons, will rarely constitute “special circumstances”. Legal advisors must be taken to be aware of the 12 month time limit for service of the original summons, and the consequences of allowing it to lapse. Haughton J. cited Peart J. who, in the context of “good reason”, in **Moynihan v Dairygold**⁶, took the “*opportunity to give a timely warning to practitioners that proper attention must be given to the question of service of proceedings after issue, especially where there is a likelihood that after expiration of one year from the date of issue, the Statute will have expired.*”. Haughton J. commented that “*If inadvertence of this nature would not reach the threshold of “good reason” it is even more unlikely to amount to ‘special circumstance’.*”

30. Haughton J. also observed that if “special circumstances” exist, the jurisdiction to grant leave to renew is discretionary. While that did discourage the Court of Appeal from overturning the High

⁵ [2005] IEHC 402

⁶ Moynihan v Dairygold Co-operative Society Limited [2006] IEHC 318

Court, it is notable that the High Court judge renewed the Personal injuries Summons in that case despite a delay of 5 months from its expiry to making the renewal application – but in the specific context of awaiting medical reports before serving a medical negligence summons.

Brady v Byrne - Brereton v National Maternity Hospital

31. In **Brady v Byrne**⁷ Hyland J., dealing with an application to set aside renewal, considered that the “*crux of the case*” was whether there were special circumstances. She cited **Murphy** to the effect that there are no hard and fast rules in respect of whether special circumstances arise but the plaintiff must identify some fact or circumstance beyond the ordinary or the usual. Hyland J. observed that the test of special circumstances, requires a “*holistic consideration*” “*in the round*” of the period of and reasons for the delay, the balance of justice and considerations of hardship/prejudice, rather than considering those factors only after considering whether special circumstances arise. But those factors “*cannot be treated as removing the requirement for a convincing explanation for the failure to serve the summons in a timely fashion or the necessity for an extension of time. Hardship or prejudice to a plaintiff alone cannot in my view amount to special circumstances.*” Notably, Hyland J. considered the prejudice to the plaintiff in refusing to renew the summons considerably greater than the prejudice to the defendants in renewing the summons. Nonetheless, that did not seem to her sufficient to tilt the balance in the plaintiff’s favour absent a satisfactory explanation for the delay.

32. Given the requirement of “*holistic consideration*” “*in the round*”, a combination of circumstances may accumulate to special circumstances even if any one of those circumstances would not do so.

33. Hyland J. noted in **Brady** that in **Brereton** she had observed that the difference between “*good reason*” and “*special circumstance*” was such that “*much shorter periods of delay are likely to be treated as sufficient to justify a refusal.*” It is clear from her judgment that Hyland J. was considering not just lapse of time in failure to serve prior to expiry of the summons (necessarily no more than a year) but also, perhaps especially, delay in bringing the post-expiry application to renew the summons.

34. Also, Hyland J. noted in **Brady** that in **Brereton** she had considered that “*The 12 month period must be treated as contextualising any further delay.*” I agree and respectfully add that the limitation of 3 months on the period of validity of the summons once renewed, further contextualises delay – though I do not suggest it denotes a limit of any kind.

⁷ [2021] IEHC 778

35. On the facts of **Brady**, Hyland J. did not consider that special circumstances had been established *“given the length of delay and the absence of a satisfactory explanation for same.”* The delay was of 8½ months.

36. In **Brereton**, Hyland J. permitted renewal of a Personal Injury Summons where the delay was 10 weeks, which she described as “relatively short” in the light of special circumstances which she identified as follows:

- The plaintiff’s solicitor wrote to the defendant before the expiry of the twelve month period informing the defendant of the intended proceedings.
- The plaintiff’s solicitor intended to serve the Summons before the expiry of the 12 month period, as stated in that letter.
- The plaintiff’s solicitor inadvertently failed to do so.
- The period of delay was a “relatively short” 10 weeks/2½ months from expiry of the Summons. But *“Had the period of delay been longer, even by a month or two, my approach to this case would have been different.”*
- Given the period of delay, and the notification of the intention to issue proceedings by way of letter of 10 March 2019, there was unlikely to be any significant prejudice to the defendant and none has been identified.
- The plaintiff’s case was likely to be statute barred failing renewal. While, if so, she might have a remedy against her solicitor and Hyland J. was also *“acutely conscious of the very clear line of case law to the effect that a plaintiff being statute barred is not in itself a sound basis for ordering renewal of a summons”*, nonetheless, that she might be statute barred was relevant to the question of hardship to her.

