

THE HIGH COURT

[Record No. 2001 11043P]

BETWEEN

DAMIEN HEFFERNAN

PLAINTIFF

AND

DESMOND RYAN AND LEONARD RYAN

DEFENDANTS

Judgment of Mr. Justice Herbert delivered the 20th day of December, 2004

1. By a Motion on Notice, dated 20th February, 2004, Desmond Ryan, Architect and, his son, Leonard Ryan, Bank Administrator, seek an Order pursuant to the provisions of Order 12 rule 26 of the Rules of the Superior Courts setting aside the purported service on them of a Plenary Summons issued on behalf of Damien Heffernan, a Network Engineer, on 4th July, 2001 and bearing Record No. 2001 11043P. Their ground is that this Originating Summons was not properly served on them or on either of them as required by the terms of Order 9 rule 2 of the Rules of the Superior Courts. By a cross motion dated 21st June, 2004 the Plaintiff, Damien Heffernan seeks an Order pursuant to the provisions of Order 9 rule 15 of the Rules of the Superior Courts declaring the service actually effected on each of them to be sufficient.

2. Affidavits were sworn by Desmond Ryan on 10th February, 2004, by Leonard Ryan on 12th March, 2004 and, by Heather Perrin, Solicitor for the Plaintiff, on 18th March, 2004. Supplemental Affidavits were sworn by Heather Perrin on 23rd March, 2004 and by Leonard Ryan on 7th May, 2004. Mr. Anthony Kelly, a Summons Server, swore an Affidavit in the Plaintiff's behalf on 22nd June, 2004 consequent upon a Direction by me during the course of the hearing of this Issue. The action arises out of a road traffic accident which occurred on 11th or 12th July, 1998, in which a motor car, the property of Desmond Ryan and driven on that occasion by Leonard Ryan and, in which the Plaintiff, Damien Heffernan was travelling as a passenger, collided with another motor car. The Plaintiff's claim is for damages for personal injuries, loss and, damage alleged to have been suffered by him in that collision by reason of alleged negligence and breach of duty, including statutory duty, on the part of the Defendants and each of them, their respective servants or agents.

3. By letter dated 19th July, 2002, O'Rourke Reid, Solicitors for the Defendants informed the Solicitor for the Plaintiff that they considered that the Plenary Summons had not been served correctly within 12 months of its date of issue and, therefore, the claim was now time-barred.

4. In his Affidavit, Mr. Desmond Ryan states that when he returned to his residence, 75 Bettyglen, Howth Road, Raheny, Dublin, 5., on 10th July, 2002 he found an envelope addressed to him in the letterbox of his house, which contained, what appeared to be an unsealed Plenary Summons dated 4th July, 2001 with a covering letter from Heather Perrin, dated 27th June, 2002 in the following terms:-

"Our Reference: HP/PB

Your Ref:

Re: My client - Damien Heffernan

Accident - 11th July, 1998

Dear Sir,

I refer to the above and enclose herewith copy of High Court Plenary Summons by way of service upon you.

Yours faithfully"

5. In his Affidavit sworn on 12th March, 2004, Mr. Leonard Ryan states that he was unaware that Damien Heffernan intended to pursue a claim for personal injuries against him until 10th July, 2002. His father, Desmond Ryan contacted him to state that on his return home from a holiday in Canada on 10th July, 2002, he found an envelope addressed to Leonard Ryan in his letterbox. Leonard Ryan states that the envelope contained what appeared to be an unsealed Plenary Summons dated 4th July, 2001 and a covering letter from Heather Perrin dated 27th June, 2002 in the same terms as that addressed to Desmond Ryan, above recited.

6. Mr. Desmond Ryan contends that as he was outside the jurisdiction on 27th June, 2002 and did not return to the jurisdiction until 10th July, 2002, he could not have been validly served with proceedings under the provisions of Order 9 rule 2 of the Rules of the Superior Courts and, that the Plenary Summons issued on 4th July, 2001 lapsed on 4th July, 2002 having regard to the provisions of Order 8 rule 1 of the Rule of the Superior Courts and could not be renewed thereafter. An Appearance Under Protest was entered on his behalf and, on behalf of Leonard Ryan by O'Rourke and Reid, Solicitors on 30th May, 2003. No waiver of any alleged irregularity in the service of the Plenary Summons arises from the entry of this conditional appearance.

