THE HIGH COURT

[2014 No. 3902P]

BETWEEN

GEOFF MEAGHER

PLAINTIFF

AND

GERARD WILLIAM SANDYS AND BRYAN C. BROPHY both practicing under the style and title of SANDYS AND BROPHY SOLICITORS

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 2nd day of February, 2016.

1. This judgment is given in an application to set aside the order of this Court made on 12th October, 2015 by which the plenary summons was renewed for a second time under Order 8, rule 1 of the Rules of the Superior Courts after the period provided by the first renewal had expired.

Background

2. The plaintiff, acting as the National President of the Society of St Vincent de Paul, instituted these proceedings for damages for *devastavit*, negligence and breach of duty, arising from the administration of the estate of Maureen O'Connell, deceased, of whose estate the defendants were the executors and in which they acted as solicitors

3. The plenary summons issued on 16th April, 2014, and was first renewed for a period of six months on 24th March, 2015 by the Master of the High Court.

4. *Ex parte* application was made by the plaintiff to this Court on 12th October, 2015 to further renew the summons. The application was made after the six month period provided in the order of the Master had expired

5. The defendants by motion dated 16th December, 2015 seek to set aside the second renewal of the plenary summons, and contend that the renewed summons became incapable of further renewal by the Court upon its expiry on 23rd September, 2015.

The application to set aside the renewal

6. Order 8, rule 2 of the Rules of the Superior Courts provides that

> *"[i]n 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".*

7. The approach to be taken to an application to set aside the renewal of the summons was definitively set out in *Chambers v. Kenefick* [2007] 3 I.R. 526 where Finlay Geoghegan J. held that fair procedures require that the defendant be given an opportunity to make such application. At page 529 her judgment she explained the approach:

> *"It appears to me that … 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."*

8. The approach of Finlay Geoghegan J. has been approved and applied in a number of subsequent cases, notably by Clarke J. in *Moloney v, Lacey Building and Civil Engineering Limited* [2010] 4 I.R. 417 and by Hogan J. in *Doyle v. Gibney* [2011] IEHC 10 and is now settled law, as a result of which the plaintiff accepts that the application to set aside is properly before me.

Jurisdiction to renew a Summons

9. Counsel for the defendants assert that renewal of the plenary summons should be set aside because it was made without jurisdiction. He argues that, while on the first renewal a broad discretion is given, a more stringent test is applicable to a second or subsequent renewal application which must, having regard to the case law, be made within the currency of the renewed summons.

10. I turn now to consider these authorities.

11. Order 8 of the Rules of the Superior Courts sets out rules pertaining to the renewal of summons. Order 8, rule 1 provides that:

> *"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." (Emphasis added)

12. Counsel for both parties accept that there is authoritative and recent judgments of the High Court on the jurisdiction to renew a summons, and agree that the judgment of Feeney J. in *Bingham v. Crowley* [2008] IEHC 453 is directly on point. That case concerned a plenary summons that had been renewed after the renewed summons had expired. Feeney J. held that the words of Order 8, rule 1 mean that a second or subsequent renewal can be granted only during the currency of the renewed summons. His reasoning is clear. At paras. 19 and 20 he stated as follows:

"Such renewal is therefore subject to the words contained in Order 8, Rule 1, being a second or subsequent renewal, namely "and so from time to time during the currency of the renewed summons". It is contended by counsel for the second named defendant that those words mean that a second or subsequent renewal can only be applied for and granted during the currency of the renewed summons, which on the facts of this case was on a date within six months from the 21st November, 2005. In other words, the second named defendant contends that on the 19th February, 2007, the application was made not within the currency of the renewed summons. The solicitor for the plaintiffs argue that a correct interpretation of Order 8, Rule 1 is that the Court retains a discretion to renew the summons and that since the word currency is not defined, that the currency of the renewed summons can be taken to apply to any date after the first renewal of the summons.

This Court is satisfied that the interpretation contended for by the second named defendant's counsel is correct. If such interpretation was not correct it would mean that the words "during the currency of the renewed summons" had no additional meaning or effect and that the sentence in the rule could have concluded at "from time to time". The Court is obliged to give effect and meaning to the wording of Order 8, Rule 1 and that includes the words "during the currency of the renewed summons". The only interpretation which can be given to the words "the currency of the renewed summons" is the period identified as being the six month period of renewal provided for in an order to renew the summons. The rule provides a more stringent requirement in relation to a second or subsequent renewal in that after the first renewal, a summons will be incapable of further renewal unless an application to renew is made within the currency of the renewed summons."

