



THE COURT OF APPEAL

**Ryan P.
Mahon J.
Edwards J.**

**Appeal Nos.: 2015/332, 2015/333, 2015/341
Jacqueline Crowe, Barry O'Neill and Graham Gibbons**

Plaintiffs

- and -

Kitara Limited, Collen Group Limited, CPM Architecture t/a Collen Project Management, CPM Engineering t/a Collen Project Management, Lightgate Professional Services Limited, Kingspan Century Limited, Dublin City Council, LM Developments Limited and Diarmuid Kelly t/a Diarmuid Kelly and Associates

Defendants

Judgment of Mr. Justice Mahon delivered on the 2nd day of March 2016

1. These appeals arise from Orders made by Moriarty J. on 8th June 2015 in relation to applications by the ninth named defendant (Mr. Kelly) to set aside High Court Orders renewing the plaintiffs' originating summonses.
2. The High Court Orders renewing the plenary summonses in all three cases are:-
 - (i) The Order dated 3rd February 2014 renewing the plenary summons issued by the plaintiff, Ms. Crowe, for six months.
 - (ii) The Order dated 3rd February 2014 renewing the plenary summons issued by the plaintiff, Mr. O'Neill, for six months.
 - (iii) The Order dated 10th March 2014 renewing the plenary summons issued by the plaintiff, Mr. Gibbons, for six months.
 - (iv) The order dated 22nd September 2014 further renewing the plenary summons issued by Mr. Gibbons, from that date, notwithstanding that its earlier renewal had lapsed on 9th September 2014.
3. On 8th June 2015 Moriarty J. upheld the renewal of summonses issued by Ms. Crowe and Mr. O'Neill, but set aside the renewal of the plenary summons issued by Mr. Gibbons from the 22nd September, 2014. Moriarty J.'s reasons in respect thereof are set out in his detailed judgment delivered on 19th March 2015.
4. Mr. Kelly has appealed the refusal to set aside the Orders renewing the summonses in the cases of Ms. Crowe and Mr. O'Neill and Mr. Gibbons has appealed the decision to set aside the renewal of his plenary summons.
5. The three plaintiffs have separately instituted proceedings in which the defendants are similar (and includes, in each case, Mr. Kelly as the ninth named defendant) as are, broadly, their background facts and the reliefs sought. Where there are differences, such are identified as necessary in the course of this judgment, as indeed they were in the judgment of Moriarty J. On this basis I have prepared one comprehensive judgment as also did Moriarty J. in the court below.

The background to the proceedings

6. The plaintiffs purchased apartments in an apartment complex in Belmayne, Dublin 13, in which all the defendants had an involvement, either in the construction or design of the complex or, in the case of Mr. Kelly, the design of fire protection measures to be incorporated into the structure. Mr. Kelly was not otherwise involved in the design or construction. Subsequently the complex was found to be deficient in relation to fire prevention issues, thus rendering it unsafe for residential use in consequence whereof, the plaintiffs contend they are now the owners of worthless properties. In this respect, the plaintiffs claim damages for negligence, nuisance and breach of duty (including aggravated and/or exemplary damages) against the defendants, including Mr. Kelly.

7. In all three cases the originating plenary summonses issued on 9th November 2012.

The summonses' renewal history

8. In the cases of Ms. Crowe and Mr. O'Neill the plenary summonses were renewed for six months by the High Court on 3rd February 2014 pursuant to Order 8 rule 1 of the Rules of the Superior Courts, and were served on Mr. Kelly on 31st July 2014, just two days prior to the expiration of the six month renewal period.

9. In the case of Mr. Gibbons, the High Court granted leave for the renewal of the plenary summons on 10th March 2014 for six months. It was not served on Mr. Kelly prior to the expiration of the six month renewal period but was purportedly served on him on 12th September 2014 some three days after its renewal had lapsed. A further renewal of the summons from 22nd September 2014 was then sought by Mr. Gibbons and was granted by the High Court. This was approximately two weeks after the earlier six month renewal had expired. The summons was subsequently served (or re-served) on Mr. Kelly. Mr. Kelly contends that the court did not have jurisdiction to renew the summons in circumstances where its earlier renewal had previously expired. A conditional appearance was entered by Mr. Kelly on 18th November 2014.

