THE HIGH COURT

[2022] IEHC 534

[2019 5272 P]

[2020 993 P]

BETWEEN

MICHAEL POWER

PLAINTIFF

AND

CJSC INDIGO TADJIKISTAN, TELIA COMPANY AB AND AGA KHAN FUND FOR ECONOMIC DEVELOPMENT S.A.

DEFENDANTS

JUDGMENT of Ms. Justice Emily Egan delivered on the 29th day of July, 2022

Introduction

1. The plaintiff is an accountant who had previously been employed as chief financial officer of the first and/or second defendant in these proceedings. The first defendant carries on the business of mobile phone operator and is based in Tadjikistan. The second defendant is a Swedish public limited company with its principal activity as telephone company and mobile network operator. The plaintiff contends that the second defendant was responsible for the oversight of matters relating to governance and ethics of the first defendant. The third defendant is a Swiss public limited company who, together with the second defendant, the plaintiff contends had fiduciary duties in respect of the governance and operations of the first defendant.

2. The plaintiff brings two separate proceedings against the defendants. In personal injuries proceedings, commenced by personal injuries summons of 3rd July, 2019, the plaintiff claims damages for personal injuries suffered by him in the course of his employment in the period between January 2016 and February 2017. In protected disclosure proceedings brought by plenary summons dated 7th February, 2020, the plaintiff claims damages for detriment suffered by reason of making a protected disclosure under s. 13 of the Protected Disclosures Act 2014 in the course of his employment.

3. This judgment concerns applications on behalf of the second and third defendants (who are separately represented) pursuant to O. 8, r. 2 of the Rules of the Superior Courts ("the Rules") to set aside an order of the High Court, McDonald J., of 21st June, 2021 renewing both the personal injuries summons and the plenary summons and granting leave to serve the said renewed summonses out of the jurisdiction on these defendants.

Structure

4. I will commence by considering the legal principles applying in respect of applications pursuant to O. 8, r. 2. After that, I will set out the relevant chronology in relation to the

second defendant and consider the renewal of the personal injuries summons. Thereafter, by reference to the same chronology, I will consider the position in relation to the renewal of the plenary summons as against the second defendant. I shall then perform the same exercise in relation to the third defendant.

5. The special circumstance identified in the order of 21st June, 2021 as justifying the renewal of the summonses was the "*difficulty in effecting service*" on the second and third defendants as described in the plaintiff's solicitor's grounding affidavit. This court must consider whether the difficulty effecting service constitutes a special circumstance and, if so, whether this justifies the renewal of both the personal injuries summons and the plenary summons as against both of these defendants. In approaching the present applications, I must consider not simply the practical difficulties encountered in serving each individual defendant, but the cumulative complexities in serving three separate defendants domiciled in three separate jurisdictions. It is also relevant to consider the engagement of the parties and their respective legal representatives both prior and subsequent to the expiry of the respective summonses and up to the time of the renewal application.

Legal principles
General

6. A summons once issued remains valid for a period of one year before it expires unless it has been served. After the expiration of twelve months, an application for an extension of time to renew the summons must be made to the court. In the past the bar applying to renewal applications was relatively low. However, O. 8, r. 1(4) now provides that in order to grant renewal, the court must be satisfied that there are special circumstances which justify an extension; such circumstances are to be stated in the order.

7. Order 8, r. 1(4) was considered by the Court of Appeal in *Murphy v. HSE* [2021] IECA 3. Haughton J. reflected upon the meaning of the expression "special circumstances" in the rule, noting that it was generally accepted to be a higher test than the previous threshold of "good reason". A "good reason" may well be something that arises commonly or frequently. By contrast, Haughton J. noted that whilst the word "special" did not raise the bar to "extraordinary", it did suggest that some fact or circumstance beyond the ordinary or usual needed to be present. The word "special" therefore necessarily imports a circumstance that is not normal or common.

8. In an application such as this, the burden at all times remains on the plaintiff because the court cannot constitutionally make an *ex parte* order which finally affects the rights of parties. Strictly speaking therefore, it is not necessary for the defendant to point to some new circumstance which was not brought to the attention of the judge granting the *ex parte* renewal.

9. It is further common case that new and different reasons for renewal should not in general be advanced by a plaintiff at the *inter partes* hearing. In the present case, I do not find that any such new or different reasons were argued before me.

Gateway?

10. An extension of time for the renewal of a summons will be granted if the applicant establishes that there are special circumstances and that those special circumstances justify the extension. In this case, a dispute arose between the parties as to whether, as the plaintiff contends, the existence of special circumstances is to be considered in tandem with the question of prejudice or whether, in the alternative, as the defendant contends, the intendment of the rule is that special circumstances must first be established before the court moves on to consider prejudice as part of the separate enquiry as to whether the special circumstances established justify renewal. In other words, is the test for the establishment of special circumstances a holistic, unitary test in which the absence of prejudice can be considered as relevant?

11. In *Nolan v. Board of Management of St. Mary's Diocesan School* [2022] IECA 10, Noonan J. considered this issue and resolved it in the following terms:

> *"Counsel for the plaintiff submitted that this meant that whether a special circumstance existed was to be considered in tandem with the question of prejudice, there being no second limb to the test, and that the law had "moved on" since* ***Chambers*** *was decided. In my judgment, this is incorrect and a misinterpretation of* ***Murphy****. Haughton J. recognised that special circumstances alone are not enough and placed emphasis on the requirement for those circumstances to justify extension. His reference to there not being a second tier or limb to the test refers to the fact that special circumstances and the justification for renewal are not two separate and distinct matters, but fall to [be] considered together in the analysis of whether it is in the interest of justice to renew the summons. Prejudice is a component of that analysis.*
>
> *However, before that analysis can be arrived at, it must be established that there are special circumstances. This follows from the court's approval of the* ***Chambers*** *approach and accords with common sense. The plaintiff's contention that the court is required to consider prejudice from the outset is to put the cart before the horse and would lead to a result diametrically opposed to the clear intent of the new rule."*

12. Therefore, a party seeking renewal of a summons must, as a "gateway requirement" establish that special circumstances exist. In the light of the judgment in *Nolan*, I cannot accept the argument of the plaintiff that in determining whether the special circumstances exist, the court is required to consider prejudice. Rather, the presence or absence of material prejudice to either party is relevant in determining whether the special circumstances found to exist justify the renewal or whether, notwithstanding that special circumstances exist, a renewal ought not be granted. In this latter respect, the court considers whether it is in the interests of justice to renew the summons which entails considering any general or specific prejudice or hardship alleged by the defendant and balancing that against the prejudice or hardship that may result for the plaintiff if renewal is refused.