13. The judgment of Feeney J. in *Bingham v. Crowley* was followed by Dunne J. in *Carlisle Mortgages Limited v. Patrick Canty* [2013] 3 IR 406, who considered his interpretation of Order 8, rule 1 "*carefully considered and thought out*" and said was an interpretation with which she found herself in agreement.

14. More recently, in *Crowe v. Kitara Limited* [2015] IEHC 422, Moriarty J. said he found the reasoning of Feeney J. "*unassailable*", and set aside the renewal for the second time of a once renewed and expired plenary summons.

15. In the light of the judgment of Feeney J., I consider that *prima facie* the order by which the summons was renewed was made without jurisdiction, as having been made outside the currency of the renewed summons.

The jurisdiction to extend time

16. Counsel for the plaintiff argues that the decision of Feeney J. in *Bingham v. Crowley* can be distinguished because time was extended by this Court on the *ex parte* application. She argues that Order 122, rule 7 of the Rules of the Superior Courts, gives the court has a wide jurisdiction to extend time in all cases where it considers that good reason exists to do so, and she points to a long line of authorities where the court has extended the time for the doing of any act or taking of any step in proceedings. The plaintiff asserts that the court has a jurisdiction to extend time to make application to renew, and that there are good reasons to do so.

17. This judgment is concerned with the net question of whether the general power to extend time may be availed of by an applicant to further renew a summons other than in the currency of the already renewed summons. I accept what is said by counsel that there is no case directly on point as to the interplay between Order 8 and Order 122 for the purposes of an application to renew a summons for a second or subsequent time, and this has the effect that the judgment of Feeney J., while it is authoritative on the jurisdiction of the Court to renew a summons, did not engage the question of the power of the Court to extend the time such that the application may be made other than during the currency of the renewed summons.

The extension of time

18. Order 122 of the Rules of the Superior Courts sets out rules relating to time. Order 122, rule 7 provides that:

"Subject to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed."

19. In *Kavanagh v. Healy* [2015] IESC 37, the Supreme Court considered the extent of the jurisdiction conferred by Order 122, rule 7. Counsel for the plaintiff places particular emphasis on paras. 3.5 and 3.6 of the judgment of the Court delivered by Clarke J. where he said the following:

"A number of matters are, therefore, absolutely clear. The first is that the Court is given a wide power to enlarge the time for serving any document including, as here, a notice of opposition. Secondly, there is no mention in Rule 7 of any requirement that the consent of the applicant be forthcoming before such an enlargement can be ordered. Indeed it is in that context the Rule 8 is of some importance for it is clear that, in a case where the applicant consents, time may be extended for the service of a notice of opposition without the need of a court order where the relevant consent is in writing. The fact, therefore, that Mr. Kavanagh did not consent to any extension of time does not affect the entitlement of the Court to nonetheless order an extension of time if the Court considers it appropriate in all the circumstances of the case.

Furthermore, it is absolutely clear from the wording of Rule 7 that an extension of time can be given even after the original time limit has expired. Finally, it is clear that the power of the Court to enlarge time extends to enlarging a time which is "fixed by any order enlarging time". Thus it is absolutely clear that the fact that time has been enlarged once

does not operate as a barrier to a second or subsequent enlargement of time. The wording of the rule is absolutely clear and there can be no room for doubt about what it means. A court can extend time for any action required to be taken by the rules, can do so even if the time originally fixed has expired and can do so a second time even if there has already been one extension."

20. Counsel for the defendants argues that the decision of the Supreme Court in *Baulk v. Irish National Insurance Company Ltd.* [1969] 1 IR 66, is authority for the proposition that a summons which has not been served within the necessary 12 month period does not as a result become a "nullity", but rather does not thereafter remain in force for the purposes of service after that date unless renewed by leave of the court. She argues that the judgement of Feeney J. failed to have full regard to that old and authoritative decision of the Supreme Court and later examples where that principle has been applied.