10. In all three cases, service of the proceedings on Mr. Kelly was affected after the expiry of the relevant limitation periods. The date of issue of the summons is however marginally within the limitation period. It is accepted by all three plaintiffs that they faced difficulties in relation to the Statute of Limitations in the event that the renewals of their summonses had not been granted in February 2014, and, (in the case of Mr. Gibbons), the 22nd September 2014. .

11. The excuse for the delay in the service of the plenary summons on Mr. Kelly by the plaintiffs was stated to be their need to engage an expert and obtain his report (which was procured in 2014) following a parting of the ways between them and their previously engaged expert from whom they had received a report in 2012. Additionally in the case of Mr. Gibbons, the court was

advised that a late change of solicitor by him further delayed service of the proceedings initially to a date some days after the expiry of the first renewal period, and subsequently within the second six month renewal period.

Order 8 of the Rules of the Superior Courts

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 each 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 plenary summons (emphasis added).

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.

3. ..

4. ..

12. Order 8 r. 1 provides for an application to the Master of the High Court to renew a summons *before the expiration of twelve months*, and where any defendant has not been served. The High Court (or the Master as the case may be) may, *if satisfied that reasonable efforts have been made to serve such defendants, or for other good reason*, order a further renewal for a period of six months. Subsequent applications for six month renewals can be also be made if applied for during the currency of the summons. Order 8 r. 2 provides that where a plenary summons has been renewed on foot of an ex parte application, a defendant is at liberty to serve notice of motion to set aside such order, as occurred in these cases.

13. In the case of Mr. Gibbons, it was submitted by Mr. Kelly that if O. 8 r. 1 did not in any circumstances permit the renewal of a summons outside the currency of an earlier renewal period. It was however also submitted on behalf of Mr. Gibbons that it was permissible for a court to nevertheless renew a summons in such circumstances by virtue of O. 122 r. 7 of the Rules of the Superior Courts, by extending the time for so doing beyond that provided for in Order 8, r. 1.

Order 122 of the Rules of the Superior Courts

(7) 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 proceedings, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

14. Specifically in relation to Mr. Gibbons, it is submitted on behalf of Mr. Kelly that the second renewal of the summons (*i.e.* the renewal dating from 22nd September 2014) ought to be set aside as it had been permitted in circumstances where, as of the date of the *ex parte* application for that renewal the period of the previous renewal had expired. The application therefore had not been made during the currency of the renewed summons (emphasis added). It is further submitted that, having regard to the specific wording of O. 8, r. 1, there is no jurisdiction to enlarge time in a manner and to a degree which is clearly in conflict with Order 8, r.1.

15. Mr. Kelly, in his affidavit grounding his application to set aside the renewal of the plenary summonses averred as follows:-

(i) The plaintiffs were statute barred at the time of the dates of the renewal of their summonses. The proceedings were not statute barred when the summonses were originally issued.

(ii) Mr. Kelly had received no particulars of the claim being made against him prior to the summons being served in July and September 2014 respectively, other than a telephone call from a solicitor (in June 2015).

(iii) No attempts had been made to serve the plenary summonses on Mr. Kelly within their initial twelve month life, or in Mr. Gibbon's case, within the first six month renewal period.

(iv) Mr. Kelly stated *that he was significantly prejudiced* by the renewal of the summonses. Such prejudice arose for the following reasons:-

- *The proceedings were statute barred and the fresh issue of such proceedings post that date would have been defended by him on the basis that they were statute barred. The renewal of the summonses deprived him of availing of such a defence.*

- *Mr. Kelly was disadvantaged in having to deal with the proceedings some seven years after his involvement with the apartment construction in circumstances where he had not been involved with its construction.*

(v) *The eighth named defendant, and who was the main contractor of the apartment construction, is in receivership since November 2009. Accordingly, any claim for contribution or indemnity as against that party has been rendered wholly ineffective.*

(vi) *Other than a telephone call from the plaintiffs' solicitor in June 2014, no notice had been provided to him in relation to the proceedings prior to service of the summonses. Mr. Kelly only has available limited documentation to deal with the claim.*

(vii) In Mr. Gibbon's case the plenary summons issued on 9th November 2012 and was renewed by Peart J. on 10th March 2014 for a period of six months. It was invalidly served on Mr. Kelly on 12th September 2014, having expired three days earlier on the 9th September 2014. It was again reviewed by order of Barr J. on 22nd September 2014 from that date, and having been so renewed was then served on Mr. Kelly.