Conditional appearance

13. As will become apparent when I set out the chronology, the second defendant entered a conditional appearance to contest the jurisdiction of the Irish Court in both sets of proceedings. There is a dispute between the parties as to whether the entry of a conditional appearance prevents the second defendant from making the present application, or otherwise impacts upon the court's approach to the present application.

14. It will be recalled that O. 8, r. 2 provides that 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 a notice of motion to set aside such order. The plaintiff contends that by entering a conditional appearance the second defendant has waived any objection to the service of the expired summons. Similarly, the plaintiff argues that the conditional appearance is also a waiver of objection to his failure to seek leave to serve the second defendant out of the jurisdiction pursuant to O. 11A, r. 4 (as to which see below). The second defendant, on the other hand, submits that the service of a conditional appearance is a well-recognised procedure when a defendant proposes to dispute the substantive jurisdiction of the Irish Courts. It does not, it is said, amount to a waiver of "domestic" irregularities such as the service of an expired summons or irregularity in service.

15. It is established that, the entry of a conditional appearance does not represent a submission to the jurisdiction of the Irish Courts. Can it be said to represent a waiver of objection to such "domestic" procedural irregularities?

16. The answer is in the negative. In *Kearns v. Evans* [2020] IEHC 257, Sanfey J. held that where a defendant has by entering a conditional appearance not submitted to the jurisdiction of the court, he cannot be precluded from applying to set aside service of the proceedings on him on the basis that the summons served had expired. Sanfey J. also concluded that there is also no requirement for a defendant to state in the conditional appearance that he intends, in addition to objecting to the substantive jurisdiction of the Irish Courts, to make an application under O. 12, r. 26 regarding the service of the summons.

17. The analysis does not end there however. Although the current application is made pursuant to O. 8, r. 2, this is not the only provision of the Rules which may be of relevance. Order 12, r. 26 is also of relevance. This provides for an application by a defendant to set aside service of a summons which he believes is invalid. As with an application pursuant to O. 8, r. 2, such an application must also be made before the entry of an appearance.

18. The interaction, in purely domestic proceedings, between O. 8, r. 2, O. 12, r. 26 and the entry of an appearance was considered by the Court of Appeal in *Lisa Lawless v. Beacon Hospital* [2019] IECA 256. The Court of Appeal held that if a defendant claims that the service upon him of proceedings is in some way invalid, for example by way of the service of an expired summons, the defendant must before entering an appearance bring an application by way of a notice of motion under O. 12, r. 26 to have the service set aside. If such defendant enters an appearance the effect thereof is to waive any objection to the

manner in which service has been effected. Indeed, Peart J. in *Lawless* went so far as to hold that once an appearance is entered, no application to renew the summons needs to be brought by the plaintiff in the first place.

19. *Lawless* thus establishes that a domestic defendant who puts in an appearance – whether or not same is labelled "conditional" or "under protest" – cures any defect in service. There is good reason for this; an expired summons is not a nullity as it is always liable to be renewed. *Lawless* also exhorts a defendant served with an expired summons to be proactive and to apply to set aside service under O. 12, r. 26. By way of complementary principle, it is also established that an application to set aside an order renewing a summons under O. 8, r. 2 may fail if it is not brought expeditiously.

20. The question which arises then is how the foregoing principles apply to a foreign defendant served with an expired summons, particularly one who has entered a conditional appearance to contest the jurisdiction of the Irish Courts.

21. As a domestic defendant may be debarred from challenging the service of an expired or irregularly served summons by the entry of an appearance, then a foreign defendant (such as the second defendant) who enters a conditional appearance must be under an obligation to at least notify the plaintiff of any such objections that it may have to service with reasonable expedition. It seems to me that if such a defendant fails so to do, it will be more difficult for it to rely upon the irregularity advanced or, indeed, to criticise delay on the part of the plaintiff. This is of particular relevance to the second defendant's very late objection to service upon it within leave to serve out of the jurisdiction having been obtained pursuant to O. 11A, r. 4 of the Rules (see paragraph 31 below).

22. Separately, as a domestic defendant is under a duty of expedition in relation to an application to set aside renewal of an expired or irregular summons, irrespective of whether or not they enter an appearance, then so too, within reason, must be a foreign defendant (such as either the second or third defendant), again irrespective of whether or not they enter a conditional appearance.

23. None of these observations are intended to overlook or deemphasise the obligation upon a plaintiff to also take steps to regularise their position, for example by timely application to renew an expired summons. The obligation upon a plaintiff to act with expedition in this latter respect is well known. A plaintiff who delays too long in bringing an application to renew a summons will undoubtedly jeopardise his or her prospects of succeeding in such application. However, the obligations upon a defendant to notify its objections to the plaintiff and to act with reasonable expedition in making an application to set as aside a renewal are also of relevance, particularly when, as in this case, both the plaintiff and the defendants' obligations are running in tandem, are under active consideration by the parties' respective legal teams and further are the subject of discussion and correspondence *inter se*.

Chronology and decision in relation to the renewal of the personal injuries summons as against the second defendant

24. The plaintiff's appointment was terminated in February 2017 and within a matter of months, the plaintiff's solicitor sent a detailed letter of claim to the second defendant. This letter communicated the bulk of the factual details underlying the pleas in the two forthcoming sets of proceedings.

