THE HIGH COURT

BETWEEN

JACQUELINE CROWE 2012/11327 P,

BARRY O'NEILL 2012/11328 P AND

GRAHAM GIBBONS 2012/11329 P

PLAINTIFFS

AND

KITARA LIMITED,

COLLEN GROUP LIMITED,

CPM ARCHITECTURE, TRADING AS COLLEN PROJECT MANAGEMENT, CPM ENGINEERING TRADING AS COLLEN PROJECT MANAGEMENT, LIGHTGATE PROFESSIONAL SERVICES LIMITED, KINGSPAN CENTURY LIMITED, DUBLIN CITY COUNCIL, L.M. DEVELOPMENTS LIMITED AND

DIARMUID KELLY TRADING AS DIARMUID KELLY AND ASSOCIATES

DEFENDANTS

JUDGEMENT of Mr. Justice Moriarty delivered the 19th day of May, 2015.

1. For purposes of this judgment, and for reasons of expedience and simplicity, I have followed the example of Mr Conlon, S.C. for the plaintiffs, in listing and addressing as a composite case what in fact are three separate sets of proceedings, issued in immediate succession to each other, and raising broadly similar but not identical issues.

2. In each of the three said claims, an application has been brought on behalf of the ninth-named defendant, Mr Diarmuid Kelly, to set aside renewals for periods of six months granted by the High Court in respect of the originating summonses. The procedure is governed by Order 8 of the Rules of the Superior Courts, headed Renewal of Summonses, of which the relevant portions may be set out 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.

3. Whilst it has long been and remains the practice that a six month renewal pursuant to Rule 1 aforesaid will readily be granted by Court on an ex parte application, often in a fairly perfunctory manner, subsequent contested applications brought by defendants to set aside such renewals on notice to plaintiffs have by contrast become increasingly convoluted and hotly contested interlocutory hearings. The current edition of Delany and McGrath on Civil Procedure in the Superior Courts contain no less than seventeen densely packed pages dealing with authorities on the matter going back as far as 1969, noting what is viewed by the authors as some lack of consistency, and more have come about since publication of that edition, culminating in a decision as recently as a week ago.

4. In the present instance, all three motions were heard together on affidavit, with the respective arguments of counsel on each side (a combined team representing all three plaintiffs/respondents) being later supplemented by excellent written submissions. Much detail as to both fact and law nonetheless arose, and I am conscious that in seeking to adjudicate upon the matter I should not seek to provide some form of dissertation. Accordingly what I shall seek to do as succinctly as possible before expressing conclusions is to summarise the main facts, the principal submissions on both sides and then, rather than conducting a leisurely excursion through all of the considerable volume of case law, set forth those legal principles from those earlier cases which seem of most guidance and assistance.

5. As to the facts, Ms Crowe, Mr O'Neill and Mr Gibbons all issued their proceedings on 9th November, 2012, against the nine defendants named in the title of the proceedings. They each sought damages for nuisance, negligence and breach of duty, including breach of statutory duty, arising from what was contended to be the defective design and construction of maisonette/apartment dwellings situated in the Belmayne housing development in Dublin 13. In the submissions of both sides, it was acknowledged that a central aspect of the claims was that the dwellings respectively constructed for the plaintiffs were defective from a fire safety perspective. In this regard, the ninth-named defendant, Mr Diarmuid Kelly, was a fire safety consultant who furnished fire safety certification in relation to each of the properties. The plaintiff's contended that the properties in question were a fire hazard and were uninhabitable, placing the plaintiffs in what was no less than "a Priory Hall type situation".

6. On behalf of Mr Diarmuid Kelly, it was stated that he was and remains a registered member of the Royal Institute of the Architects of Ireland, and an Associate Member of the Institute of Fire Engineers. He received drawings from the Architect in order to make an application for a Fire Safety certificate for the entire development, and marked up various fire prevention measures that were required. In addition he produced a report which contained a specification and steps as to how the fire prevention measures would be implemented, and issued an opinion confirming that the design complied with relevant building regulations. His report and opinion, including drawings, were then submitted by the Architect to the local authority to issue a Fire Certificate for construction of the development. It was contended on his behalf that he had no role in regard to construction of the development, or in regard to inspection of the construction, or the provision of certificates of compliance after construction.

