Neutral Citation Number: [2010] IEHC 8

THE HIGH COURT

2004 313 P

EDMOND MOLONEY AND JACQUELINE MOLONEY

PLAINTIFFS

AND

LACEY BUILDING AND CIVIL ENGINEERING LIMITED AND KENNETH MEEHAN AND J.W. LEVINS PRACTISING AS MEEHAN LEVINS PARTNERSHIP (A FIRM) AND MEEHAN LEVINS PARTNERSHIP LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Clarke delivered on the 21st January, 2010

1. Introduction

1.1 This is an application under O. 8 of the Rules of the Superior Courts to set aside an order made by Peart J. renewing the plenary summons in these proceedings for a period of six months from the date of the order concerned.

1.2 The plenary summons was issued originally on 9th January, 2004. On 11th May, 2009, Peart J. made the relevant order renewing the summons for a six month period from that date. The second, third and fourth named defendants now seek to have the order of Peart J. set aside. I turn first to the relevant facts and procedural history.

2. Facts and Procedural History

2.1 The second and third named defendants are founding members of the firm know as Meehan Levins Partnership. That firm was initially engaged by the plaintiffs ("the Moloneys") in 1996 to design a dwelling house at Tara Hill, Gorey, County Wexford ("the property"). The Moloneys also appointed the first named defendants, Lacey Building and Civil Engineering Limited ("the Contractor") to construct the property. In March, 1999 the Meehan Levins Partnership incorporated as a limited liability company in the form of the fourth named defendant, Meehan Levins Partnership Limited, (together with the second and third named defendants, "the Architects").

2.2 On 28th February, 2002, the Moloneys terminated the relevant retainer with the Architects and the Contractor by letter ("the termination letter"). The reasons for the termination were stated as being purported defects in the construction of the property and the timeliness and the quality of the Contractors' workmanship. So far as the Architects are concerned, complaint was made as to the supervision of the works by the Architects. In addition, complaint was made that architects' certificates were furnished in circumstances where it was alleged that it was clear that the Contractor had not properly carried out the works. By a separate letter of the 28th February, 2002, the Moloneys also terminated their agreement with the Contractor. Apart from a letter of the 14th March, 2002, from the Meehan Levins Partnership asserting that any problems were the responsibility of the Contractor nothing happened for over a year until, in the context of indicating that proceedings were being finalised, a suggestion concerning an inspection was raised on behalf of the Moloneys. A number of further items of correspondence passed on which nothing much turns, but by letter of the 22nd July, 2004, a more detailed complaint was made by solicitors acting on behalf of the Moloneys specifying what were said to be defects in the construction drawings and specifications and again threatening proceedings. At this stage solicitors were instructed on behalf of the Architects and an expert, Mr. Brian O'Connell, was nominated to conduct an inspection which appears to have taken place as a joint inspection on the 14th October, 2004. Nothing much again appears to have happened until 2006 when there is a further exchange of correspondence, some of which it will be necessary to refer to in more detail subsequently.

2.3 In the meantime, a plenary summons issued on the 9th January, 2004. Save for some mention in the 2006 correspondence to which I have just referred, no intimation of the existence of such proceedings was given on behalf of the Moloneys to the Architects. As is clear the summons was not, in fact, served either within the six month period required by the Rules or for a period of over five years thereafter prior to the application to Peart J. to renew the summons.

2.4 The reason given for the failure to serve the plenary summons within the time prescribed by the Rules of the Superior Courts was that the solicitor for the Moloneys was said to be awaiting a report from an expert to advise on the issue of liability and intended to serve a statement of claim at the same time as the summons. It is asserted by the Architects that this does not constitute a good reason for the failure to serve the plenary summons in a timely fashion.

2.5 To date, no statement of claim has been provided. The report of the relevant expert, Mr. Brendan McGing, structural surveyor, was issued in 2006. It was Mr. McGing's opinion that the property might have to be demolished in order to rectify problems which he identified. That report was delivered to the solicitors for the Architects on 12th May, 2008, with a letter setting out that the solicitors for the Moloneys had been instructed to go ahead with the proceedings against the defendants. It also appears that certain further expert reports may have been recommended or sought at different times.