Altan Management, Moloney v Lacy & Downes v TLC Nursing Home

37. In **Altan Management v Taylor Architects**⁸ Heslin J. cited Murphy in extenso. He also emphasised **Moloney v Lacy Building and Civil Engineering Ltd**⁹ in which Clarke J. had referred to a

“..... general ‘tightening up’ of the approach of the courts to delay which can be identified in the dismissal for want of prosecution jurisprudence applies also to cases involving an application to renew a summons, such that the question of whether a reason put forward may be deemed a “good reason” may be looked at with greater scrutiny, and the factors

⁸ Altan Management (Galway) Limited v Taylor Architects Ltd [2021] IEHC 218

⁹ [2010] 4 I.R. 417

which can properly be taken into account in assessing the balance of justice may need to be looked at from a perspective that places a greater emphasis on the need to move with expedition.”

Recently, in **Klodkiewicz v Palluch**¹⁰ Butler J., having noted considerable inconsistency in the case law, cited **Moloney** as exemplifying that over the last 15 years or so the courts have adopted an increasingly restrictive attitude towards the renewal of summonses.

38. On the one hand, it should be said of Moloney that the plaintiff had the benefit of the “good reason” standard as opposed to “special circumstances”. On the other, the delay in Moloney was an egregious 5 years and 4 months in a witness action in professional negligence action in which the prospect of faded memories arose - as opposed to the present case which will proceed on documents – at least as far as is known as yet.

39. In **Altan**¹¹ Heslin J., said *“it does not seem to me that this Court has the discretion to grant a renewal, in the absence of such special circumstances regardless of any hardship which might result to the Plaintiff. The existence of special circumstances on the facts of a given case seem to me to be a sine qua non for the grant of a renewal ...”*.

40. Heslin J., emphasised¹² the obligation on a plaintiff at the ex parte stage to be full and frank, as regards setting out all relevant facts and circumstances in the grounding affidavit. There can be no “holding back” and, at the ex parte stage, the court is entitled to regard what a plaintiff has said on affidavit as being both accurate and comprehensive insofar as concerns what they maintain constitute the special circumstances justifying a renewal. Heslin J.¹³ also cited Simons J. in **Downes v TLC Nursing Home Ltd**¹⁴ to the effect that:

“... the affidavit grounding an ex parte application to extend time for the making of an application for leave to renew a summons must set out in full the factual circumstances relied upon as justifying an extension of time. In particular, the affidavit must address the delay between the expiration of the initial 12 month period and the date of the application to court. All relevant correspondence must be exhibited. Given that the application is made ex parte, there is a duty on solicitors to make full and frank disclosure of all relevant matters to the court. The affidavit should set out the facts relied upon as establishing the “good reason” for which it is said that the summons should be renewed.”

¹⁰ [2021] IEHC 67 (High Court (General), Butler J., 1 February 2021)

¹¹ §95

¹² §81

¹³ §96

¹⁴ [2020] IEHC 465 §§37-39

Bank of Ireland v Sugrue

41. In **Bank of Ireland v Sugrue**¹⁵ the High Court refused to set aside a renewal of a summons primarily due to the defendant's 2-year delay in applying to set it aside. Quinn J. cited Chambers as to the "good reason" test and also for the observation of Finlay-Geoghegan J. that the court may have regard to the entire chronology of events and the conduct of the parties in assessing whether good reasons exist and where the justice of the case lies. The plaintiff relies on this observation.