7. At paragraph 7 of his Affidavit sworn on 12th March, 2004, Mr. Leonard Ryan avers that he does not reside at 75 Bettyglen, Raheny and, did not reside there at the time the Plaintiff attempted to effect service of the Plenary Summons on him. In both his Affidavits he gives his address as 15 Westbrook Lawn, Naul Road, Balbriggan, County Dublin.

8. In her Affidavit, sworn on 18th March, 2004, Heather Perrin, Solicitor for the Plaintiff, states that on 27th June, 2002 she retained the services of Mr. Anthony Kelly, whom she believed to be an experienced Summons Server and who was known to a member of her staff for more than five years, to effect service on both Defendants of the Plenary Summons issued on 4th July, 2001. As the road traffic accident had occurred on 11th or 12th July, 1998, the action would become time-barred on 11th or 12th July, 2001. Mr. Leonard Ryan contends on the Affidavit evidence, that no due or reasonable diligence was exercised by the Plaintiff in endeavouring to effect personal service of the originating Summons on him. This is a matter of fact for the Court to determine. In her Supplemental Affidavit sworn on 23rd April, 2004, Heather Perrin deals with the reasons for the delay in issuing and then in serving the originating summons.

9. The reason advanced for this belief by Mr. Leonard Ryan is that he and the Plaintiff had a mutual close friend, Mr. Colin Newman.

This gentleman, he states, attended the wedding of the Plaintiff and, it was intended that he would be Best Man to Leonard Ryan at his own wedding in June, 2004. Leonard Ryan states that the Plaintiff could readily have ascertained his house or business address from Mr. Newman and, with regard to the latter, pointed out that he had worked for Irish Life and Permanent Group, (now Permanent T.S.B.), for the previous thirteen years.

10. In her Supplemental Affidavit, sworn on 23rd April, 2004, Heather Perrin, Solicitor for the Plaintiff, states that when instructing her on 6th August, 1998 Damien Heffernan did not know the address of Leonard Ryan or the name of his insurers but believed that the road traffic accident had been investigated by members of An Garda Siochana stationed at Donnybrook Garda Station. On 16th September, 1998, after some correspondence she was informed by Donnybrook Garda Station that they had no record of the accident. On the following day the Plaintiff told her that he had received information which indicated, though he could not be sure, that Eagle Star were the insurers concerned. However, some three days later he contacted her again and changed this to Church and General. She states that during 1999 and 2000 the Plaintiff told her that he was continuing with his inquiries. She states that she had alerted the Plaintiff to the passage of time and the operation of the Statute of Limitations.

11. In March, 2001 she states that the Plaintiff told her that he had ascertained that Leonard Ryan might be residing at Bettyglen, Raheny, but was unsure of the exact address. She states that by consulting Thoms Street Directory, she ascertained that a Desmond Ryan resided at No. 75 Bettyglen, Raheny. On 28th March, 2001 she states that she asked the Plaintiff if Desmond Ryan could be the father of Leonard Ryan and he said that he would make inquiries. On 26th June, 2001 she states that Leonard Ryan told her that he had made inquiries at Bettyglen as to where Leonard Ryan lived and a neighbour had pointed out No. 75. On the same day she avers that she wrote the usual form of preliminary letters to Desmond Ryan and Leonard Ryan addressed to 75 Bettyglen, Raheny, Dublin, 5., and, she exhibits photocopies of these letters in her Supplemental Affidavit. She states that she received no reply to these letters. She caused the Plenary Summons to be issued on 4th July, 2001.

12. At paragraph 14 of her Supplemental Affidavit, Heather Perrin states that on 27th June, 2002 she wrote covering letters to Desmond Ryan and to Leonard Ryan addressed to them at 75 Bettyglen, Raheny, Dublin 5., and, enclosed these with copies of the Plenary Summons in envelopes.

13. I think it might fairly be said, without any danger of one being accused of the least exaggeration that from the date of the alleged road traffic accident on 11th or 12th July, 1998, until documents were, by his own account, collected by Mr. Anthony Kelly, the Summons Server, at the offices of Heather Perrin, on 27th June, 2002, the Plaintiff Damien Heffernan had been dilatory in prosecuting his alleged claim for damages for personal injuries loss and damages. The originating Summons was issued just seven days before the claim became statute barred. It was almost exactly a year after Heather Perrin claims that she was told by the Plaintiff that a neighbour at Bettyglen, Raheny, had informed him that Leonard Ryan resided at No. 75, before the first attempt to serve the Plenary Summons on the Defendants was made and, again just seven days before the Plenary Summons ceased to be in force, the issuance of which had prevented the claim from becoming statute barred.