The judgment of Moriarty J.

16. Moriarty J. found that in relation to all three plaintiffs, their arguments in relation to the application of Statute of Limitations and the procurement of expert evidence to be *tenuous and unconvincing*. While acknowledging that the cases required significant preparation and that there may have indeed been disagreements between the two experts retained to prepare reports, he commented as follows:-

"However, playing brinkmanship with the Statute of Limitations as was done was not justified, nor was the failure to notify Mr. Kelly in advance of actual service in any but the more cursory and belated manner."

17. The learned High Court judge then went on to express his view that ultimately the relevant factors for consideration were the *"interests of justice"* and *"the relevant degree of prejudice which an adverse outcome would be likely to occasion to either side"*.

18. In relation to all three plaintiffs, in relation to the issue of prejudice, he made the following findings:-

(i) The cases were *predominantly document based*, and that Mr. Kelly would as a matter of probability be made fully aware of all that was alleged against him, and would be in a position to mount a defence in relation thereto. He also noted that if the claims against Mr. Kelly failed he would, in all probability, be awarded his costs.

(ii) Although there was delay, *it is not of such proportions as have been encountered in other cases*.

(iii) The consequences for all three plaintiffs, in the event that they were unsuccessful in resisting the present applications, were stark. He remarked that *Clearly, if what is alleged against the defendants among whom Mr. Kelly is a central player is substantiated, a scenario of losses of highly significant if not catastrophic proportions would be established, with a resulting probability of very significant damages or other remedies*.

(iv) In relation to the relative degree of likely prejudice to either side the outcome was clearly in the plaintiffs' favour.

19. On this basis the learned High Court judge proceeded to find in favour of Ms. Crowe and Mr. O'Neill. However, he found against Mr. Gibbons on the basis that the renewal of his plenary summons on a date after its earlier renewal had expired was invalid, in that it clearly contravened Order 8 r. 1 of the Rules of the Superior Courts, and that Order 122, r. 7 did not provide jurisdiction to the court to extend the time for renewal in circumstances where Order 8 r. 1 specifically provided that an application for renewal must be made during currency of the renewed summons. In so doing he expressed his approval of, and agreement, with the judgment of Feeney J. in *Bingham v. Crowley* [2008] IEHC 453.

Discussion

20. Order 8 r. 1 of the RSC provides for the renewal of a summons for a period of six months where a court is *"satisfied that reasonable efforts have been to serve such defendant, or for other good reason . . ."*. In these cases, no issue arises as to difficulties encountered in efforts to serve Mr. Kelly. While the plaintiffs may have believed themselves to have had good reason to delay the service of proceedings on Mr. Kelly because of issues relating to their engagement of an expert witness, there was in fact no obstacle or other difficulty in effecting service on Mr. Kelly at any time. It therefore follows that the only permissible basis for the summonses being renewed for six months was *"for other good reason"*. Clearly, Moriarty J. in his judgment felt that there did exist *other good reason*, or, more accurately, as appears from his judgment *other good reasons*. While the learned High Court judge did not rank particularly highly those factors which he identified as reasons supporting the renewing of the summonses, it is nevertheless evident from his judgment that the most compelling reason in his view related to the catastrophic consequences for the plaintiffs if the renewals of their summonses were to be set aside. In this respect, he made no distinction between the three plaintiffs.

21. In *Baulk v. Irish National Insurance Company Limited* [1969] IR 66, Walsh J. referred to *"other good reason"* in the following terms:-

"While the phrase 'other good reason' may refer to circumstances or factors which throw light on the failure to serve the summons within the twelve months, in my view it is not exclusively referable to the question of service but refers also to any other reason which might move the court, in the interests of doing justice, between the parties, to grant the renewal."