42. While it would be excessive to cite at full length the circumstances disclosed in the judgment of Quinn J., the context of his citation of the observation by Finlay-Geoghegan J. does throw some light for present purposes. The summons had issued in February 2015 and attempts at service failed in March 2015. In April 2015 the plaintiff's solicitor retained a tracing agent to find the defendants. The agent, inter alia, called to a number of addresses but the defendants had moved away from each. Nor did the agent find the first named defendant at his club. In March, 2017, the trace agent reported to the plaintiff's solicitors that they had found the defendants residing at an address in Mullingar. Quinn J. continues:

66. Although the court has been presented with limited evidence as to what transpired for the two-year period following April 2015, the plaintiff has given evidence of reasonable attempts at service made immediately after the issue of the Summons, and thereafter that the "trail went cold". That characterisation of the "trail" can only be taken to have been caused by the five different addresses held by the defendants over the relevant four year period.

67. The affidavit grounding the application to renew the summons asserts that reasonable efforts were made, and continues by stating that "in all the circumstances good reason exists to renew the summons". No expansion is given as to what those good reasons are, but it is clear from the judgment of Finlay-Geoghegan J. in Chambers v Kenefick that the court may have regard to the entire chronology of events and the conduct of the parties in assessing whether good reasons exist and where the justice of the case lies.

68. It was not until March 2017 that the plaintiff discovered the new address in Mullingar at which the defendants were residing. It delayed from then until September 2017 in filing the application for the renewal of the summons, although it moved promptly thereafter to effect service at the address known to it.

.....

71. The defendants resided at five different locations in the space of less than four years. They cannot be faulted for that fact of itself. Nor is there any evidence to suggest that their relocation of address was motivated by a desire to avoid the plaintiff's claims or these proceedings. However, such efforts as were made by the plaintiff to effect service were thwarted by these changes of location, leading finally in 2017 to the discovery of the defendants' new address at Mullingar.

¹⁵ The Governor And Company Of The Bank Of Ireland v Sugrue [2021] IEHC et 1 (High Court (General), Quinn J, 22 February 2021)

.....

73. *Whilst the plaintiff has provided limited information as to events between April 2015 and March 2017, I accept the explanation that the “trail went cold” and that this state of affairs was caused by the defendants residing at five locations in the relevant four year period without notifying the plaintiff.*

74. *This set of circumstances was the principle cause for the lateness of the application to renew the Summons.*

75. *When the summons was served in November 2017, the applicant wrote one letter to the plaintiff’s solicitors in January 2018, and then waited until served with the Notice of Motion returnable before the Master on 19 October, 2018, before taking any further steps, including the appointment of a solicitor. The defendant then waited until July 2019 to file this application, the effect of which was to obtain a return date 6 years after the date of the demand on the guarantee, thereby creating a potentially significant prejudice to the plaintiff.*

76. *There have been material delays by each of the parties. I have concluded that the four changes of address in as many years, followed by the delay in bringing this application at a time when the plaintiff had indulged the defendants with numerous adjournments, has the effect that the balance of justice favours the refusal of this application.”*

43. It seems to me that, while the plaintiff’s reliance on Quinn J.’s invocation of Chambers as to inferences from the chronology is understandable, its application in Sugrue was to a very particular set of facts in which the circumstances, delay and inaction of the defendant had considerable weight – not least her awaiting expiry of the limitation period before moving to set aside renewal. Also, whether the facts disclosed on a plaintiff’s affidavit can ground inferences as to the cause of delay in seeking to renew a summons or Civil Bill will be necessarily dependant on the particular circumstances of the case.

44. True, the authorities – for example **Downes** – oblige the plaintiff to set out on Affidavit the “.. the facts relied upon as establishing the “good reason” for which it is said that the summons should be renewed.” – “set out in full the factual circumstances”. But as has been famously said, “the state of a man’s mind is as much a fact as the state of his digestion”¹⁶ – the same is true of a solicitor’s mind and it is not unreasonable to expect an explanation as to what in fact caused delay in seeking to renew a summons. For example, it may be in a particular case that a disclosed factual event or circumstance could have caused a delay but did not in fact do so as the solicitor simply never adverted to the matter. It might be, for example, that belated investigations showed that a defendant had been missing for many years but that would not have been the cause of delay if, in truth, the investigations were belated because the solicitor had forgotten all about the case. In such a case the cause of delay would have been inadvertence, not the fact that the defendant had been

¹⁶ *Edgington v Fitzmaurice* (1885) 29 Ch. 459, 483. Bowen LJ

missing. I do not suggest such circumstances will be common or likely – I merely seek to illustrate my point that the actual cause of delay must be disclosed by the Plaintiff seeking renewal. Nor would a solicitor be justified in merely referring, in that example, to the fact that the defendant had been missing for many years without disclosing his own entire inadvertence to the issue of service. The issue is not whether circumstances existed which could have caused the delay – it is whether circumstances existed which did cause the delay.