14. Fortunately for the Plaintiff and, despite this unbelievable inaction on his part in advancing his claim, the provisions of Order 9 rule 2 of the Rules of the Superior Courts, in my judgment are concerned with whether reasonably appropriate attempts to effect personal service on the Defendants were made and not with delay generally in the prosecution of the action, including delay in attempting such service. Order 9 rule 2 provides for an alternative form of service, without the necessity of a prior Court Order, in circumstances where, "the Defendant is personally within the jurisdiction and due and reasonable diligence has been exercised in endeavouring to affect such personal service." The Court, in case of challenge, is required to be satisfied on Affidavit that each of these conditions precedent had been complied with before this alternative form of service was utilised. In my judgment, Order 9 rule 2 was not intended to be the equivalent of, for example, Order 84 rule 21 (1), requiring prompt service of an originating summons even within the limitation period specified by Section 11(2)(b) of the Statute of Limitations, 1957 or other Statute or Statutory Instrument. Such delay would of course be relevant to obtaining the renewal of a Summons under the provisions of Order 8 rule 1 of the Rules of the Superior Courts.

15. The attempts to effect service and particulars of the service actually effected appear from the Affidavit of Mr. Anthony Kelly sworn on 22nd June, 2004 and filed on behalf of the Plaintiff following a direction from me during the course of the hearing of this Issue, I had considered that the account given by Heather Perrin in her Affidavit sworn on 18th March, 2004 based upon information in this regard furnished to her by Pauline Ball, a member of her Staff, as to what Mr. Anthony Kelly had told her about the service, was altogether insufficient. I believe that it is necessary to set out in full paragraphs 3 to 7 inclusive of this Affidavit of Mr. Anthony Kelly:-

"3. I say that on the 27th day of June, 2002, I received instructions from Heather Perrin Solicitor, through her Assistant Ms. Pauline Ball to serve a Plenary Summons. I called to the offices of the said Heather Perrin and was given two envelopes and each containing a copy of the Plenary Summons together with covering letters dated 27th June, 2002 and each addressed to the respective Defendants and was also given the original Plenary Summons. I was then instructed by the said Ms. Ball to effect service on each of the Defendants by serving same at their home at 75 Bettyglen, Raheny in the City of Dublin.

4. I say that on Monday 1st July, 2002 I attended at the above address at 75 Bettyglen and after knocking at the door, same was opened to me by a young woman who identified herself as the daughter of the first named Defendant and the sister of the second named Defendant and she informed me that she was Ms. Lesley Ryan. On my enquiry, I was informed by her that her father was on holiday in Canada and she then informed me she would telephone her brother. I say that I was standing adjacent to the hall door which was open and she made the phone call in my presence. I distinctly heard her telling him I was there to serve a Summons on him. She then informed me that he had told her to pass onto me that he was not going to go to Court and further to inform me that 'you can serve me if you can find me'. I say I then left the premises.

5. I say that I returned to the office of Heather Perrin on the same day i.e. Monday the 1st July, 2002 where I relayed the above information to Ms. Pauline Ball. She then advised me that I should effect service on the Defendants by serving same on the said Lesley Ryan at the premises at 75 Bettyglen Raheny. I say that on the following morning i.e. 2nd July, 2002, I returned to the premises at 75 Bettyglen, Raheny. I knocked at the door but there was no response. I noted that there were two motor cars in the driveway and I felt that there was somebody in the house. I returned to my car where I waited and in the course of the following hour or so, I knocked on the door at intervals and eventually, Ms. Ryan came to the door and told me she been out late the night before. I say that after exchanging pleasantries, I handed each of the envelopes containing copy Plenary Summons and covering letters to Ms. Ryan, showing her at the same time the original thereof and I left the premises.

6. I further say that at all times I was fully satisfied that Ms. Ryan was an adult probably in her early twenties. I say that within the specified period as directly averred to in my Affidavit of Service I endorsed service on the said Summons.

7. Contrary to what is being alleged in this case, I say that I did not at any time, ever leave these documents or indeed any documents in the letterbox of the said premises at 75 Bettyglen, Raheny."

16. Unfortunately but very understandably, and despite the direction of Johnson J., on 22nd March, 2004, Ms. Lesley Ryan has not sworn an Affidavit in this Issue.