2.6 An application was made, in the ordinary way, *ex parte* to Peart J. on the 11th May, 2009, for an order renewing the plenary summons. Without reaching a definitive conclusion as to the precise date on which any cause of action, which the Moloneys may have had, originally accrued, it seems unlikely that any such cause of action could have post-dated the termination of the Architects retainer on the 28th February, 2002. On that basis, it seems almost certain that any proceedings of the type contemplated in this case would have become statute barred in February, 2008. The application to Peart J. was, in that context, made some fifteen months after the proceedings would otherwise have become statute barred. The application was, thus, made some nine months after the last date when a summons issued within the limitation period could have been served without being renewed.

2.7 It should also be noted that, while the proceedings remain in being against the Contractor, it would appear, on the basis of what I was told at the hearing of the application, that it is not considered that there is any point in pursuing the Contractor in these proceedings. In any event, subsequent to the order of Peart J., an application to set aside the order renewing the summons was brought by notice of motion dated the 9th July, 2009. This judgment is directed to the issues which arose on that motion. In that context, it is appropriate to commence by summarising the submissions of both parties.

3. The Architects' Submissions
3.1 The Architects set out the basis for the relief sought as follows:-

> (a) The plenary summons was issued some five years and four months before its renewal was sought and obtained;
>
> (b) It is said that no good reason has been put forward as to why the summons should be renewed;
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> (c) The Architects are, it is said, still unaware of the exact allegations made against them;
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> (d) Given the passage of time, the fading of memory is likely to and may well prejudice the Architects in their defence; and
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> (e) The relevant expert's report was available in 2006 but the application to renew was not made until May 2009, without explanation for this delay.

3.2 The Architects assert that the termination letter gave no indication of what claim, if any, was to be made against them. The Architects further assert that, at the time when the solicitors for the Moloneys claim that they were awaiting the expert report of Mr McGing, the Moloneys already had other expert reports sufficient, at least, to allow proceedings to be commenced.

3.3 It is submitted that there is no good reason to explain the delay in the service of the plenary summons.

4. The Moloneys Submissions
4.1 Solicitors for the Moloneys assert that there was no prejudice to the Architects in having the plenary summons renewed where, it is said, the Architects were aware of the Moloneys claims since the termination letter, and had engaged in correspondence concerning the nature and extent of the Moloneys complaints and carried out inspections of the property. Against that background it is now necessary to turn to the provisions of the Rules and the relevant jurisprudence.

5. Order 8 of the Rules of the Superior Courts
5.1 Order 8 provides as follows:-

> "1. No original summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons. After the expiration of twelve months, an application to extend time for leave to renew the summons shall be made to the Court. The Court or the Master, as the case may be, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed summons. The summons shall in such case be renewed by being stamped with the date of the day, month and year of such renewal; such stamp to be provided and kept for that purpose in the Central Office and to be impressed upon the summons by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in the Form No. 4 in Appendix A, Part I; and a summons so renewed shall remain in force and be available to prevent the operation of any statute whereby a time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original summons.
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> 2. In any case where a summons has been renewed on an ex parte application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order."

5.2 It has been suggested that, when bringing an application under O. 8, r. 2, a defendant needs to adduce new evidence or information so as to satisfy the court that, had the relevant facts been known at the initial hearing, the summons would not have been renewed; see the judgment of Morris J. in *Behan v. Bank of Ireland* (Unreported, High Court, 14th December, 1995).

5.3 However, Finlay Geoghegan J. in *Chambers v. Kenefick* [2007] 3 I.R. 526, came to a somewhat different view where, at p. 529, she states:-

> "It is necessary for me to consider whether the approach of Morris J. sets out in full the proper approach of the High Court on hearing an application under O. 8, r. 2. With respect to Morris J. it appears to me that it does not set out the full circumstances in which the court may consider an application under O. 8, r. 2. It appears to me that, in addition to the approach set out by Morris J., it is open to a defendant, by submission, to seek to demonstrate to the court that, even on the facts before the judge hearing the *ex parte* application, upon a proper application of the relevant legal principles the order for renewal should not be made. This appears to me to be necessary having regard to the purpose of an application under O. 8, r. 2. It only relates to orders which have been made *ex parte*. On any *ex parte* application by a plaintiff, a defendant has not had an opportunity of making submissions to the court as to why the court should not exercise its discretion under O. 8, r. 1 to renew a summons. It appears to me that the purpose of including O. 8, r. 2 is to accord to a defendant fair procedures in the High Court, and to permit a defendant where he considers it necessary to make submissions to a judge, even on what might be described as an agreed set of facts, that the court should not exercise its discretion to renew a summons, and therefore I propose considering this application from the defendant on that basis."