45. It is, of course, possible that a simple and particular sequence of events will explain a plaintiff's delay on a *res ipsa loquitur* basis – and even excuse it in greater or lesser degree. Perhaps even, that will often be the case. But if a plaintiff does not take the obvious course of disclosing on affidavit, not merely the bald chronology of events but its state of appreciation and attitude from time to time to the issue and urgency of service, and of renewal, of a summons or Civil Bill and its decision-making process in that regard, such a plaintiff runs a considerable risk that the Court will decline to draw the inferences it urges. The court should not be required to read between the lines of the plaintiff's affidavit on this type of issue.

Chambers

46. I have already considered Chambers in two respects above – as to the balance of justice and as to the interpretation of affidavits. As to the former, its recent citation shows that it is still, and properly, influential. But it must be borne in mind that it was decided on an earlier iteration of the Rule – in which the “good reason” test applied even to a post-expiry renewal application - as opposed to the more demanding “special circumstances” test now applicable. It also, by about 5 years, predates the recognition in *Moloney* of a “*general ‘tightening up’ of the approach of the courts to delay*” and the “*greater scrutiny*” of the good reason proffered to renew a summons.

47. Notably also, Chambers was a medical negligence action in which the defendant's insurers had been sent a copy of the summons to the defendants insurers a little over two months after the summons issued and shortly afterwards solicitors replied indicating they would accept service. The plaintiff's solicitor overlooked service thereafter. Finlay-Geoghegan J. took a view of the solicitor's inadvertence which might not be readily taken today – but, then again, might on similar facts given she associated the inadvertence strongly with the fact that the insurers had the summons shortly and had taken legal advice after it issued clearly – a factor which weighed heavily in favour of renewal. The point is, though, that the plaintiff's affidavit was express as to that inadvertence – indeed her solicitor thought and expressly stated that he had thought that he had served the summons and on that basis had even threatened a motion for discovery. I do not disagree with Quinn J. in *Sugrue* in his reference to Chambers as to reliance on a chronology of events. But I do not think that Quinn J. intended to invest that reference with the weight which the Plaintiff in the present case argues it should bear. Far from being a case in which the Court had to read between the lines of an affidavit to infer reasons for delay, Chambers was a case in which the plaintiff's solicitor had been explicit on the issue. And in *Sugrue*, while the plaintiff's evidence was slim in

respect of a lengthy period, it had given evidence that after reasonable attempts at service and despite the tracing agent's efforts the "trail went cold". Quinn J. unsurprisingly inferred that *"That characterisation of the "trail" can only be taken to have been caused by the five different addresses held by the defendants over the relevant four year period."* Quinn J. was saying no more than that a particular chronological sequence of events may justify an inference in favour of a plaintiff – and the facts in Sugrue were clearly of that kind. And of course I agree. But that is far from saying that a plaintiff may ordinarily and with confidence rely on such inferences as absolving it from active explanation of its delay.

DRM v Proton

48. In **DRM v Proton**¹⁷ Simons J. renewed a plenary summons in defamation in the interests of justice. There the plaintiff had informally served the summons by email and tracked post and the defendant had thereby received and considered it. The defendant, located in Switzerland, chose not to appear in the proceedings but did not communicate that choice to the plaintiff and ignored the plaintiff's later request that it appear. Only after the Plaintiff got judgment in default of appearance did the defendant act – by motion to set aside the judgment on the basis that service of the summons had been ineffective in law for failure to follow the procedure prescribed by Order 11E of the Rules of the Superior Courts for the service of documents abroad. Simons J set aside the judgment for irregularity of service.

49. The plaintiff, against the risk that judgment would be set aside on that basis had motioned to renew the summons. Simons J. described his judgment as addressing *"the fallout of a tactical decision made by the defendant not to contest a claim for defamation brought against it"*. He considered that if the summons were not renewed, the defendant would be rewarded for having failed to object at the time to the form of service, and for having chosen to ignore the proceedings thereafter. All this in circumstances in which, failing renewal, the action would be statute barred.