21. She further argues the power given to the court under Order 122, rule 7 to extend time has no application to renew a summons for a second or subsequent time as the matter is one of the jurisdiction of the Court, and Order 8 provides the entire jurisdictional basis on which a summons may be renewed.

Discussion
22. I consider that counsel for the plaintiff is incorrect. In the first case it is clear that *Baulk v. Irish National Insurance Company Ltd.* was opened to Feeney J. in the course of the hearing in *Bingham v. Crowley,* and he refers to it expressly at para. 17 of his judgment, and indeed approved in general the reasoning of Walsh J. in that case which is consistent with the approach of Finlay Geoghegan J. in *Chambers v. Kenefick*, and the general approach of the court that a summons will be renewed if there is good reason to do so and "*by reference to the overall interests of justices between the parties"*. However, whilst Feeney J. identified the search for the interests of justice, and that those interests must guide the court in considering whether to renew a summons, his analysis pointed him to a conclusion that the summons "*could not be renewed under O.8, r.1*" as it was not done during the currency of the renewed summons. His judgment is in my view clear authority that the matter is one of jurisdiction, and that the jurisdiction of the court to renew the summons is one that may be exercised only within the currency of the renewed summons, and that the court may not extend that time.

23. Counsel suggests that Moriarity J. left open the question whether time can be extended in an application to renew a summons for a second or subsequent time in *Crowe v. Kitara Limited*. Moriarity J. at para. 19 of his judgement appears to envisage extensions in the case of "*limited technical defects or the like*", but his comment was *obiter* and it cannot be suggested that the reason the in the present case summons needed to be renewed on the second application arose from a "technical" defect, as it was the failure to serve within six months that led to the application.

The power is "subject to any provision of statute"
24. Counsel for the plaintiff argues that under Order 122, which allows the Court to extend the time for the doing of any act or thing in respect of which time limits are set out, is subject only to any relevant provision of *statute,* and that the express words of Order 122 are not of themselves subject to any provision of the Rules of the Superior Courts. It is argued by the plaintiff that the Rules of court are not to be treated as statute law for this purpose.

25. The nature of secondary legislation was considered by Clarke J. giving the judgment of the court in *Shell E & P Ireland Limited v. McGrath and ors* [2013] IESC 1. At para. 57 he said as follows :

"The rules of court are, of course, a form of secondary legislation. They are made with the authority of the Oireachtas in the form of the enabling provisions of the Courts of Justice Acts 1924-36 and the Courts (Supplemental Provisions) Act 1961 ("the Courts Acts")."

26. He went on to say at para. 59 that the Rules have the force of law and his reasoning guides my conclusion that the distinction sought to be argued is artificial.

"On that basis the rules have the force of law and have the same status as time limits to be found in primary legislation except, of course, that the rule-making authorities do not have the power to depart from those time limits which are specified in primary legislation. It is, of course, the case that the type of legislation which has been adopted in recent times in the planning and immigration fields, for example, not only imposes a statutory time limit for the commencement of proceedings but also prevents any question as to the validity of relevant measures being raised save by judicial review. There is no similar provision in respect of challenges outside those fields which have been the subject of specific legislation. No such restriction applies to a challenge in respect of measures such as the CAOs and the consent which are at the heart of these proceedings. However, it remains the case that a judicial review challenge to those measures would be required, as a matter of law, to be taken within the time limits specified in the rules of court or in such extended time as the court might provide. It seems to me to necessarily follow that permitting such a challenge to be brought in a manner which would entirely circumvent those rules would amount to permitting rules which have the force of law as secondary legislation to be circumvented in an inappropriate way. It seems to me to follow that a valid exercise by the rule-making authority of its power to impose, by rule of court, time limits for the bringing of judicial review applications necessarily implies, by analogy, that those rules are applicable to such challenges in whatever way, as a matter of procedure, the challenge concerned may be brought."

Inherent jurisdiction
27. Counsel for the plaintiff also argues that the court has a power in its inherent jurisdiction to extend time in order to allow the plaintiff access the court, in order to do justice between the parties and to prevent the defendants from avoiding liability in respect of the matters claimed. It is argued that no prejudice is done to the defendants who were as a result of other proceedings and the involvement of the Law Society well aware of the claims.