5.4 In *Bingham v. Crowley* [2008] IEHC 453, Feeney J. agreed with the reasoning of Finlay Geoghegan J., and accepted that the defendants in that case had demonstrated that the order should not have been made in the first instance on the basis of the facts then before the court. I also agree that the proper approach is as identified by Finlay Geoghegan J. in *Chambers*.

5.5 The legal principles governing the exercise of the jurisdiction to renew a plenary summons are, in my view, as summarised by Finlay Geoghegan J. in *Chambers* at p. 530 of her decision, as follows:-

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

5.6 In *Bingham v. Crowley*, the plaintiffs, parents of a deceased person, sought to renew a summons in respect of a medical negligence claim. The plaintiffs claimed, *inter alia*, that the summons was not served as they were awaiting further expert medical opinion. Feeney J. noted that it was not averred that such opinion impacted on the ability to serve the summons and concluded as follows, at para. 34:-

> "The Court is satisfied that the opinion of the first named plaintiff that additional reports were required from further medical experts was not a good reason for the non service of the plenary summons."

5.7 On the basis of the judgment of Feeney J. in *Bingham*, it seems clear that the absence of an appropriate expert report may provide, in certain circumstances, a "good reason" for not serving a plenary summons pending the receipt of such a report. However, it is clear that the absence of an appropriate expert report will only justify a failure to serve a plenary summons where the existence of the report concerned would be reasonably necessary in order to justify the commencement of proceedings in the first place. There is ample authority for the proposition that it is appropriate for a party considering suing for professional negligence to have obtained a sufficient expert report in advance of commencing such proceedings such as would warrant forming the view that there was a *prima facie* case of negligence against the professional person concerned. Likewise, in *Green v. Triangle Developments Ltd* [2008] IEHC 52, I noted that the existence of such a report would be necessary before a third party claim was brought in professional negligence. However, I also noted in Green that, in the context of the obligation to seek to join a third party as soon as was reasonably practicable, the mere fact that a required expert report was not available would not form a justifiable basis for any more delay than was reasonably necessary to procure the expert report concerned. A similar view as to the need to carry out appropriate investigations in a reasonably timely manner can be found in the judgment of Dunne J. in *Creevy v. Barry Kinsella & Ors* [2008] IEHC 100.

5.8 In summary, therefore, insofar as the absence of an appropriate expert report may be put forward as a good reason for not serving a plenary summons, it seems to me to follow that the expert report concerned must be reasonably necessary in order to justify the decision to responsibly maintain proceedings in the first place, rather than be necessary in order take further steps in the proceedings (such as the drafting of a statement of claim or bringing the case to trial) and, it must also be established that any delay occasioned by the absence of the expert report concerned was reasonable in all the circumstances, such that appropriate expedition was used by the party placing reliance on the absence of the expert report concerned, in attempting to procure same.

5.9 Finally, before going on to the facts of this case, I should note that some reliance was placed by counsel for the Architects on cases such as *Gilroy v. Flynn* [2005] ILRM 290, *Allergan Pharmaceuticals (Ireland) Ltd v. Noel Deane Roofing and Cladding Ltd* [2006] IEHC 215 and *Stephens v. Paul Flynn Ltd* [2005] IEHC 148 and [2008] IESC 4, where both this Court and the Supreme Court had to consider applications for dismissal for want of prosecution. It would be fair to summarise the jurisprudence which emerges from those cases as imposing a stricter view in relation to delay. While the test to be applied in the context of an application to dismiss for want of prosecution is not identical to the test to be applied in a renewal application there are, in my view, significant similarities. In the case of the delay jurisprudence, it is clear that the first question that must be asked is as to whether there was inordinate or inexcusable delay. The extent of the delay which is necessary to invoke the jurisdiction in the first place (i.e. delay which might be considered to be inordinate) has no parallel in the renewal jurisprudence for a summons needs to be renewed if it is not served within the specified period of six months. However, there are at least some parallels between the question of whether any delay which may be inordinate might be regarded as excusable (as arises in the delay jurisprudence), and whether there may be said to be a "good reason" for the renewal of the summons in the renewal jurisprudence. Likewise, it is clear that when the first hurdle is surmounted in either case, the court then has to go on to consider the general justice of the case, which consideration is likely to involve many of the same matters (such as degree of delay, prejudice, and the like) whether a dismissal for want of prosecution case or a renewal case is under consideration.