50. Simons J. cited **Murphy v HSE** in extenso as to special circumstances - encompassing the interests of justice – which I have also done above. Notably, Simons J. considered that the "underlying principle" is that the courts should lean towards deciding cases on their merits where this can be done consistently with the requirement for expedition in litigation and without prejudicing the rights of the other parties¹⁸. The consequence of refusing to renew the summons would be to shut out the plaintiff's claim without a hearing on the merits. While the fact that, failing renewal, the proceedings would be statute barred was not, in itself, a justification for renewing a summons it was a relevant factor in considering the balance of justice. With none of this do I disagree.

¹⁷ DRM Contract Administration Ltd v Proton Technologies AG [2021] IEHC 554 (High Court (General), Simons J, 25 August 2021)

¹⁸ citing, by analogy, *McGuinn v Commissioner of An Garda Síochána* [2011] IESC 330

51. But Simons J., referred to the requirement for expedition in litigation, seems to me to have been indirectly invoking the requirement of special circumstances to excuse delay in seeking to renew the summons: hence the express imposition of that requirement by the rule in the specific case of a post-expiry application to renew. It also seems to me that Simons J., in referring to the requirement for expedition in litigation, is consistent with the view of Hyland J. in **Brady** and in **Brereton** that *“The 12 month period must be treated as contextualising any further delay.”* I have added that in my view the limitation of 3 months on the period of validity of the summons once renewed, further contextualises delay.

52. It is also important to note the view Simons J. took of the particular facts in **DRM v Proton**¹⁹:

“The facts of the present case are truly exceptional. Given the events of September and October 2018, it had been reasonable for the plaintiff to assume that service of the plenary summons had been effected. No objection had been taken by the defendant at that time as to the form of service. Indeed, the defendant had, initially, attempted to enter an appearance to the proceedings. The service of the summons has since been found to be irregular on technical grounds only.

This is not a case where a plaintiff failed to make reasonable efforts to serve the proceedings within the twelve-month period allowed under the Rules of the Superior Courts, with the result that there is now a difficulty under the Statute of Limitations. Rather, these proceedings were issued promptly on 15 October 2018, within a matter of months of the publication of the allegedly defamatory emails. Notwithstanding that the service was irregular, it is a fact that the defendant has been on notice of the defamation proceedings since 18 October 2018 at the latest. This is highly significant. The case law indicates that one of the factors which can be taken into account on a renewal application is that a defendant was on notice of the proceedings, notwithstanding that same had not been formally served. Such informal notice allows a defendant to, for example, preserve such records as may be relevant to the defence of the proceedings, or, in the case of a professional, to notify their insurers.”

Application of Law to Facts

53. Counsel for the plaintiff, as to special circumstances, submits, and I accept, that the plaintiff made appreciable efforts to serve the first defendant within the year during which the Civil Bill was valid for service upon him – specifically, until the order for substituted service on 13th May, 2019. That is relevant to my decision but it does not of itself suffice as a special circumstance justifying renewal.

¹⁹ §101 et seq

54. As to the period from the order for substituted service on 13th May, 2019, I bear particularly in mind that in **Brady v Byrne**, Hyland J. considered that while a holistic consideration of delay, the reasons for delay, the period of delay, the balance of justice in considerations of hardship and prejudice was required, those factors could not remove the requirement for a convincing explanation for the failure to serve the Civil Bill in a timely fashion or the necessity for an extension of time. In this case no explanation is deposed to – I am asked to infer such explanation from the circumstances.

55. Counsel submits that the terms of the substituted service order were unusual – not least as requiring publication in a Saskatchewan newspaper. I am not convinced by that argument. On the one hand, it is perfectly clear that the 2-week window for service between the order for substituted service on 13th May, 2019 and the expiry of the Civil Bill on 27 May 2019 was short – indeed, very short. However, it is equally clear that the urgency of the matter must at that stage have been apparent to the plaintiff’s solicitors – see above **Moynihan v Dairygold**. It is also clear that there was ample time within the period to effect service by ordinary post as the order required.