28. The summons was not served, but the plaintiff asserts that three unsuccessful attempts were made to serve each defendant, on 9th September, 2015, 18th September, 2015 and 22nd September, 2015. The plaintiff asserts that the defendants have sought to evade service, and this is disputed by the defendants.

29. I consider that no inherent jurisdiction to engage considerations such as those advanced by counsel can be said to exist as the provisions of the Rules are clear in expressly delimiting the manner and time for the making of an application to renew for a second or subsequent time.

30. In this I am guided by the decision of the Supreme Court in *G McG v D.W.* 2004 IESC 21 and the dicta of Murray J. at page 27

that:

> *"Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders. It may indeed be otherwise where a fundamental principle of constitutional stature is invoked against a statutory or regulatory measure determining jurisdiction, but that is not the case here."*

31. His judgement was followed by Clarke J. in *Mavior v. Zerko Ltd*. 2013 3 I.R 268:

> *"It seems to me that what Murray J. cautioned against in the passages cited was the creation of parallel jurisdictions for resolving much the same area of controversy, founded on, on the one hand, existing law and, on the other hand, an asserted inherent jurisdiction. As Murray J. pointed out, to attempt to invoke an inherent jurisdiction of the courts so as to go beyond delineation specified, in a constitutionally permissible way, in a statute, would be for the courts to trespass on the legislative role of the Oireachtas. If, in a constitutionally permissible way, the Oireachtas have defined the limits of a particular jurisdiction then it is not for the courts to extend those limits by invoking a vague "inherent jurisdiction"."*

Laffoy J., giving the judgement of the Supreme Court, came to the same conclusion in *Re F.D* [2015] IESC 83.

Conclusion and Summary
32. It seems to me that the application of the defendants must succeed. The provisions of Order 8 are special provisions relating to the renewal of a summons, and the recent and authoritative decisions of the High Court mentioned above make it quite clear that a second renewal of a summons must be done during the currency of the renewed summons. I consider that it cannot be said that, as between Order 8 and Order 122, that the general provisions of Order 122 must prevail in all cases, as such an interpretation would fail to give effect to the precise provisions which govern the relevant application, and an individual Rule which has the force of law

33. The matter is one of jurisdiction and also one where in my view the general provisions of Order 122, rule 7 cannot override or inform the interpretation of the specific provisions relating to a specific and particular form of application such as the one to renew the summons. Such a conclusion is consistent with the general principles of statutory interpretation, or the interpretation of deeds or contracts, namely that special provisions or conditions must always prevail in the case of a dispute or difference between those and general conditions.

34. I consider also that the judgement of Clarke J. in *Kavanagh v. Healy* may be distinguished, as the Supreme Court was giving judgment on an application to extend time to serve notice of opposition in judicial review proceeds when an order extending time had already been made but not complied with. His analysis was based *inter alia* on the fact that he regarded it as "*of some importance"* that time could have been extended by consent of the parties, and that therefore the Rule itself contemplated further extensions, and did not govern the jurisdiction of the court to allow an extension of time. Thus I consider that counsel for the plaintiff is not correct that his judgment is determinative of the issue before me.

35. Furthermore it seems to me that if I were to accede to the application under Order 122, rule 7 made by the plaintiff I would be ignoring not just the findings of Feeney J. and the other decisions which followed and applied his findings and reasoning, but also would be ignoring precisely the reasoning of Feeney J. which was based on a close, and in my view correct and well-reasoned, construction of the provisions of Order 8 itself, and specifically those relating to time, and which was expressly approved and followed in recent High Court judgments referred to above.

36. The issue was in my view firmly characterized as one of jurisdiction by Feeney J. in *Bingham v. Crowley*. Thus the Rules themselves govern the manner and, more importantly, the timing of an application to renew, and once the time for the bringing of the application has passed the court may not engage the question of whether there is good reason to extend time. I consider that Order 8, rule 2 deprives the court of jurisdiction when application for a second or subsequent renewal is not made in the currency of an already renewed summons. Therefore, in my view the question of whether there is good or sufficient reason to renew the summons is not engaged, as the power is not exercisable on a second or subsequent renewal other than during the currency of the renewed summons.