22. *Baulk* was concerned with Order 8, r. 1 of the 1962 Rules of the Superior Courts, and dealt with an application to renew a summons made within twelve months of the date of its issue. That provision was replaced with Order 8, r. 1 of the 1986 Rules which provides for the renewal of a summons after an initial period of twelve months, and for subsequent periods of six months. However, both the old and new Order 8, r. 1 both refer to a renewal being permitted *for other good reason* as an alternative to their having been reasonable efforts made (or not made as the case may be) to serve the summons.

23. In his judgment in *Baulk*, Walsh J. also stated:-

"..In my view, the fact that the Statute of Limitations would defeat any new proceedings which might be necessitated by the failure to grant the renewal sought could itself be a good cause to move the court to grant the renewal."

24. The *Baulk* decision was in general terms followed by *McCooey v. The Minister for Finance* [1970] IR 159. However, in *McCooey* attention was drawn to the fact that in that case, (as in *Baulk*) the defendant was aware at an early stage of the plaintiff's intention to sue them.

25. However, the Supreme Court expressed a somewhat different view in the case of *Roche v. Clayton* [1998] IR 596. In his judgment in that case, O'Flaherty J. stated:-

"It is not a good reason in light of O'Brien v. Fahy to renew a summons simply to prevent the defendant availing of the Statute of Limitations. The Statute of Limitations must be available on a reciprocal basis to both sides of any litigation."

26. In the years following a number of High Court decisions adopted the view as expressed by O'Flaherty J. in the *Roche* case. These include the cases of *Moynihán v. Dairy Gold Co-operative Society Limited* [2006] IEHC 318, *O'Keeffe v. T. and G. Crampton* [2009] IEHC 366, *Moloney v. Lacey Building and Civil Engineering Limited* [2010] 4 IR 417, 427 and *Bingham v. Crowley* [2008] IEHC 453.

27. It is useful at this juncture to quote the following from the head note in the *Maloney* case (and the judgment of Clarke J.):-

"(i) That, in exercising the jurisdiction to renew a plenary summons, the court should first consider whether there was a good reason to renew the summons. Secondly, if satisfied that there was or might be a good reason, the court should consider whether it was in the interests of justice between the parties to renew the summons. Thirdly, in considering the interest of justice the court should examine the hardship for each of the parties if the renewal was not made.

(ii) That the absence of an expert report could be a good reason for not serving a plenary summons but only if the expert report was reasonably necessary in order to justify the decision to responsibly maintain the proceedings and if appropriate expedition was used in attempting to procure the report.

(iii) That the stricter approach taking by the courts in relation to delay in the prosecution of proceedings, which could be identified in the dismissal for want of prosecution jurisprudence also applied to cases involving an application to renew a summons.

(iv) That in considering an application for renewal of a summons, the court should pay significant attention to the fact that the policy behind the Statute of Limitations was that the defendant be aware in a formal sense that proceedings had been commenced, either within the statutory period or within a short time thereafter, and accordingly the court should have regard to any real risk of prejudice.

(v) That the good reason to renew a summons must be more than a simple need to avoid the defendant relying upon the Statute of Limitations. The history of events up to the time when the Statute might have applied and the extent to which the defendant knew of the existence of the claim, and the fact that proceedings had been brought on foot of it could constitute good reasons."

28. In his judgment in *Maloney*, Clarke J. cited with approval the test identified by Finlay Geoghegan J. in *Chambers v. Kennefick* [2005] IEHC 402, [2007] 3 I.R. 526. Finlay Geoghegan J. expressed her view that the proper approach of a court in determining whether it should exercise its discretion under Order 8, r. 2, and where the application is based upon what is referred to therein as "other good reason" is the following:-

"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 interest 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."

29. In *Chambers* it was held that the fact that a copy of the summons was delivered to the defendant's insurers, coupled with the fact that the failures subsequent to serve the summons properly in accordance with the Rules of the Superior Courts 1985 was due to simple inadvertence, constituted a good reason to renew the summons. Finlay Geoghegan J. also found that the balance of justice was more heavily weighted in favour of the plaintiff, in circumstances where a requirement to issue a new plenary summons could prejudice the plaintiff's ability to rely upon the date of knowledge test provided for under the Statute of Limitations (Amendment) Act 1991. In considering such prejudice, she stated that the court should take into account the considerable delay by the defendant in bringing its application to set aside the order.