5.10 I am, therefore, satisfied that the general tightening up of the approach of the courts to delay which can be identified in the dismissal for want of prosecution jurisprudence applies also to cases involving an application to renew a summons, such that the question of whether a reason put forward may be deemed a "good" reason may be looked at with greater scrutiny and, the factors which can properly be taken into account in assessing the balance of justice may need to be looked at from a perspective that places a greater emphasis on the need to move with expedition.

5.11 In addition, it does have to be remembered that the policy behind the existence of a statute of limitations in the first place is that proceedings of various types are required, as a matter law, to be commenced within a specific period of time. It is worthy of some note that, in proceedings commenced in the Circuit Court, it is, for all practical purposes, necessary to move to the service of civil bill before the proceedings can properly be said to have commenced. The possibility that Circuit Court proceedings can, therefore, be said to have been commenced in circumstances where the relevant defendant has not received a formal notification of the commencement of the proceedings concerned, does not, in practice, exist. It seems to me that an application for the renewal of a summons in this Court needs to be viewed against the background of the statutory policy that proceedings must be commenced within the relevant limitation period. The purpose behind that policy is to prevent claims from being brought outside what has been determined to be a reasonable period for the category of case concerned. Given that proceedings in this Court are said to have been commenced once issued, it follows that it is possible to formally notify a defendant (by service) of the existence of proceedings outside the limitation period. Obviously any summons issued less than six months prior to the expiry of the relevant limitation period can be served outside that limitation period without any renewal. However, it, nonetheless,

seems to me that a court in considering an application for renewal should pay significant attention to the fact that the policy behind the statute of limitations is that a defendant be aware in a formal sense that proceedings have been commenced, either within the statutory period or within a short time thereafter. In that context, it is illustrative to look at the "good reason" identified by Finlay Geoghegan J. in *Chambers* where the defendant concerned had been sent a copy of the relevant plenary summons but where same had not been formally served so that the defendant concerned was fully aware of the existence of proceedings even though there had been a technical failure to effect formal service. It seems to me that a renewal of a summons outside the limitation period so as to further extend the time (by reference to the limitation period) within which service can be affected, amounts at least to a stretching of the principles behind the existence of a statute of limitations in the first place. Such considerations should, in my view, inform decisions relating to both the question of what might be taken to be a "good" reason for the renewal of a summons and also in weighing the factors that might be put in the balance in considering where the balance of justice lies.

5.12 It also seems clear from *Roche v. Clayton* [1998] 1 I.R. 596, that it is not a good reason to renew a summons simply to prevent the defendant availing of the statute of limitations. In that case, O'Flaherty J., speaking for the Supreme Court, and having made reference to *McCooey v. Minister for Finance* [1971] I.R. 159 and, in particular, *O'Brien v. Fahy* (Unreported, Supreme Court, Barrington J., 21st March, 1997) noted that the statute of limitations must be available on a reciprocal basis to both sides of any litigation. To the extent, therefore, that *Baulk v. Irish National Insurance Company Limited* [1969] I.R. 66, might give rise to a possible argument to the effect that the fact that the plaintiff might otherwise be statute barred can provide good reason on its own, it seems to me that subsequent Supreme Court authority makes it clear that that argument is not tenable. It follows that the "good reason" must be more than a simple need to renew the summons so as to avoid the defendant being able to rely on the statute. It does seem that the history of events up to the time when the statute might have applied, and in particular, the extent to which the potential defendant knew of the existence of the claim and most especially, the fact that proceedings had been brought on foot of it, can constitute good reasons for the purposes of the Rules.