17. Undoubtedly, Mr. Anthony Kelly made only one attempt to effect personal service of the originating Summons on the Defendants before availing of the alternative procedure provided for by Order 9 rule 2 of the Rules of Superior Courts, that is, by delivering a copy of the Plenary Summons to Lesley Ryan, admitted at the hearing of this issue to be the daughter of the first named Defendant and the sister of the second named Defendant, at what he had been clearly instructed was the house or place of residence of the Defendants and, showing her the original Plenary Summons. It was not challenged at the hearing of this Issue that Lesley Ryan was aged sixteen years and upwards on 2nd July, 2002, the relevant date.

18. I find that there is nothing in principle or in law which would preclude a Court from deciding that a single attempt to serve a Defendant personally could not amount to, "due and reasonable diligence... in endeavouring to affect such personal service". The examples of "due diligence" to be found at page 211 of Wylie, "The Judicature Acts (Ireland) and the Rules of the Supreme Court (Ireland), 1905", dealing with Order (ix) rule 2, which is in essentially the same terms as Order 9 rule 2 of the present rules of the Superior Courts, are just indications of the level of evidence which the Courts will in general require. But what the Court will regard as sufficient evidence of, "due and reasonable diligence" must vary with the facts of each individual case. A too rigid or formalistic approach to the question would in my judgment be contrary to the object for the alternative form of service provided by Order 9 rule 2 which is, to allow the Court to act on the presumption, (which is rebuttable), that knowledge of the proceedings came to the attention of the Defendant. Having regard to the possible consequences for a Plaintiff of a defective service of an originating Summons and, despite the power of the Court under the provisions of Order 9 rule 15 to declare a particular service sufficient, "upon just grounds", a determination by reference to some fixed formulae would in my judgment amount to an unnecessary and therefore unjustifiable interference with the constitutionally guaranteed right of access to the Courts and to litigate.

19. There is a conflict of evidence on affidavit between Mr. Anthony Kelly and Mr. Leonard Ryan as to what occurred on Monday 1st July, 2002. Mr. Kelly swears that Ms. Lesley Ryan told him she would telephone her brother and immediately made a telephone call and spoke to someone in his presence and in his hearing. He swears that he heard her tell this person that someone was at No. 75 Bettyglen, Raheny to serve a summons on him. Mr. Anthony Kelly swears that Ms. Lesley Ryan then told him that she was to pass onto him that the person to whom she was speaking was not going to Court and to inform him that he could serve him if he could find him. In his Supplemental Affidavit sworn 7th May, 2004 Mr. Leonard Ryan swears that he recalls receiving a telephone call from his sister that a Summons Server was at his father's house with two brown envelopes. He swears that he never thought that the summons was for him, "arising from an accident nearly four years earlier" and, he therefore assumed that the summons in some way related to the family business of Leonard Ryan and Associates, Architects. He swears that he cannot remember exactly what he said, but he believes that he indicated that service should be by registered post to the registered office of this Firm.

20. I find that Mr. Leonard Ryan is incorrect in his recollection. I find, from the Affidavit evidence of Heather Perrin and Anthony Kelly and the internal corroboration of the name and address on the Plenary Summons and the covering letter dated 27th June, 2002, that the brown envelopes were addressed to the Defendants individually at 75 Bettyglen, Raheny, Dublin, 5. Despite the name "Leonard Ryan" in the title of the Firm of Architects, the second named Defendant on his own Affidavit evidence had been an employee of a financial institution for the previous thirteen years. Even if he did not associate the attempted service of a summons on him with the road traffic accident in August 1998, I find it incredible in the circumstances that he would have considered that it was intended for the firm of Leonard Ryan and Associates. Even if he did not associate the two events, in my judgment, the action of any reasonable man would be to ask his informant to read the documents to him or to ask to speak to the Summons Server and make inquiries about them directly from him. If Mr. Anthony Kelly have been told by the second named Defendant through his sister to serve the documents by registered post addressed to the registered office of the Firm of Leonard Ryan and Associates, as a Summons Server of more than ten years experience as stated in his Affidavit, he would in my judgment have protested and explained that personal service was required and in any event or if Leonard Ryan wished to be served at the registered office of the Firm would have asked for the address of that office. Ms. Lesley Ryan has chosen not to file an Affidavit but I believe that the Court may infer that if Mr. Anthony Kelly was attributing reported speech to her which she had not reported to him she would have denied this in some manner.