30. In *Bingham v. Crowley and Others* [2008] IEHC 453, Feeney J. considered the judgment of Finlay Geoghegan J. in *Chambers*. He expressly approved of the decision in that case, which he summarised as authority for the requirement *"that the court should firstly consider whether there is a good reason to renew the summons but a good reason must be considered in the context of the overall justice between the parties"*. He also stated:-

"Whilst prejudice is a factor to take into account in considering the interests of justice as between the parties, its presence or absence is not conclusive. The court has already identified that the Statute of Limitations must be available on a reciprocal basis and that it is not a good reason to renew a summons simply to prevent the defendant availing of the Statute of Limitations."

31. Earlier in his judgment, Feeney J. commented in relation to the Statute of Limitations issue:-

"However, in this case what occurred was that a plenary summons was issued, just before the time limit provided for by the Statute, and no attempt or effort was made to serve such summons. The significance of such failure is all the greater in this case where there was no warning letter. By November 2005, none of the defendants were aware of any civil action. It would have been opened to the plaintiffs in this case after they had issued the summons to have served it and at the same time indicated by letter that a further medical report was being obtained and that the Statement of Claim would be delivered on receipt of same. The fact that further enquiries were being made with an additional medical expert provides no basis for justifying the failure to serve a plenary summons. The requirement to serve a summons without delay is all the greater not only where there has been no warning letter, but also where the period provided for in the Statute of Limitations has already expired."

32. In this case, Mr. Kelly was unaware of the proceedings pending against him at any time prior to the expiry of the limitation period had expired. It is on this basis that Mr. Kelly maintains that by the time he first became aware of the proceedings, yet alone being served with those proceedings, such proceedings were outside the limitation period, and if such renewal had been refused (or is now set aside), any freshly initiated proceedings would afford him the opportunity to defend them on the basis that the claims were statute barred. The renewal of the summonses deprives him of the possibility of defending the claims on that basis.

The reasons for the delay

33. In the cases of Ms. Crowe and Mr. O'Neill the applications to the High Court dated 29th January 2014 seeking to renew the plenary summonses were grounded on the affidavits of their solicitor, Ms. Margaret Roche. In her affidavits, Ms. Roche identified as

the reason for the failure to serve the summary summons within the initial twelve month period to be "*the technical and complex factual nature of the plaintiffs' claim*" and the awaiting of "*advices and reports from experts*" and the need to undertake detailed analysis of the prospective liability of each of the defendants, including Mr. Kelly. Ms. Roche also refers in her affidavit to the failure to renew the summonses as possibly preventing the plaintiffs' from pursuing their claims because of the provisions of the Statute of Limitations.

34. By notice of motion dated 17th December 2014, Mr. Kelly sought to set aside the High Court order of 3rd February 2014 renewing the plenary summonses in the cases of Ms. Crowe and Mr. O'Neill. In his grounding affidavit, Mr. Kelly referred to the fact that the plenary summons was not served on him until 31st July 2014, two days inside the six month renewal period. Mr. Kelly also referred to the lack of information provided by these two plaintiffs as to the nature of the ongoing investigations or advices/reports which they maintain prevented or delayed the service of proceedings within the initial twelve month period. Mr. Kelly also pointed to the manner in which he maintained he was prejudiced by the renewal of the plenary summonses on 3rd February 2014, and pointed to the fact that the renewals has resulted in a claim which was manifestly statute barred as of the date of renewal being permitted to proceed. Mr. Kelly also pointed to the fact that he was unaware of the plaintiffs' claim against him until receiving a telephone call in June 2014 informing him that legal proceedings were about to be served, and this was followed with the service of the proceedings on 31st July 2014. He remains ignorant as to the details of the claim being made against him. Mr. Kelly also referred to his lack of relevant documentation at this remove in time and the fact that the eight named defendant, who was the main contractor on the development, had not gone into receivership thereby undermining any claim that he might otherwise have had against him for contribution or indemnity arising from the plaintiffs' proceedings.