25. This letter was promptly acknowledged by the Swedish lawyers representing the second defendant, Mannheimer Swartling. Thereafter, throughout the summer and autumn of 2017, the plaintiff's solicitor and the second defendant and/or Mannheimer Swartling corresponded in relation to a data access request of the plaintiff.

26. By letter dated 28th November, 2017, in response to two separate letters from the plaintiff's solicitor seeking the nomination of Irish solicitors to accept service of the proceedings, Mannheimer Swartling confirmed that its client did not propose to engage Irish lawyers at this stage. Thereafter, on 19th June, 2018, the plaintiff's solicitor furnished Mannheimer Swartling with a copy of the PIAB application form and medical report and sought consent to service of documents by electronic mail in accordance with SI no. 475 of 2017. However, by letter of 18th July, 2018, Mannheimer Swartling clearly informed the plaintiff that its client would not accept electronic service of legal proceedings and that it expected that the plaintiff would comply with the applicable rules relating to foreign service of legal proceedings in Sweden. The second defendant was of course fully within its rights to take this approach.

27. On 28th June, 2019, the plaintiff's solicitor again forwarded a letter of claim to Mannheimer Swartling and requested confirmation that they had authority to accept service of the proceedings in both the personal injuries proceedings and the protected disclosure proceedings. Shortly thereafter, on 3rd July, 2019, the personal injuries summons issued.

28. By letter of 15th July, 2019, Mannheimer Swartling confirmed that they did not have authority to accept service of the proceedings and again informed the plaintiff that he should comply with the rules relating to foreign service of legal documents. It was indicated that the second defendant would vigorously contest any proceedings, including on jurisdictional grounds.

29. Notwithstanding this, on 17th July, 2019 the plaintiff's solicitor sent a copy of the personal injuries summons by registered post directly to the second defendant, copied to Mannheimer Swartling, and again requested confirmation that they would accept service of the proceedings. Soon after this the plaintiff sent a letter before action directly to the second defendant and to Mannheimer Swartling. However, on 31st July, 2019 Mannheimer Swartling again stated that they did not have instructions to accept service of legal proceedings on behalf of the second defendant.

30. Shortly after this, the plaintiff's solicitor's town agent informed him of a difficulty encountered in issuing the plenary summons in the protected disclosure proceedings, namely that the Central Office had indicated that leave of the court was required to serve the summons out of the jurisdiction on the first defendant in Tadjikistan. The plaintiff's legal

team considered whether it was necessary to obtain leave to serve out of the jurisdiction in respect of the first defendant only or whether it was also necessary to obtain such leave in respect of the second and third defendants. Ultimately, the plaintiff's town agents emailed his solicitor to indicate that the Central Office had confirmed their own understanding that leave to serve out was only required in respect of the first defendant. On 3rd February, 2020, the plaintiff applied *ex parte* to the High Court for leave to serve the first defendant out of the jurisdiction with notice of the protected disclosure proceedings. This order was granted and the plenary summons and concurrent plenary summons in the protected disclosure proceedings issued on 7th February, 2020.

31. It is now common case that, pursuant to the provisions of O. 11A, r. 4(1), leave to serve out of the jurisdiction should have been sought in respect of all three defendants ("the O. 11A leave issue").

32. The plaintiff's solicitor served a copy of the order of 3rd February, 2020 and the notice of the personal injuries summons on Mannheimer Swartling indicating that they would arrange service directly upon the second defendant in compliance with the applicable rules relating to foreign service. Despite this, on 12th February, 2020, the plaintiff's solicitor attempted to effect service of these documents directly upon the second defendant by post. No acknowledgment issued and as a result, the plaintiff's solicitor determined to effect service of the proceedings on the second defendants pursuant to EC Regulation 1393/2007 ("Regulation 1393/2007").

33. Accordingly, on 21st February, 2020 and 9th March respectively the personal injuries summons and the plenary summons in the protected disclosure proceedings were issued to the Courts Service of Ireland as transmitting agency pursuant to Regulation 1393/2007. The Courts Service sent the request for service of the proceedings to the relevant Swedish receiving agency who it appears confirmed receipt to the Irish transmitting agency.

34. Article 7 of Regulation 1393/2007 states that service is to be effected by the relevant receiving agency within one month of transmission and that failure to serve the documents within time obligates the receiving agency to inform the transmitting agency whereupon the delay can be explained to the plaintiff. As is now apparent, the Swedish receiving agency did not effect service upon the second defendant until 1st September, 2020, two months after expiry of the personal injuries summons. The plaintiff's solicitor, however, was unaware of this. He avers that he was not informed that any delay in effecting service was afoot and reasonably expected that the proceedings had been served within one month of receipt.

35. The second defendant entered a conditional appearance on 30th September, 2020. The plaintiff could not have discerned the date of service of the proceedings from the appearance. The appearance did not refer to any objection based upon the service of an expired personal injuries summons. Nor incidentally did the appearance refer to any objection based upon the O. 11A leave issue. This conditional appearance stated that it was entered solely for the purposes of contesting the jurisdiction of the Irish Courts but also reserved the right, in the alternative, to defend the proceedings.

36. In my view, the above demonstrates that the plaintiff's solicitor had made reasonable effort to serve the personal injuries summons on the second defendant prior to its expiry. As the plaintiff's solicitor did not receive verification of service, he might perhaps have followed the matter up to confirm that service had been effected. Irrespective of this however, the non-service of both sets of proceedings by the Swedish receiving agency for a period of in excess of 6 months after their receipt and its failure to communicate this to the Irish transmitting agency (and hence to the plaintiff), in my view constitutes special circumstances.

37. I should at this stage respond to a specific argument of the second defendant in relation to the information sheet filled out by the plaintiff's solicitor and lodged with the Courts Service as transmitting agency pursuant to Regulation 1393/2007. The information sheet requires the applicant to indicate the date after which service is not required to be effected. It appears that the date entered in this box was 30th December, 2020. The second defendant argues that the plaintiff's solicitor could not have had a reasonable expectation that the personal injuries summons would be served within time prior to its expiry because he had identified a date beyond the lifetime of the summons.