56. As to advertisement in a local newspaper in Saskatchewan, the distance involved and unfamiliarity of the locus may have perhaps, at first glance, seemed daunting. But I have no reason to believe that in reality a brief search – perhaps on the web - would not have quickly found a suitable newspaper and an email or phone call would have quickly resulted in placing the ad in question - with perhaps some brief delay for fund transfer to pay for the advertisement. Funds transfer apart, it is likely to have been no more complicated an exercise than placing an ad in the local paper in a county of Ireland distant from the metropolis. Indeed, it seems to me that the substituted service order provided for a relatively undemanding form of substituted service, capable of being urgently acted on as need required, depending entirely on relatively simple actions within the power of the plaintiff and not requiring, in any degree, proof that the proceedings had in fact come to the attention of the first defendant. That, at least, is my starting assumption. So, while the window was brief, it does seem to me that compliance with the substituted service order was, at least *prima facie*, perfectly possible prior to the expiry of the Civil Bill.

57. Of course, it might be that effecting substituted service was in fact a far more difficult proposition than strikes me as likely to have been the case. But if it was, then it was up to the plaintiff, bearing the onus of proof of special circumstances in this application, to so apprise the court and describe and confirm the occurrence of whatever difficulty might have arisen. The plaintiff should have deposed to any such difficulties and has not. For all I know, no effort whatsoever may have been made to serve the Civil Bill after the substituted service order and prior to its expiry and no consideration during that interim of the urgency of service may have occurred. Or service may have been attempted and failed. Or a proper and reasonable decision may have been made that the attempt was impracticable. I simply am not told. While the period available for service between the substituted service order and the expiry of the Civil Bill was short, the failure to serve in that period

requires explanation and no explanation has been given - much less an explanation amounting to or even capable of contributing to a special circumstance.

58. I return to the affidavit of Ms. Comerford which grounds this application. As stated, she gives a very spare account of the facts – far less than I have given by taking account of other affidavits in the proceedings. On foot of that spare account she simply asserts as follows:-

“I say that it appears (the previous) solicitors was unable to perfect service of the proceedings upon the first defendant as the civil bill expired on 27 May 2019 prior to (the present) solicitors filing a notice of change of solicitor.”

59. It is important to state that this assertion by Ms. Comerford that the previous solicitor was “unable” to serve the Civil Bill, is made entirely by way of inference from the facts disclosed in her affidavit. She seems to have been in no better position than I am in to make that inference from those facts.

60. Counsel for the plaintiff submits that I should accept as it stands the evidence to which the applicant has disposed. Inasmuch as there is, in this ex parte application and necessarily, no contradictory evidence, that submission is correct as far as it goes. However, that does not oblige the court to draw, from the facts of which evidence is given which I accept, inferences favourable to the plaintiff. Nor does it oblige the court to accept from the deponent what are clearly the deponent’s inferences from the facts - as opposed to an account of primary facts themselves.

61. Given the account of matters given in the affidavits of Messrs Hughes, McTiernan and Trofinchenko and that of Ms. Flanagan, Ms. Comerford is correct in describing the previous solicitors as having been unable to effect service on the first defendant up to the date of the order of 13th May, 2019 for substituted service. But Ms. Comerford gives no explanation for delay from 13th May, 2019 in seeking to renew the Civil Bill and she shows no factual basis for her inference that the previous solicitors were unable to effect substituted service before expiry of the Civil Bill.

62. Absent positive averments in this regard, I do not see either the terms of the substituted service order of 13th May, 2019 or the brief period between that order and the expiry of the Civil Bill as contributing to a finding of special circumstances bearing upon the question of renewal of the Civil Bill.

63. More generally, Ms. Comerford does not articulate why the sparse facts disclosed on her affidavit constitute “special circumstances” justifying renewal of the Civil Bill. While affidavits should not be argumentative, it is fair to expect an account of the solicitor’s actual decision-making process and state of mind from time to time as to renewal so the court can discern what actually caused (as

opposed to might have caused) the lapse of time (to use a neutral phrase) in seeking to renew the summons. While it may have undesirable consequence for the Plaintiff, if the reality is that the issue was not adverted to that should be stated – see **Downes**. If the issue was adverted to then there should be no difficulty in giving an account of that advertence.