21. I am satisfied on the Affidavit evidence and I find that the events described at paragraph 4 of the Affidavit of Anthony Kelly sworn on 22nd June, 2004 occurred and, that Leonard Ryan did tell his sister to inform Mr. Kelly that he was not going to Court and that he could serve him if he could find him. At paragraph 3 of this Affidavit, Mr. Anthony Kelly swears that on 27th June, 2002 he was instructed by Pauline Ball to serve both Defendants at 75 Bettyglen, Raheny. I think it is reasonable for the Court to infer that from these specific instructions he assumed that both Defendants resided there and therefore he did not think of asking Lesley Ryan for the address of her brother's house, place of residence or office.

22. In these special circumstances I am quite satisfied, and I so find, that due and reasonable diligence had been exercised in endeavouring to effect personal service of the originating Summons in this case. I am satisfied on the evidence and I find that Leonard Ryan was aware that a Summons Server was seeking to serve proceedings on him and he either realised why or chose not to know why, when the simple question of, "who is suing" would have explained everything to him. Having regard to the purpose behind the personal service rule, which I have already stated, and the time constraint with the very serious consequences for the Plaintiff in this case, even if very largely of his own making, in my judgment it would be irrational, unjust and unreasonable for this Court to hold that Mr. Anthony Kelly should have made further efforts to effect personal service on Mr. Leonard Ryan before using the alternative form of service permitted by Order 9 rule 2 of the Rules of the Superior Courts. It was not suggested at the hearing of this Issue that Mr. Leonard Ryan was not personally within the jurisdiction on 4th July, 2001 the date of issue of the originating Summons or on 2nd July, 2002 the date of service of that summons.

23. At paragraph 7 of his principal Affidavit sworn on 12th March, 2004, Leonard Ryan states, "I do not reside at 75 Bettyglen, Raheny in the County of Dublin and, did not at the time the Plaintiff attempted to effect service on me." By Order 9 rule 2 of the Rules of the Superior Courts the alternative form of service must be effected, "at the Defendant's house or place of residence". There was no dispute at the hearing of this Issue that 75 Bettyglen, Raheny, is the dwelling house of Desmond Ryan the first named Defendant and father of Leonard Ryan the second named Defendant. It is clear from a large body of Case Law that, "house" and "residence" are ambiguous words with no fixed meaning and whose meaning can vary widely with the circumstances. The words must always be construed according to the object and intent of the statute or statutory instrument in which they occur. As used in Order 9 rule 2 of the Rules of the Superior Courts in my judgment, "place of residence" was intended to denote the place where a Defendant

might be actually living at a particular time, where he ate drank and slept, while "house" was intended to denote his or her dwelling house or permanent abode the place where he or she was at home. I consider that, "place of residence" was intended to cover all sorts of more or less temporary residences inhabited by persons living or working away from their dwelling house, such as hotels, lodging houses, hostels, institutional residences and seasonal residences.

24. This is an application by the Defendants to set aside the service of the Plenary Summons and therefore the onus of proving that the service was deficient rests upon them. I find that Mr. Leonard Ryan has established a prima facie case on the Affidavit evidence that 75 Bettyglen, Raheny was not his house or place of residence at the time of the service of the originating Summons on 2nd July, 2002. There is nothing in the Affidavit of Mr. Anthony Kelly or in his Affidavit of Service of the Plenary Summons sworn on 3rd July, 2002 or in the Affidavits of Heather Perrin to challenge this. The fact that 75 Bettyglen, Raheny is his father's house does not in itself entitle an inference to be drawn that it is also the second named Defendant's house. Heather Perrin states at paragraph 9 of her Supplemental Affidavit sworn on 23rd April, 2004, that the Plaintiff had informed her on 26th June, 2001 that he, "made some inquiries through neighbours as to the number of a house where Leonard Ryan resides and the house identified to him by a neighbour was number 75." Apart altogether from the very unsatisfactory nature of this evidence, it relates to a period of time eleven months prior to the date of service. Mr. Leonard Ryan does not state in either of his Affidavits when he took up residence at 15 Westbrook Lawn, Naul Road, Balbriggan and in what capacity, but he has stated on oath in his Affidavit sworn on 12th March, 2004 that he did not reside at 75 Bettyglen, Raheny at the time the Plaintiff attempted to effect service on him which, on reading this Affidavit as a whole he identifies as being between 27th June, 2002 and 10th July, 2002. In such circumstances what an unidentified "neighbour" is alleged to have said to the Plaintiff, who did not swear an Affidavit in this Issue, "on 26th June, 2001 is not sufficient to shift the weight of the evidence in his favour."