35. In her replying affidavit the plaintiff's solicitor, Ms. Roche, provided some detail as to the necessity for her clients' engaging a second expert as a result of a falling out with their originally retained expert towards the end of 2012. She referred to a preliminary opinion from the newly engaged expert being received on 6th November 2013, some weeks prior to the application to renew the summons. Of some relevance is the fact that the information provided by Ms. Roche in this regard does not fully explain how difficulties arising in relation to the retention of an expert should so seriously delay the service of a plenary summons which had been prepared with the benefit of advices from the initially retained expert. Ms. Roche also referred in her affidavit to a letter dated 15th February 2013 sent to the defendants, including Mr. Kelly, and the fact that that letter was subsequently returned by An Post.

36. In the case of Mr. Gibbons the position is somewhat different. His first application to renew the summonses is dated 11th February 2014. The accompanying grounding affidavit of Mr. Gibbons's solicitor, Ms. Sonia McEntee, refers to the "*technical and complex nature*" of the claim, the pursuance of ongoing investigations and the awaiting of further advices and reports from various experts, as being the excuse for the failure to serve the plenary summons within the initial twelve month period and the first six month renewal period. References are also made by Ms. McEntee to Mr. Gibbons's change of solicitor in late October 2011 shortly before the expiry of the said twelve month period, and to an on-going review and investigation of Mr. Gibbons's claim then underway.

37. In any event, Mr. Gibbons was permitted to renew his plenary summons for a period of six months. Notwithstanding that renewal, the plenary summons was not served within that six months; and this necessitated a further application to the High Court for a further renewal of the summons and an order extending the time for making that application. That application to the High Court is dated 19th September 2014 and was accompanied by the grounding affidavit of Ms. McEntee. For all practical purposes, precisely similar reasons are given for the failure to serve the plenary summons within the first six months of the renewal period as were given in the course of the earlier application to renew the plenary summons.

38. In his affidavit grounding the application to the High Court to set aside the second renewal of Mr. Gibbons's plenary summons, Mr. Kelly identifies a number of reasons in support of his contention that such renewal would be prejudicial to him. He refers *inter alia* to the lack of information provided to him in relation to the claim against him, the fact that the claim against him would, in the absence of the summons being renewed, effectively be statute barred, his lack of documentation to enable him fully defend any claim against him and the fact that the eighth named defendant, the contractor on the development had gone into receivership.

39. Order 8, r. 1 of the RSC permits the renewal of a summons where the court, or the Master, as the case may be, is satisfied that reasonable efforts have been made to serve such defendant, *or for other good reason* (emphasis added). It is therefore appropriate to consider in the first instance whether there were reasonable efforts on behalf of all three plaintiffs to serve the plenary summons on Mr. Kelly. In my view, *reasonable efforts* to serve were not made. It was manifestly clear that within the initial twelve month life of the plenary summons, (and to an even greater extent within the subsequent six month period of renewal in the case of Mr. Gibbons), that the limitation period as provided for by the Statute of Limitations was about to expire, or had expired. In those circumstances there was an imperative on the plaintiffs to serve the plenary summonses with reasonable expedition and yet, in the case of Ms. Crowe and Mr. O'Neill no service was effected within the initial twelve month period, and then only shortly before the imminent expiry of the six month renewal period. In the case of Mr. Gibbons no service was affected in either the said twelve month period or the subsequent six month renewal period.

40. It is therefore necessary to consider the alternative reason for permitting the renewal of a summons namely, "*for other good reason*".

41. In the case of Ms. Crowe and Mr. O'Neill I agree with the decision made by Moriarty J. in the High Court. In my view the "other good reason" requirement has been satisfied, albeit just about reached. In their cases, the renewal of the plenary summons was a first six month renewal. Problems had arisen on the plaintiffs' side during the initial twelve month renewals of the summonses in relation to the retention of expert witness, and while that on its own may not have provided a sufficient excuse for failing to serve the summonses it may well have been the case that the difficulty in relation to the retention of an expert witness acted to deflect the plaintiffs and their solicitor from the important task of ensuring the survival of the proceedings by serving them on Mr. Kelly. It is also a factor that the limitation period referable to these proceedings had not expired at the time of the institution of the proceedings. That limitation period probably expired at some late point within the first twelve months of the life of the proceedings. To this extent the limitation period had only relatively recently become a feature in this case.