38. I believe that the plaintiff's solicitor was entitled to rely upon the obligation of the Swedish agency to effect service within one month of receipt of the proceedings or to notify the Irish transmitting agency. In any event, there is no evidence whatsoever of any causative link between the date entered on the information sheet and the failure of the Swedish receiving agency to serve both sets of proceedings within the appropriate time. When the delay in service later came to light, the plaintiff's solicitor wrote on several occasions to the Swedish receiving agency with a view to ascertaining why the proceedings had not been served within the time expected. It appears that no response to these communications was received. As such, it would be unreasonable to infer that the date entered either caused the delay in service or means that the plaintiff's solicitor should have anticipated such delay. Rather, I suspect that there is a validity in the plaintiff's solicitor's suspicion that the reason for the delay arose from the fact that the time at which the proceedings were forwarded to the Swedish receiving agency (February and March of 2020) coincided with the beginning of the Covid 19 pandemic.

39. The first indication that the plaintiff's solicitor had that the personal injuries summons had expired prior to service was by way of a letter dated 6th October, 2020 from the second defendant's Irish solicitors, ("the second defendant's solicitors"). This letter stated that the personal injuries proceedings had not been served within 12 months of the date of issue and expressly reserved their clients right to apply to set aside service of the personal injuries proceedings in due course. The letter also stated that the second defendant's solicitors had instructions to bring a motion to challenge the jurisdiction of the Irish Courts in both sets of proceedings. Finally, this letter requested service of the statement of claim in the protected disclosure proceedings (which was subsequently delivered on 13th October, 2020) to enable instructions to be taken. This letter did not make any objection to service on grounds of non-compliance with O. 11A, r. 4(1), the O. 11A issue.

40. I accept of course that service on the second defendant without leave being obtained in accordance with O. 11A, r. 4(1) was irregular. I am also acutely conscious of the fact that inadvertence or, indeed, a misconception on the part of the plaintiff's legal advisers (in this instance in relation to the need to seek leave to serve out of the jurisdiction) would very rarely constitute a special circumstance, irrespective of whether or not such inadvertence or misconception may have been contributed to by other parties such as the Central Office. However, I think it would be going too far to state that such inadvertence or misconception can never either constitute or contribute to the establishment of special circumstances. Inadvertence or errors in relation to service may provide an explanation as to why service was not effected, was delayed, or was effected incorrectly or irregularly. On rare occasions, the courts have been prepared to find that such an explanation for non-service is sufficient to establish special circumstances justifying renewal.

41. Thus, in *Chambers v. Kenefick* [2007] 3 IR 156, a case under the old rules in which the relevant threshold was "*good reason*", Finlay Geoghegan J. refused to set aside the order renewing the summons in circumstances where it was issued on 25th June, 2002, a copy of the summons was sent on 2nd September, 2002 to the defendant's insurers, who accepted service, and the summons was not formally served due to the solicitor's inadvertence. Finlay Geoghegan J. was satisfied that the failure to serve the summons was due to inadvertence and oversight on the part of the plaintiff's solicitor. She stated that although this inadvertence did not constitute a "*good reason*", such inadvertence and oversight was the explanation for why the summons, a copy of which had been furnished, was not formally served. Therefore, the fact that the copy summons had been delivered, coupled with the fact that the failure to subsequently formally and properly serve it under the rules was simply due to inadvertence, constituted a "*good reason*".

42. The reasoning in *Chambers* was applied in a case under the new rules, *Brereton v The Governors of the National Maternity Hospital & Ors.* [2020] IEHC 172 (which decision was itself commented upon with approval by Haughton J. in the Court of Appeal in *Sheila Murphy v. Health Service Executive*). In *Brereton*, Hyland J. noted that the plaintiff's solicitor had intended to serve the summons before the expiry of the twelve-month period, that the failure to do so was inadvertent and that within the twelve-month period a letter had been written to the defendants informing them of the intended proceedings.

43. In the present case, as in *Chambers* and *Brereton*, the fact that the personal injuries summons was delivered within time (as early as 19th July, 2019) directly to the second defendant and also to Mannheimer Swartling is critical. Further, as in *Chambers* and *Brereton*, the plaintiff's solicitor clearly intended to formally serve the summons within time. Although I fully accept that the application to renew in this case was clearly not made as quickly as that in *Brereton*, (in which case the application was made only 2 months after the expiry of the summons), I deal separately with this below and ultimately conclude that this delay does not prevent the establishment of special circumstances arising from the difficulties in effecting service.

44. For all of the above reasons it is my view that, at least up until the end of November 2020, the plaintiff has established special circumstances in respect of the difficulty in effecting service of the personal injuries summons on the second defendant.

45. At first sight, the expiry of time between the letter from the second defendant's solicitors of 25th November, 2020 (notifying the plaintiff that the summons had expired prior to service) and 21st June, 2021 (the date of the plaintiff's *ex parte* application to renew) seems excessive.

46. However, when looked at closely, it is apparent that developments during this period were part of an ongoing process as between the plaintiff and the two defendants in relation to the litigation. In my view, the following factors together ensure that this passage of time does not prevent the plaintiff from establishing special circumstances. Indeed the time needed by all parties to bring forward the complex and overlapping series of applications necessary to bring clarity to this matter is itself a manifestation of the special circumstances existing in this case.

47. First, although the application to renew was not made until 21st June, 2021, the plaintiff had served the second defendant (and the third defendant) with the *ex parte* application papers over a month before that, on 7th May, 2021 and gave them an opportunity to address the court on the reliefs sought. Whilst of course the defendants were perfectly entitled to decline to attend, they were clearly fully informed of the forthcoming application and were afforded an opportunity to make any arguments that they wished to make to the effect that the reliefs sought ought not be granted.