64. I was not entirely clear to what, if any extent, counsel relied in arguing for special circumstances, on the fact of change of solicitor slightly less than 2 months after the Civil Bill expired. Assuming such reliance, I consider that a change of solicitor is not in any way beyond the ordinary or the usual in litigation as contemplated by Hyland J., in **Brady v Byrne** and so does not qualify as a special circumstance.

65. The question of change of solicitor is of perhaps some, but in any event minor, relevance to the issues I have to consider. No doubt the assignment agreement between Permanent TSB and Start Mortgages either included, or did not include, or even excluded, detailed respective obligations and entitlements as to the passage of information from Permanent TSB and its lawyers to Start Mortgages and its lawyers both before and after the assignment and as to co-operation after the assignment. The point is that whatever were the arrangements in this regard they were no doubt deliberate and so cannot form part of, or alternatively have great weight in the consideration of, special circumstances and the balance of justice. There is no assertion that Start Mortgages did not get from Permanent TSB information to which it was entitled disclosing the circumstances of the case. Once to hand it was incumbent on the new solicitors to ensure they got, and to consider within a relatively brief period of having taken over the file, the relevant information to the extent the assignment entitled Start Mortgages to that information. To look at the matter another way and describing the position slightly inaccurately but nonetheless illuminatingly, Start Mortgages in February 2020 “bought” an expired Civil Bill. I make this observation in particular given the complete lack of evidence before me as to what the previous solicitors did or did not do or consider between the order for substituted service of the Civil Bill and its expiry other than the bald fact of failure to serve the Civil Bill.

66. I should add that the assignment of the mortgage loan does not seem to me to add to any case for special circumstances or as to the balance of justice on the basis that any error prior to expiry of the Civil Bill was by Permanent TSB. This view seems to me consistent with the recent view of McDonald J in **ACC v Joyce**²⁰ as to delay in execution of a judgment. I note also that Whelan J has recently opined in **O’Beirne v Bank of Scotland**²¹ that an assignee of a mortgage “..... *has stepped into the shoes of the mortgagee and must accept the obligations and consequences which flow from that*”. The facts of that were different but the principle is general. True, **O’Beirne** related to an assignee qua assignee of a mortgage, as opposed to qua assignee of the loan secured by the mortgage (as in this case). But clearly to apply different a principle in the case of assignment of a loan to that applying to in the case of assignment of the mortgage securing the loan would be a

²⁰ [2022] IEHC 92

²¹ *O’Beirne v Bank of Scotland Plc & Pentire Property Finance DAC* [2021] IECA 282 Whelan J Delivered 27th October 2021

recipe for confusion - to no end I can discern. In fairness, counsel for the Plaintiff did not much press the assignment of the mortgage and/or loan as a special circumstance.

67. As I say, in my view, the fact of a change of solicitor is of little relevance. It might perhaps allow a brief leeway of time but no more. In broad terms, it remains the case that the *ex parte* docket to renew the Civil Bill did not issue in this case until about 5½ months after the expiry of the Civil Bill. It does appear to me that that period falls to be considered, as was suggested by Hyland J. in **Brady v Byrne**, in the context of the 12-month period during which the Civil Bill is ordinarily valid for service and also, as I have said, with the 3-month period which is now the duration of a renewal. It is in those contexts that the period of 5½ months calls for explanation. Indeed in **Breton** Hyland J, considering a 2½ month delay and allowing renewal, said a delay longer by even a month or two would have yielded a different result. Perhaps the 5½ months could have been explained but it has not been explained. As it is not explained, I need not consider what explanation would have assisted the Plaintiff.