25. Order 9 rule 15 of the Rules of the Superior Courts provides that:-

"In any case the Court may, upon just grounds, declare the service actually effected sufficient."

26. In the case of *Grady v. Kearney*, 8 Irish Common Law Reports (appendix) xlv, it was held that service upon a servant girl near the Defendant's house was not sufficient to satisfy the provisions of Section 32 of the Common Law Procedure Amendment Act (Ireland), 1853. No reason for his decision was given by the learned Judge, who instead allowed substituted service because of treats to the process server. In that case the Defendant had admitted in a letter written to the Plaintiff that he had received a copy of the summons admitted the claim and sought time. There was no rule the equivalent of Order 9 rule 15 of the present Rules of the Superior Courts in the Common Law Procedure Amendment Act, (Ireland), 1853 or in the 1905 Rules, but Wylie in his Work above referred to, at page 217 states that this was a practice at Common Law but not in Chancery. It seems to me that if a positive rule of the nature of the present Order 9 rule 15 had been in existence in 1859 the decision of Perrin, J., would probably have been to deem the service actually effected in that case sufficient.

27. It seems to me, that in the present case the second named Defendant, Leonard Ryan, wishes to rely upon a time-bar defence arising from his own deliberate and conscious frustration of a *bona fide*, even if very last minute, attempt to serve the Plenary Summons on him which would have had the effect of preventing the statutory period from running out. It is not denied that at the time he was personally in the jurisdiction. I find that he knew through his sister that a person was at his father's house endeavouring to serve a Summons on him and not on Leonard Ryan and Associates, Architects. In the altogether improbable event of his being unaware of the probable nature of the intended action, I find that he deliberately chose to try to evade being fixed with that knowledge. While accepting that there is no evidence to contradict his bald assertion that he did not at the time reside at 75 Bettyglen, Raheny, it is a reasonable inference for this Court to draw that he had lived there and had remained in contact with that house as evidence the facility and rapidity with which his sister and, later, his father were able to contact him. I am quite satisfied on the evidence, that the second named Defendant either had or but for his own deliberate evasions would have had full knowledge of these proceedings on 1st July, 2002. In these circumstances, it seems to me that it would be unjust not to apply the provisions of Order 9 rule 15, - even though these are provisions which should be utilised sparingly-, and to deem the service actually effected by Mr. Anthony Kelly on the second named Defendant sufficient.

28. In the case of Desmond Ryan, the first named Defendant, the position appears to me to be otherwise. It was accepted by Counsel for the Plaintiff at the hearing of this Issue that Desmond Ryan was on holiday in Canada on 1st and 2nd July, 2002 when Mr. Anthony Kelly served the Originating Summons in this action. For the alternative mode of service permitted under Order 9 rule 2 of the Rules of the Superior Courts to be effective, the Defendant must be, "personally within the jurisdiction", on the date of service. This is consistent with the object of Order 9 rule 2 which is to ensure that knowledge of the proceedings comes to the attention of the Defendant so as to enable him or her to enter an appearance and if he or she so wishes, to defend the claim.

29. The use in Order 9 rule 2 of the word, "personally", in my judgment, shows that nothing short of the actual physical presence of the Defendant in the jurisdiction at the moment of alternative service under Order 9 rule 2 will suffice. No form of constructive presence through, for example, a close family member or a servant or clerk who would have a moral or legal duty to bring the existence of the proceedings to the attention of the Defendant will suffice [see *Tisdall v. Humphrey*, (1867) I.R. (Cl) 1; *McBirney and Company v. Dunne* (1879) ILTR 74]. It was not suggested that Desmond Ryan had gone to Canada for the purpose of evading service of the Plenary Summons on him. In these circumstances, there could be no just grounds upon which the Court could declare the service actually effected on Desmond Ryan sufficient. To attempt to do so would be to totally disregard the purpose and object not alone of Order 9 rule 2 but also of Order 10 of the Rules of the Superior Courts.

30. The Court will therefore order that the service of the Plenary Summons issued herein on 4th July, 2001 on Desmond Ryan, the first named Defendant, be set aside and, as the limitation period has expired, that the proceedings against him be dismissed.