48. Second, it was clear at all times that, if the second defendant was unprepared to waive its objections, the plaintiff would move to renew the summons. This was specifically stated in the plaintiff's solicitor's letter of 19th November, 2021 and indeed a draft affidavit grounding this renewal application was enclosed with that letter. During the subsequent period of December 2020 to May/June 2021, there was active engagement between the solicitors for the plaintiff and the two legal teams engaged by the defendants. There is no doubt that the second defendant (and indeed the third defendant) were fully aware during this entire time that the plaintiff intended to bring, and was in the course of preparing, an application to obtain orders renewing the summons and regularising the position.

49. Third, on 4th December, 2020, the second defendant served a motion seeking an order that the Irish Courts decline jurisdiction and seeking to have service of the proceedings set aside pursuant to O. 12, r. 26. This motion was based upon purely substantive jurisdictional grounds and did not address the issue of service of the expired personal injuries summons (or the O. 11A leave issue). One can understand that this motion (which was served on the plaintiff in January 2021) probably served to divert the plaintiff's legal team at least temporarily from the course of preparation of the *ex parte* application.

50. Fourth, the application papers which the plaintiff's legal team had to prepare in respect of the various applications necessary in relation to both defendants were by no means straightforward. I would not view the passage of several months as an excessive period in

which to assemble the relevant materials, refer papers to counsel, research the legal aspects of the application, advise upon the tactical approach to be taken and draft the lengthy application papers. During this period, the plaintiff's legal advisers had many complex decisions and judgment calls to make. For example, as the plaintiff's solicitor avers, at one stage, consideration was given to seeking an order deeming good the previous service effected, particularly in respect of the protected disclosure proceedings.

51. Fifth, it seems to me that (a) the second defendant's motion to set aside service (on substantive jurisdictional grounds), (b) the plaintiff's intended application for renewal of the summons and (c) the second defendant's intended application to set aside renewal of the summons on grounds of its expiry were case managed together (and in tandem with similar applications concerning the third defendant). In this respect, I note that on 10th May, 2021 a timetable for all such applications was directed by Allen J. Although there was some very slight slippage in this agreed timetable on the plaintiff's side, this is of no consequence. The reality is that all parties were aware of the stance being adopted by their opposites and that matters were being brought forward in a careful and considered (albeit perhaps somewhat cautious) manner by all parties' legal representatives.

52. Overall, I cannot see how all of the above circumstances are not, as contemplated by Haughton J. in *Murphy*, out of the ordinary and unusual. Therefore, bearing in mind that the plaintiff does not have to establish exceptional circumstances, but rather special circumstances, I am of the view that the relevant bar is crossed in relation to the difficulties encountered in serving the personal injuries summons on the second defendant.

53. None of the above is fundamentally altered by the fact that, in light of the O. 11A leave issue, the service actually effected upon the second defendant in September of 2020 was irregular. The key point is that service, although irregular was in fact effected upon the second defendant who entered a conditional appearance to both sets of proceedings. As explained at paragraph 21 above, a foreign defendant who enters a conditional appearance must be under an obligation to at least notify the plaintiff of its objections to service with reasonable expedition. However, the second defendant did not rely upon or invoke the O. 11A leave issue at any stage prior to the plaintiff's application to renew in June 2021. Nor indeed was it invoked in any correspondence since the renewal order in June 2021. The issue was not adverted to in the second defendants present motion papers or even in its written legal submissions in respect of the present application. Just short of two years have passed since the date of service in September 2020 and the second defendant sought to raise the O. 11A, r. 4 issue for the first time in oral argument before me. It is now simply too late for it to do so in circumstances where same was not at any stage notified to the plaintiff or otherwise pleaded. Moreover, the order renewing the summons also granted leave to re-serve the defendants out of the jurisdiction. This in my view cures any latent defect in the proceedings resulting from the non-compliance with O. 11A, r. 4.

Do the special circumstances justify renewal of the personal injuries summons in relation to the second defendant?

54. In my view, the special circumstances in this case justify renewal of the personal injuries summons.

55. The second defendant knew about the issues forming the subject matter of these proceedings as early as June of 2017 when the plaintiff's solicitor wrote a very detailed letter of claim to the second defendant directly. This was clearly brought to the attention of Mannheimer Swartling who responded to the plaintiff within two weeks of the date of this letter. From that point on, the plaintiff's solicitor was in correspondence with Mannheimer Swartling on a regular and almost continuous basis.

56. The exception is the period from July 2018 to June 2019. This period of inactivity however is of little relevance to the current application as it preceded the issue of the personal injuries summons – which it will be recalled issued in July of 2019.

57. After the commencement of the personal injuries proceedings, the plaintiff initially corresponded with Mannheimer Swartling with a view to persuading them to accept service, but ultimately determined to serve the second defendant directly in compliance with the applicable rules for foreign service under Regulation 1393/2007 as implemented in Ireland by O. 11D of the Rules. Although, as indicated above, the proceedings were not in fact served on the second defendant by the Swedish transmitting agency until 1st September, 2020 (and then irregularly), the plaintiff's solicitor had previously sent a copy of the personal injuries summons by registered post directly to the second defendant and to Mannheimer Swartling on 17th July, 2019. The plaintiff had also served notice of the personal injuries summons together with the order of 3rd February, 2020 by registered post on Mannheimer Swartling on 12th February, 2020 and had delivered same by ordinary post directly to the second defendant on 28th February, 2020. Thus, the second defendant was clearly fully aware of the proceedings and indeed had been furnished with a copy of same (albeit not by way of properly effected service) prior to the expiry of the personal injuries summons of 3rd July, 2020.

58. The second defendant therefore had notice of the proceedings immediately after their commencement (and indeed had been aware of the issues arising for several years beforehand). The personal injuries summons is very fully pleaded and runs to 20 pages. This would have enabled both the defendants to preserve such records as may be relevant to the defence of proceedings, start to collect evidence or if necessary, notify their insurers. This is all highly significant as the case law indicates that one of the factors which can be taken into account on a renewal application is that the defendant is on notice of the proceedings notwithstanding that same had not been formally served.