42. The nature of the proceedings is also of particular relevance. The plaintiffs proceedings relate to properties purchased by them in circumstances where, many years later, it is discovered that deficiencies in the fire prevention measures incorporated in the development are so great as to render the development unsafe for human habitation. The consequences for the plaintiffs are therefore catastrophic.

Conclusion

43. These various factors lead me to the conclusion that there did exist *other good reasons* (emphasis added) such as justified the first renewal of the summonses in the cases of all three plaintiffs. While the consequences of so doing does create some prejudice for Mr. Kelly given the length of time that has elapsed since his involvement with this development, I agree with the view expressed by

Moriarty J. in his judgment to the effect that this is largely a document based case and it is likely that Mr. Kelly was in no more difficult a position to defend himself after service of the proceedings than he would have been had these proceedings progressed more speedily, and more precisely, had he been served during 2013. In relation to the prejudice argument Mr. Kelly was probably no worse off in 2014 (or, indeed 2015) than would have been the case in 2013.

44. I would therefore dismiss Mr. Kelly's appeal in the cases of Ms. Crowe and Mr. O'Neill. The position in relation to Mr. Gibbons is different in that it is his second renewal of his summons that falls to be considered.

45. For essentially the same reasons as indicated by Moriarty J. in his judgment, the position of Mr. Gibbons is quite clear. Mr. Gibbons was in much the same boat as Mr. Crowe and Mr. O'Neill in relation to the initial six month renewal period of his summons. However, I am satisfied that there is no reasonable excuse for his failure to serve his plenary summons within the six month renewal period which expired on 11th September 2014. I have already indicated that in the case of Ms. Crowe and Mr. O'Neill, they just about satisfied the threshold of establishing 'other good reasons' for the renewal of their summonses. I cannot see any basis therefore to justify a finding that such 'other good reasons' continued to exist or arose beyond the expiry of the initial six month renewal period, and into a second such renewal period. It is not possible, in my view, to identify any reasonable excuse for the failure to serve the summons prior to 9th September 2014, or to identify good reason to justify a second six months renewal of the summons.

46. It is also contended that a court does not have jurisdiction pursuant to Order 122, r. 7 to extend the time for the renewal of a summons beyond the time provided by Order 8, r. 1.

47. Order 8 r. 1 is quite specific as to the circumstances in which a summons may be renewed. They are:-

- (i) The Master of the High Court may renew a summons for a further six month period if the application for such renewal is made before the expiration of the initial twelve month life of the summons.
- (ii) The High Court may renew a summons after the expiration of the initial twelve month life of the summons.
- (iii) In both instances the renewal will be for a period of six months.
- (iv) In both instances a renewal may be permitted if the Master of the High Court (as the case may be) is, either, satisfied that reasonable efforts have been made to serve the defendant, or, for other good reason.
- (v) The Court may permit further six month renewal periods if applied for during the currency of the renewed summons (emphasis added).

48. It is clear therefore that Order 8, r. 1 does not, of itself, permit a second (or subsequent) six month renewal of a summons unless applied for within the life of the previous renewal. In Mr. Gibbon's case this did not happen as the first six month renewal period had expired when the application to renew for a second six month period was made.

49. The next issue to consider is Order 122, r. 7. This provides a general power to the Court to enlarge or abridge the time for 'doing any act or taking any proceedings' as elsewhere provided for in the Rules.

50. Does Order 122, r. 7 permit a court to extend the time in which to apply for a second (or subsequent) renewal of a summons at a time when the currency of the summons has already expired, and in circumstances where such renewal is not permitted under Order 8, r. 1? Order 122, r. 7 was utilised in this case to enable the renewal of Mr. Gibbons' summons on 22nd September, 2014 some days after the expiration of the previous six month renewal period. In other words, the court permitted the renewal of the summons notwithstanding that the requirement in Order 8, r. 1 to the effect that the application to be made during the currency of the summons, by extending the time for so doing pursuant to Order 122 r. 7.