5.13 I should, in passing, comment that I do not consider that it is appropriate to characterise a failure to renew a summons as amounting to a penalty for procedural mishap. To so characterise it would, in seems to me, be to place little or no weight on the policy considerations behind the statute of limitations in the first place. The statute creates a situation where the issuing of proceedings one day after the limitation period leaves the relevant defendant with a complete defence, whereas the issuing of the same proceedings two days earlier would allow the proceedings to be considered on the merits. There are, as I have pointed out, very good policy reasons why a threshold is imposed. To regard a failure, for no explicable reason, to serve the summons within six months or at least within six months of the date when the statute expires, as merely a procedural mishap would seem to me to afford far too little weight to the policy behind the statute.

5.14 Likewise, it seems to me that the policy inherent in the statute of limitations requires that proceedings be commenced and, thus, be tried within a reasonable proximity to the events giving rise to the relevant claim. Part of the reason behind that policy is that injustice may be caused if proceedings are not formally commenced in a timely manner, thus causing problems for the defendant. However, it seems to me that another aspect of the relevant policy is to assist in ensuring that cases come to trial sufficiently close to the events giving rise to the relevant proceedings so as to minimise the risk of injustice. In that context, and to the extent that such matters are capable of assessment at that stage, it seems to me that, in balancing the interests of justice in a renewal application, the court should have regard to any real risk of prejudice.

5.15 Against the background of those principles, I now turn to the facts of this case.

6. Application to the Facts of this Case

6.1 On behalf of the Moloneys it is said that it was desired to serve a statement of claim with the plenary summons and that, for those reasons, it was considered necessary to obtain further and more detailed expert reports in order to facilitate the drafting of the statement of claim concerned. While that may be so, there does not seem to me to be any legitimate basis for a contention that the Moloneys were not in possession of a sufficient expert report to warrant the commencement of professional negligence proceedings against the Architects as of the date of the issue of the plenary summons in this case. I am not, therefore, satisfied that the absence of expert reports affords, on the facts of this case, a "good reason" for the plenary summons not having been served within the period provided by the rules, and the absence of such expert reports does not, therefore, in my view, amount to a good reason for renewing the summons in this case.

6.2 It is further said that there was some notification on behalf of the Moloneys to the Architects of the fact that a summons was issued. That part of the correspondence which passed between the parties in early 2006 can be so interpreted, is undoubtedly correct. However, it is equally clear from the immediate replying correspondence on behalf of the Architects that the relevant correspondence was not interpreted by them as meaning that proceedings had, in fact, been issued. In the circumstances it does not seem to me that it is appropriate to approach this case as being one where the Architects were on any meaningful notice of the fact that proceedings had, in fact, been commenced rather than that proceedings were being threatened. A letter from the Moloneys solicitors of the 30th January, 2006, does refer to "the High Court proceedings instituted against your client and the builder". However, a reply from the Architects' solicitors of the 28th February, 2006, notes "that it is your intention to issue proceedings" and confirms a willingness and authority to accept service. It also needs to be noted that, apart from some brief correspondence in the succeeding months (terminating on the 26th May, 2006) concerning an inspection of the premises, the correspondence between the respective solicitors went silent from in or about that time until well after the statute of limitations would have expired, with the relevant correspondence recommencing in May, 2008. That recommenced correspondence was immediately replied to on behalf of the Architects by a letter of the 4th June, which puts squarely in issue the fact that the proceedings had become statute barred.

6.3 In all the circumstances, I am not satisfied that this is a case where it can properly be said that the Architects knew or, ought to have known, that proceedings had been commenced.

6.4 It is, of course, the case that, at least to some extent, a claim had been intimated on behalf of the Moloneys. However, it is fair to say that the correspondence between the parties can reasonably be characterised as sparse so that while the possibility of a claim had been intimated, same did not appear to have been pursued with any significant vigour, and the correspondence peters out in 2006 without any contact between the parties between then and the time when the statute would have expired in February, 2008. It would not have been unreasonable for the Architects to consider

that the matter had been let drop by that stage.