59. Furthermore, the fact that the proceedings would in all likelihood be barred under the statute of limitations if the renewal is set aside, although not in itself a justification for renewing the summons, is an appropriate consideration.

60. Bearing in mind all of the above it would be entirely contrary to the interests of justice to grant the application now sought.

Decision in relation to the renewal of the plenary summons as against the second defendant

61. The above analysis applies with even greater force to the renewal of the plenary summons in the protected disclosure proceedings. The plaintiff's early correspondence to the second

defendant and its Swedish lawyers notified them of the facts forming the subject matter of both sets of proceedings. Indeed, it is entirely apparent from a review of both sets of proceedings that the two proceedings are based upon the same factual substratum.

62. The plenary summons and concurrent plenary summons in the protected disclosure proceedings were issued pursuant to the order of 5th February, 2020. The plenary summons was issued to the Courts Service as transmitting agency on 9th March, 2020.

63. Whilst the personal injuries proceedings had expired by the time of their service on 1st September, 2020, the service of the protected disclosure proceedings on the second defendant predates the expiry of the summons in February 2021 by five months.

64. In these circumstances, the only argument which could be called in aid by the second defendant in relation to the plenary summons/protected disclosure proceedings is that the service actually effected on it on 1st September, 2020 was irregular having regard to the provisions of O. 11A, r. 4.

65. I reject this argument for all of the reasons set out at paragraph 53 above. Moreover, it is well-established that failure to effect service in strict compliance with the requirements laid down in the Rules will not be fatal where the proceedings have actually been brought to the attention of the defendant who has suffered no prejudice by reason of any defect in the service, which is the case here.

66. Accordingly, I find that the plaintiff has established special circumstances insofar as concerns the second defendant.

67. In addition, for the reasons discussed above, I am fully satisfied that these special circumstances justify renewal of the summons. The second defendant has been on early and full notice of the factual assertions underlying the protected disclosure proceedings and of the plaintiff's intention to issue those proceedings. It was served with the plenary summons prior to its expiry and was served with a very fully pleaded 13-page statement of claim at the request of its solicitors in October 2020.

68. It follows that the reliefs sought by the second defendant in both the personal injuries proceedings and the protected disclosure proceedings must be refused.

Chronology and decision in relation to the renewal of the personal injuries summons as against the third defendant

69. On 26th June, 2017, the plaintiff sent a detailed letter of claim to the third defendant at its registered office in Switzerland. By letter of 18th July, 2017 the third defendant's Irish solicitors ("the third defendant's solicitors") confirmed that the third defendant had instructed them to defend any proceedings taken against it and questioned the basis on which the Irish Courts would have jurisdiction.

70. Thereafter, in response to a data access request issued by the plaintiff, correspondence ensued between the plaintiff's solicitor and Lenz and Staehelin, Swiss lawyers advising the third defendant in the context of the data access request.

71. In October 2017, the plaintiff's solicitor wrote to the third defendant's solicitors requesting confirmation that they had authority to accept service of the proceedings on behalf of the third defendant. There was no response to this letter. On 19th June, 2018 the plaintiff's solicitor sent these solicitors the PIAB application and medical report.

72. As was the case in respect of the second defendant, there was then a hiatus between June of 2018 and June 2019. On 28th June, 2019 letters of claim were sent by the plaintiff's solicitor to the third defendant at its registered office in Switzerland in respect of the protected disclosure proceedings. By letter of the same date the plaintiff's solicitor asked whether the third defendant's solicitors had authority to accept service of both the personal injuries proceedings and the protected disclosure proceedings on behalf of the third defendant. The personal injuries summons issued on 3rd July, 2019.

73. On 17th July, 2019, some three weeks after the personal injuries summons issued, the third defendant's solicitors wrote to the plaintiff's solicitor requesting a copy of both sets of proceedings to enable them to take instructions. By registered letter of the same date, the plaintiff's solicitor sent a copy of the personal injuries summons to the third defendant and copied its solicitors and again requested confirmation of the solicitor's authority to accept service. The plaintiff's solicitor followed this up with a letter before action on 19th July, 2019.

74. On 1st August, 2019 the third defendant's solicitors replied to the plaintiff's letter observing that the plaintiff had not specified the basis upon which the Irish Courts would have jurisdiction and confirming that, in the event that the proceedings were issued in Ireland, the third defendant had instructed them to fully defend the proceedings, including on jurisdictional grounds.

75. In so far as relevant, I accept the plaintiff's contention that over this period of time he had a reasonable basis for believing that the third defendant's solicitors would have authority to accept service of the personal injuries proceedings. This explains why, as of that time, the plaintiff had not put in motion the steps necessary to effect service of the personal injuries proceedings in Switzerland.

76. Matters changed however on 6th December, 2019 when the third defendant's solicitors informed the solicitors for the plaintiff that they did not have authority to accept service of the personal injuries proceedings on behalf of the third defendant. Accordingly, in January of 2020, consideration was given to the appropriate method of service on the three separate defendants. It will be recalled that on 24th January, 2020 the plaintiff's solicitor's town agents emailed him to say that the Central Office had confirmed that leave to serve out of the jurisdiction in respect of the plenary summons in the protected disclosure proceedings was required only in respect of the first defendant. Consequently, on 5th February, 2020 the plaintiff's solicitor sought and obtained leave *ex parte* to serve notice of the protected disclosure proceedings on the first defendant outside the jurisdiction and thereafter issued the plenary summons and concurrent plenary summons in those proceedings for service on the second and third defendants respectively. The plenary summons and concurrent plenary summons thus issued in the protected disclosure proceedings on 7th February, 2020.

77. The plaintiff's solicitor wrote to the third defendant's solicitors on 12th February, 2020 enclosing the order of 3rd February, 2020, a copy of the personal injuries summons and a copy of the concurrent plenary summons.