51. In his judgment, Moriarty J. took the view that in the particular circumstances of this case, the court did not have jurisdiction to extend time pursuant to Order 122, r. 7 to provide for the renewal of the summons in Mr. Gibbon's case, and thus bridge the gap between 9th September 2014 and 22nd September 2014, the period in which the plenary summons had undoubtedly lapsed. Moriarty J. stated:-

"... It is argued by Mr. Bredin that, on a proper construction of the relevant Rule, and on foot of the judgment to Feeney J. in Bingham v. Crowley aforesaid the court lacked jurisdiction to make a further order renewing the plenary summons, and any service effected on foot of it was nullity, since any second or subsequent renewal must be made while the renewed plenary summons remains in force. Accordingly, the application to renew the plenary summons in relation to Mr. Gibbons was required to be made prior to 9th September 2014. I have fully read the lengthy and considered judgment of the late Feeney J. in the Bingham case and note that it was followed by Dunne J. in Carlisle Mortgages v. Canty [2013] IEHC 552, albeit in the context of renewal of possession orders under O. 42, r. 20."

52. Moriarty J. decided that it was not appropriate to extend the time to renew the summons pursuant to Order 122, r. 7. He left open the door to a court extending time under that rule in limited circumstances, when he remarked:-

"..However, that might apply to limited technical defects or the like.."

53. The very same issue was recently considered by Baker J. in *Meagher v. Sandys and Brophy* [2016] IEHC 37. Baker J. stated:-

"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."

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."

54. In arriving at her decision, Baker J. considered the nature of secondary legislation and referred to the judgment of Clarke J. in *Shell E & P Ireland Limited v. McGrath and Ors* [2013] IESC. In his judgment in that case, Clarke J. stated (at para 57):-

"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")."

55. At para. 59 of his judgment, Clarke J. stated:-

"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."

56. Baker J. also rejected the contention that the court had an inherent jurisdiction to extend time limits provided for in the Rules of the Superior Courts. She sought to distinguish the view expressed by Clarke J. in *Kavanagh v. Healy* [2015] IESC 37, when he stated:-

"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 that 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."

57. The subject matter of the *Kavanagh* case concerned the serving of a notice of opposition in judicial review proceedings.

58. Order 8, r. 1 provides in very specific terms the time periods in which a court may renew a summons. Compliance with that rule is clearly in the interests of the administration of justice and the efficient processing of claims through the courts. It is also undoubtedly designed to ensure that parties against whom proceedings have been instituted, and who may know little or nothing of that fact, are protected from the prospect of such proceedings being resurrected long after their institution, and (as in this case) at a point outside the limitation period. This is especially so in cases where the subject matter of the proceedings is professional negligence.

59. In my view the provisions of Order 8, r. 1 clearly and unequivocally set down time limits for the renewal of summonses (subject to certain criteria being satisfied). Such time limits, and the provision that the renewal of a summons should only be permitted in circumstances where the summons is current and subsisting, are eminently reasonable and fair, and well capable of compliance, particularly by litigants who have the benefit of legal representation.

60. However, O. 122, r. 7 cannot be ignored. In its ordinary meaning it provides the jurisdiction *"to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time... and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed"*. It seems to me quite clear that the power to enlarge time appointed by the rules is provided and provided without limitation. It appears to me that the judgment of Clarke J. in *Kavanagh* is also authority for this position.

61. Having so stated, I am, however, firmly of the view that the power to extend time provided for by Order 122, r. 7, particularly insofar as it relates to the renewal of summonses is a power which should only be utilised in very limited circumstances and where there are compelling reasons for so doing. In his judgment, Moriarty J. referred to the application of Order 122, r.7 in a manner which was, in effect, in conflict with Order 8, r. 1 being applied in the event of *limited technical defects or the like*. Possibly such an approach might be unduly limited, but if it is, it is not far off the mark.

62. In the case of Mr. Gibbons, while, as in the case of his co-plaintiffs, he had, at least, an arguable excuse for his failure to serve the summons within the life of its renewal (which renewal expired on 9th September 2014), I find it impossible to find any justification or excuse for the revival of the summons after that renewal period had expired. On this basis, I would dismiss Mr. Gibbons appeal.