68. Counsel does suggest that by reason of the assignment it was not possible to move the application to renew until Start Mortgages had been substituted as a Plaintiff. At the issuing of the *ex parte* docket the assignment to Start Mortgages had been agreed but not completed. As stated, it issued on the authority of Permanent TSB and prayed renewal of the Civil Bill. It was returnable 13 January 2020. I am not told what happened on that return date nor is there any averment by Ms. Comerford in any supplemental affidavit what was done or any decisions as to what was to be done with the *ex parte* docket seeking to renew the Civil Bill on any date between its issue on 15th November, 2019 and the order on foot thereof – the order under appeal – made over 1½ years later on 26 July 2021. She does not say why the application was not moved on 13 January 2020 or until July, 2021. But at 13 January 2020 the sale to Start Mortgages had still not yet completed and if it was thought proper to issue the Ex Parte Docket on 15th November, 2019 on the instructions of Permanent TSB, noting relevant to the constitution of the proceedings had changed by the return date on 13 January 2020. So it's not apparent, by reference to the plaintiff's argument of special circumstances based on the need to substitute Start Mortgages as plaintiff before seeking to renew the Summons, that there was any impediment to moving the renewal application on that occasion. If there was another impediment on that occasion I am not told of it.

69. In any event, in **ACC v Joyce**²² the applicant sought to excuse delay in making an application for leave to execute a judgment by reference to a similar transmission of interest as occurred here. McDonald J. held that:

“ there would have been nothing, during the currency of that process, to prevent an application being made, in the meantime, for leave to execute after the relevant six-year period. The relevant holder of the judgment debt could have done so. In its capacity as assignee of the judgment debt, Cabot cannot absolve itself of the inactivity on the part of the

²² [2022] IEHC 92

relevant holder. In this context, as the judgment of Allen J. in the Irish Nationwide case makes clear, an assignee of a judgment debt is in no better position than the original judgment creditor. an application by an assignee of a judgment debt is to be approached on the same basis as an application by the party originally entitled to execute the judgment.”

In my view, the same rationale applies here. The clock does not stop between an agreement to transmit and completion of the transmission – in this case a period of over 6 months – as to stop the clock would put the assignee in control, to a greater or lesser degree, of extending the period of the the putative special circumstance.

70. Counsel for the plaintiff also suggested that relevant to the question of special circumstances was the fact that, even were the Civil Bill renewed, the defendant would have an opportunity to apply to set it aside. First, and insofar as special circumstances have been described in the case law as being something beyond the ordinary or the usual, the opportunity to set aside renewal is a commonplace. That argument could be made, not unusually, but rather in every case of an application to renew a Civil Bill. In any event, the argument seems to me to put the cart before the horse – the horse being the plaintiff’s obligation in the ex parte application to renew to prove special circumstances. The fact that subsequently a defendant might be able to negate that finding of special circumstances is hardly something upon which the plaintiff is entitled to rely by way of proof of those special circumstances in the first place.

71. Counsel for the plaintiff also suggested that the fact that this is a possession action in which service has failed as to one defendant but succeeded as to another contributes to a finding of special circumstances. Again, I cannot see that this is a circumstance beyond the ordinary or the usual.

72. Interestingly, counsel for the plaintiff did not assert hardship to the plaintiff on the basis that failing renewal of the Civil Bill its action would be statute-barred. Even where made, as it very often is in such applications as this, that argument does not of itself suffice as a special circumstance. But it is a factor relevant in the holistic consideration so it is at least noteworthy that the argument was not made. Counsel in fact argued that, failing renewal, the consequence would be discontinuance of the action against the second defendant and a new action against both defendants. This, he said, would be at additional cost ultimately recoverable from the defendants. While arguable, I am not convinced that an order for possession in these proceedings against the second defendant would be of no advantage to the plaintiff. In any event and notably, in **Brady v Byrne**, Hyland J. considered that hardship or prejudice to a plaintiff alone could not amount to special circumstances. I do not consider this prospect of discontinuance and new proceedings to amount to a special circumstance or as much tilting the balance of justice in favour of renewal on a holistic consideration.

DECISION

73. In all the circumstances, and despite counsel's skilful efforts for the Plaintiff, I find that the Plaintiff has demonstrated no special circumstances justifying renewal of the Civil Bill. and no basis for renewal on an holistic consideration of the interests of justice. I refuse the application to renew the Civil Bill.

74. This judgment is delivered electronically. As this was an ex parte application which has been refused and I am minded to make no order as to costs. Failing application for a different order, an order will issue accordingly after the expiry of 14 days hereof.

David Holland

7/3/22