78. It is common case that the service of both sets of proceedings on the third defendant was unfortunately impacted upon by certain misconceptions. The first such misconception, (which was also present in relation to the second defendant) was as regards the O. 11A leave issue. In my view, there is a distinction here between the position of the second and third defendants. This is because, by letter of 6th March, 2020 the third defendant's solicitors expressly drew the plaintiff's attention to the fact that the order of 3rd February, 2020 did not grant leave to serve the plenary proceedings outside the jurisdiction and that it would not be entering an appearance. Both defendants argue that this letter ought to have alerted the plaintiff's solicitor to the fact that leave to serve out of the jurisdiction pursuant to O. 11A, r. 4(1) was required in respect of both sets of proceedings for both the second and third defendants. For reasons already explained, this point is of little weight in so far as concerns the second defendant. However, the point has some merit in so far as concerns the third defendant. On the other hand, however, the plaintiff has never sought to rely upon the service effected on the third defendant's solicitors on 12th February, 2020 (or the corresponding service on Mannheimer Swartling on behalf of the second defendant) as constituting valid service. Rather, his solicitor continued his efforts to effect service thereafter as herein set out.

79. The second misconception arises from a distinction between the appropriate method for service applying in respect of the second defendant (who was domiciled in Sweden and thus subject to Regulation 1393/2007/O. 11D of the Rules) and the third defendant (who was domiciled in Sweden and thus subject to the service requirements outlined in the Hague Convention as implemented in Ireland by O. 11E of the Rules). However, on 17th February, 2020, the plaintiff's solicitor made a request to the Irish transmitting agency to effect service of both sets of proceedings on the third defendant outside the jurisdiction pursuant to Regulation 1393/2007/ O. 11D (rather than pursuant to the Hague Convention/O. 11E).

80. In so doing, it also appears that the plaintiff's solicitor made an error and provided an address for service on the third defendant which was in Sweden (and not, as it should have been, in Switzerland). As a result, service was not effected on the third defendant prior to the expiry of the personal injuries summons in July of 2020. Moreover, in contradistinction to the position that applied in relation to the second defendant, who was served in September 2020, the third defendant was not served at that time.

81. On 7th October, 2020, the plaintiff's solicitor sought a status update in relation to service on the third defendant from the Irish transmitting agency. Shortly thereafter, the plaintiff's solicitor contacted the Central Office of the High Court by telephone to enquire about serving documents upon the third defendant pursuant to the Hague Convention. On the same day he sent an email to the appropriate Swiss central authority under the Hague Convention, seeking an address for the purposes of sending over legal documents for service.

82. On 14th October, 2020 the plaintiff's solicitor wrote to the Swiss central authority for the purposes of effecting service on the third defendant pursuant to the Hague Convention. The said letter enclosed a copy of both the personal injuries proceedings and the protected disclosure proceedings.

83. It is common case that a third misconception may have been at play here because this is not the correct mode of service under the Hague Convention/ O. 11E. A party desiring to serve out under the Hague Convention must lodge the request for service with the Master of the High Court who will certify that the request for service complies with the requirements of the Convention prior to the transmission of the request to the relevant central authority. The plaintiff's solicitor simply bypassed the Irish central authority and served the proceedings directly to the Swiss central authority.

84. Notwithstanding this, on 9th November, 2020 the third defendant's Swiss lawyers, Lenz and Staehelin, gave authority to a particular individual to collect the relevant legal documents from the Swiss central authority on behalf of the third defendant. The following day, this individual signed and dated a certificate under the Hague Convention indicating the collection of documents. On the same day, the Swiss central authority wrote to the plaintiff's solicitor enclosing a stamped attestation certificate confirming that the documents (comprising notices of the personal injuries summons and plenary summons and French translations of each) had been served in conformity with Article 6 of the Hague Convention.

85. After service of the proceedings was effected in Switzerland, the third defendant's solicitors wrote to the plaintiff's solicitor on 17th November, 2020 in respect of the documentation served. This is a detailed letter and draws the plaintiff's solicitor's attention to the requirements of O. 11E and to the fact that the personal injuries summons had expired by the time of service. The letter also states that there was no proper basis upon which the Irish Courts could have substantive jurisdiction to deal with the claim. The letter concluded by noting that if and when service of one or both sets of proceedings was properly effected, the firm had instructions to fully defend the proceedings, including on jurisdictional grounds. This letter did not advert to the other irregularity in service emanating from non-compliance with the requirement to obtain leave to serve the third defendant out of the jurisdiction pursuant to O. 11A, r. 4.

86. Notably, the third defendant did not enter any appearance to the proceedings, whether conditional or otherwise.

87. The plaintiff's solicitor did not respond to this letter of 17th November, 2020 for some time, notwithstanding reminders on 4th December, 2020 and 8th January, 2021 (save by way of a holding letter on the 19th January, 2021). In the meantime, the plenary summons in the protected disclosure proceedings expired.

88. The plaintiff's first substantive response was by way of letter of 7th May, 2021 in which it was indicated that the plaintiff would make an application for renewal of the summonses in both sets of proceedings and an application for leave to serve proceedings outside the

jurisdiction in respect of all three defendants; and that the relevant motion papers would be forwarded shortly.

89. By letter of 12th May, 2021 the third defendant reserved its right to object to service of proceedings on all four grounds, namely the service of the expired personal injuries summons, the O. 11A leave issue, the Hague Convention/ O. 11E issue and on substantive jurisdictional grounds. However, no application was made by the third defendant to set aside the service effected pursuant to O. 12, r. 26 until the present application, which issued in January of 2022.

90. As was the position in relation to the second defendant, the third defendant elected not to appear or participate at the *ex parte* application in June 2021.