6.5 In circumstances where, therefore, I am not satisfied that any acceptable explanation has been given for the failure to serve the summons well before the time when application to renew was made to Peart J., the fact that I am satisfied that it can not be said that Architects were in any meaningful sense on notice that proceedings had been commenced rather than that a claim had been intimated, and the fact that even to the extent that a claim had been intimated, same had only been particularised to a limited extent and the trail had been allowed to run cold for a significant period prior to the expiry of the limitation period, the only real reason that can be asserted for renewal is that the Moloneys claim would otherwise be statute barred. As already indicated that, by itself, is not a good reason.

6.6 In all those circumstances, I am not satisfied that a good reason has been established for the renewal of the summons in this case. Lest I be wrong in that consideration, I should also touch on questions concerning where the balance of justice might be said to lie.

6.7 I am satisfied that there would be a significant risk of prejudice to the Architects should these proceedings now be permitted to continue. While it is true to say that the Architects were given early notice, in general terms, of the complaints made by the Moloneys and had, again in the those general terms, an opportunity to inspect the premises, which opportunity was availed of, it nonetheless needs to be noted that a case such as this is likely either to turn on or to be significantly influenced by, many points of detail. To take but one general issue it is clear that the complaints made by the Moloneys originally involved accusations both against the Contractor and the Architects. There may, of course, be circumstances where both a contractor and a firm of architects may be liable in respect of the same defects given whatever level of supervision the architects concerned were contractually obliged to exercise. However, it also is the case that in many proceedings involving a claim against both a contractor and a firm of architects, certain items where liability can be established may be attributed solely to one or the other, having regard to whether it can be said that the problem stemmed from a failure to construct properly in accordance with plans or a design defect. It is inevitable that the ability to deal with questions of detail which could be highly material to the question of whether any particular item of claim could properly be said to arise from a liability on the part of the contractor on the one hand, or the architect on the other hand, must have been significantly impaired by the passage of time and in particular the fact that the claim, which it would appear will now be made if these proceedings are permitted to continue, will involve the filing of detailed particulars, at least some of which will undoubtedly come to the attention of the Architects for the first time some eight or nine years after their retainer was terminated. As an example, the first intimation that it might be necessary to knock and rebuild the property is of very recent origin. Issues concerning whether such a consequence really arises, whether, if so, it was always necessary or has been caused or contributed to by delay and whether that consequence is attributable to any fault on the part of the Architects may well require detailed analysis. Given the recent appearance of this aspect of the case the risk of prejudice is obvious. In those circumstances, it seems to me that there is a real risk of prejudice.

6.8 In addition, it seems to me that it is appropriate to take into account the particularly long delay after the issue of the plenary summons and before its renewal which is shown on the facts of this case. In addition, the fact that the application to renew occurred well over a year after the last date on which the statute of limitations could be said to have expired, seems to me to identify the delay in this case as being particularly excessive.

6.9 Having regard, therefore, to the particularly long, and in my view unexplained, delay not just from the time when the plenary summons was issued but also from the time when the statue of limitation expired and, indeed, the last time (being six months after the statute expired) when it could reasonably be expected that a summons issued within the statute could be served, coupled with the real risk of prejudice to the Architects on the facts of this case, I am satisfied that the balance of justice would not, in any event, favour the renewal of the summons in this case.

6.10 In assessing, in accordance with the test identified by Finlay Geoghegan J. in *Chambers*, the balance of hardship it also needs to be noted that the Moloneys have instituted proceedings (which are currently held up pending this judgment) against their former solicitors for negligence. The jurisprudence concerning dismissal for want of prosecution makes clear that the fact that a plaintiff may have a legitimate complaint against his advisers (and to be able to make claim in that regard) is a relevant factor which leans against absolving a party for failures on the part of those advisers.

7. Conclusions

7.1 I have, therefore, come to the view that there is no good reason for the renewal of the summons in this case.

7.2 Even if I had been satisfied that there was a good reason I have, for the reasons which I have sought to identify, come to the view that the balance of justice in all the circumstances would not have favoured the renewal of the summons. There will, therefore, be an order setting aside the previous order made by Peart J. renewing the summons.