31. No argument was made at the hearing of this Issue that the application by the Defendants to set aside the service of the Plenary Summons on them was too late and should not be entertained by the Court. The argument in the case of *Reynolds v. Coleman* (1887) 36 Ch. D iv., 453 was that the Defendant was served on 19th April, 1886 and took no step until 7th June, 1887 to set aside this service, a delay for which he gave no satisfactory account. The Defendant's application then was to discharge the Order of the Court made on 6th April, 1886 giving leave to the Plaintiff to serve Notice of the writ on the Defendant out of the jurisdiction. Judgment in default of defence had been obtained by the Plaintiff against the Defendant on 26th June, 1886. On appeal from the decision of Kay, J., at first instance, Cotton, L.J., with whom Bowen, L.J., agreed held at page 462 of the Report that it was,

"Too late for the Defendant, who had lain by without taking any step for more than twelve months, to ask us to interfere on the ground of those alleged irregularities, - [insufficient disclosure ex-parte to the Court on seeking service out of the jurisdiction], - however much we might have attended to them if, immediately after the service had been made, he had applied on those grounds to discharge the Order for service. Supposing, then, that he could have maintained those objections to the contents of the Affidavit if he had come earlier than he has, I am of opinion that we cannot attend to

them now.”

32. In the instant case, service was effected by Mr. Anthony Kelly on the Defendants on 2nd July, 2002. By a letter dated 19th July, 2002, Messrs O'Rourke Reid, Solicitors for the Defendants instructed by Allianz Insurance Company wrote:-

“We must point out initially that we feel that there is a preliminary issue with regard to the Statute of Limitations herein in that the Plenary Summons was not correctly served within the period of 12 months from the date on which it was issued.”

33. On 30th May, 2003 as a result of letters from Heather Perrin on 16th August, 2002, 9th December, 2002 and 28th May, 2003, Messrs O'Rourke Reid entered an Appearance Under Protest in these proceedings. In the covering letter to Heather Perrin they stated that this was done, “in order to reserve our rights regarding the possible ineffective service of the Plenary Summons herein.” The Notice of Motion pursuant to the provisions of Order 12 rule 26 of the Rules of the Superior Courts was not served on behalf of the Defendants until 20th February, 2004. The cross motion on behalf of the Plaintiff pursuant to the provisions of Order 9 rule 15 was not taken until 15th June, 2004.

34. Now in this case despite the delay of about one year and seven months between the date of the service of the Plenary Summons and the motion to have that service set aside, the Defendants had within nine days of Mr. Desmond Ryan returning to this State from Canada and, seventeen days after the service of the Plenary Summons by Mr. Anthony Kelly, clearly indicated to the Solicitors for the Plaintiff that in their opinion the Plenary Summons had not been properly service. This was in a sense formally put on the record on 30th May, 2003 by the Appearance Under Protest, which also required the delivery of a statement of claim. So far as the Court is aware a statement of claim has not been delivered in these proceedings. It appears to me that having signalled and clearly signalled, shortly after the actual service of the Plenary Summons that they considered this service to be defective, the Defendants' insurers, who had conduct of the case, then adopted a “wait and see” attitude. No Motion for Judgment in default of Appearance was taken by the Plaintiff in the 10 months following the service of the Plenary Summons though Heather Perrin did press for an appearance in August and December of 2002 and in May, 2003. Unlike the situation which pertained in *Reynolds v. Coleman*, (above cited), Judgment was not entered against the Defendants prior to the taking of the Motion to set aside the service of the Plenary Summons on them.

35. In the circumstances, particularly when an objection to the Defendants' Notice of Motion on the ground of delay was not taken by the Plaintiff at the hearing of this Issue, I find that the Court should not decline to entertain the Defendants' application to set aside service of the Plenary Summons on them by reason of delay on the part of the Defendants in issuing and bringing on that Motion on Notice.

36. The Court will decline to make an Order dismissing the application of the second named Defendant, Leonard Ryan, that the service of the Plenary Summons on him be set aside and, the Court will make an Order on the cross motion of the Plaintiff deeming sufficient the service actually effected on the second named Defendant.

Other cases referred to in argument

Uwaydah v. Nolan and Another (High Court – unreported), (Barron, J., 21st February, 1997).

Laurie v. Carroll and Others [1957 – 58], 98 C.L.R. 310.