91. In summary, the personal injuries summons was irregularly served on the third defendant four months after its expiry (as opposed to two months after its expiry in the case of the second defendant). In considering whether all of the above establishes special circumstances arising from the difficulty encountered by the plaintiff's solicitor in serving the proceedings, there is distinction to be made between the second and third defendants. In respect of the second defendant, I found that the plaintiff's solicitor had a reasonable expectation that service would be effected prior to the expiry of the personal injuries summons and that the unexplained failure of the Swedish receiving agency to serve the summons constituted special circumstances. However, in light of the several factual and procedural errors or misconceptions which unfortunately impacted upon the attempts at service on the third defendant in March 2020, I do not think that the same could fairly be said insofar as concerns the efforts to serve the personal injury summons on that defendant. In short, in the case of the third defendant, the selected address and even the country of service (Sweden rather than Switzerland) was incorrect.

92. Separately the service attempted was in any event impacted by several procedural defects (of which notice was given to the plaintiff). As set out at paragraph 78, in common with the second defendant, service on the third defendant was irregular as leave to serve out of the jurisdiction had not been sought in accordance with O. 11A, r.4. However, the third defendant had flagged this defect in service, albeit perhaps somewhat obliquely, in early March of 2020, four months prior to the expiry of the summons. The plaintiff is therefore in a weaker position to assert a reasonable expectation of valid service within the lifetime of the summons and the third defendant is in a commensurately stronger position to rely upon this irregularity in service. In addition, the service of the summons on the third defendant suffered from an additional frailty to that pertaining to the second defendant, insofar as service was incorrectly effected having regard to the provisions of the Hague Convention/O. 11E.

93. Overall, my view is that these circumstances could not give rise to a reasonable expectation of service within the lifetime of the summons or to other special circumstances. In addition, whilst the above certainly discloses "*difficulty in effecting service*", I do not think that the particular misconceptions or inadvertence subtending these difficulties and causing the non-

service of the personal injuries summons within its lifetime are on par either with those in issue in *Chambers* or *Brereton*.

94. I have also carefully considered whether the overall complexities in effecting service on the three separately domiciled defendants can in itself constitute a special circumstance justifying the renewal of the plenary summons and have concluded that it cannot. Were it otherwise, the same rationale could presumably apply in any action in which a plaintiff institutes proceedings against several foreign defendants. It would in my view be unfair to such defendants to hold, virtually as a matter of principle, that the complexities inherent in such litigation, without more, gives rise to special circumstances.

Decision in relation to the renewal of the plenary summons as against the third defendant

95. The essential difference between the personal injuries proceedings and the protected disclosure proceedings is that the protected disclosure proceedings were served on the third defendant in November 2020 before the expiry of the plenary summons, albeit that this service was irregular.

96. Does the irregularity of service arising from the O. 11A leave issue and the O. 11E issue prevent the establishment of special circumstances? In my view the answer is in the negative. Notwithstanding these irregularities, on 10th November, 2020 the Swiss central authority sent the plaintiff a certificate confirming service of the documents in accordance with the Hague Convention. This no doubt reassured the plaintiff. Although objection was shortly taken by the third defendant to the irregularities in service, the plaintiff was entitled to rely upon the fact that, as the plenary summons had not expired prior to service, the service effected, although irregular, could if necessary be deemed good or corrected in some other way.

97. As matters played out, the plaintiff took some time to bring the relevant application and it was necessary to seek renewal of the summons and fresh leave to serve out of the jurisdiction. The third defendant criticises the plaintiff's delay in bringing the motion to renew the summons. However, this does not in my view prevent the above from constituting special circumstances. This is partly because many of the points already discussed at paragraphs 45 *et seq* apply with equal force here.

98. In addition, focussing only on the plaintiff's delay is to ignore the fact that the defendant must also act with expedition in bringing an application to set aside renewal of a summons. Whilst the second defendant brought a motion challenging the renewal very shortly after the *ex parte* order in July of 2021, the third defendant did not bring its equivalent motion until January of 2022.

99. The third defendant argues that it was not in the position to bring the present application at an earlier point in time because it had not been properly served with the order of the 21st June, the papers associated therewith and with the fresh initiating proceedings by the 21st September, 2021 (as per the renewal order). These documents were formally served on the third defendant one day late, on 22nd September, 2021. This may have been because, unlike the position that pertained in relation to the second defendant, the third

defendant did not authorise its Irish solicitors to accept service and it was necessary for the plaintiff to once again serve same in Switzerland pursuant to O. 11E.

100. Ultimately, the third defendant agreed by letter dated 13th October, 2021 that it would proceed on the basis that service had been effected on 22nd September, 2021 (on which date service was effected simultaneously on the third defendant in Switzerland through the relevant Swiss central authority and on its Irish solicitors). However, the third defendant had previously been sent the relevant *ex parte* application papers on 4th June, 2021 and had also been sent the renewal order of 21st June, 2021 on 8th July (within days of its perfection). No doubt because of the complexity of the matter, even after accepting service on 22nd September, 2021, it still took the third defendant four further months to issue its own application to set aside service. This in my view renders its criticism of the plaintiff's delay in preparing his own application papers somewhat hollow.

101. In my view special circumstances are established insofar as concerns the renewal of the plenary summons as against the third defendant. I am further satisfied that these special circumstances justify the renewal of the summons. As with the second defendant, the key point is once again that service, although irregular, was in fact effected upon the third defendant before the expiry of the summons. I am also influenced by the absence of specific prejudice on the part of this defendant given its early notification of the full particulars of the claim.

Conclusion

102. For the reasons set out below, having heard three days of argument and carefully considered almost 2,000 pages of documentation, I am fully satisfied that the plaintiff has established special circumstances relating to difficulty in effecting service of both sets of proceedings on the second defendant. I am also satisfied that the plaintiff has established that such special circumstances justify renewal of both sets of proceedings as against the second defendant. In addition, I am satisfied that the plaintiff has established special circumstances relating to difficulty in effecting service of the plenary summons on the third defendant and that such special circumstances justify renewal of the summons as against that defendant. I am not satisfied that the plaintiff has established special circumstances justifying renewal of the personal injuries summons as against the third defendant.

103. It follows that I must refuse both reliefs sought by the second defendant. I will also refuse the relief sought by the third defendant in the protected disclosure proceedings. I will grant the relief sought by the third defendant in the personal injuries proceedings.