7. As stated, all three plaintiffs issued proceedings on 9th November, 2012, against the nine named defendants. On 3rd February, 2013, and 10th March, 2014, Orders were made by the High Court renewing the plenary summonses in all three cases for service, pursuant to Order 8 Rule 1 as aforesaid. On no realistic appraisal, whatever difficulties may have arisen, can it be said the plaintiffs moved expeditiously. Save for what appears to have been a telephone call from an unidentified solicitor in June, 2014, to Mr Kelly, the first formal notification of the relevant proceedings conveyed to him appears to have been on 31st July, 2014, and 4th September, 2014, during or shortly before service of the proceedings on foot of the renewal orders, and apparently after the relevant limitation periods had expired.

8. I shall furnish a very truncated summary of the principle arguments made by each side, and in that regard I intend no disservice to the very capable and thorough submissions addressed by both Mr. Conlon, and by Mr. Bredin, B.L., who appeared for the ninth-named defendant. As the moving party in the three applications, what in essence was contended for by Mr. Bredin was that the proceedings brought by each of the plaintiffs were on any realistic appraisal belated, commenced, if not actually after expiration of the relevant period of limitation, close to such expiration, and that such notification to his client as had been conveyed of the intended proceedings prior to service was at best minimal. Further, he argued that the main purported excuse for the delay at all stages, to the effect that the plaintiffs and their advisers had been unforeseeably delayed in procuring the expert reports necessary for suing a professional such as Mr. Kelly, was not borne out by the facts. The position of his client was said to be significantly prejudiced by the resultant delay, both in the context of procurement of all necessary documentation and impaired recollection of events a significant period ago, and such prejudice was likely to exceed any likely prejudice to he plaintiffs who, in the event of the applications proving successful, would still be able to proceed against the remaining defendants. It was also submitted that additional force in the application brought against the third-named plaintiff, Mr. Graham Gibbons, was apparent because in his case the summons had not been served within the six months renewal period, and a further period had been sought and granted in which service only then was effected, further circumstances which were argued not merely to be indicative of additional delay, but to preclude in law any finding that service had duly been effected.

9. For the three plaintiffs/respondents, Mr. Conlon acknowledged that little could be advanced on behalf of his clients in the context of significant efforts having been made to serve Mr. Kelly but that in the context of the alternative criterion of "other good reason" specified in Order 8, rule 1 aforesaid, the position of his clients was such as to warrant refusal of the relief sought in each instance. Pointing to recent Supreme and High Court authorities, he submitted that the view of Delaney and McGrath in their aforesaid edition to the effect that "the net effect of the case law in this area would seem to be that the phrase 'other good reason' is in practical terms treated by the courts as being synonymous with interests of justice" (at 2-63), correctly stated the law. Amongst many elements which he felt should influence the court in any exercise of its discretion were the circumstances that the case could fairly be described as a "documents only case", in which it was difficult to see how realistic prejudice could affect Mr. Kelly by virtue of such delay as had occurred; in contrast, each of the plaintiffs were faced with the contingency that the properties acquired were a fire hazard and accordingly uninhabitable, as vouched by the expert Report of Mr. Robin Knox, exhibited in the replying Affidavit filed. Whilst delay had undoubtedly occurred, it was not of such duration as should be fatal to the plaintiffs' entitlement to maintain proceedings against a crucial and significant defendant in Mr. Kelly. Suing a professional was a matter of particular gravity, and a dispute between experts who had originally been retained had significantly contributed to delay in procuring the Report from Mr. Knox, as again addressed in the replying Affidavit. In contrast to Mr. Kelly, the consequences for each of the plaintiffs if the relief sought was acceded to were grave in the extreme, and would mean that each was severely handicapped in maintaining and succeeding in proceedings of particular seriousness. The olive vine held out on behalf of Mr. Kelly to the effect that they would still be able to maintain their case against the other defendants was of cold comfort, as the essence of the case lay in fire hazard and safety; amongst other defendants, pursuit of the eighth-named defendant, L.M. Developments Limited was unrealistic since the company had been in receivership for some years. In balancing relative prejudice, the court should not lose sight of the difficulties of the plaintiffs in maintaining complex proceedings against a significant number of insured and well-resourced defendants. As to the additional potential difficulties faced by Mr. Gibbons, it was the case that there had been a late change of Solicitor on his part, and that the actual service of the proceedings on Mr. Kelly that then ensued had fallen only a marginal period of some days after expiry of the first extension. In this regard, it was submitted that it might be viewed as appropriate to apply O. 122, r. 7 of the Rules of the Superior Court, providing "the court shall have power to enlarge or abridge the time appointed by these Rules, or fix 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 the same is not made until after the expiration of the time appointed or allowed".

10. Both in the written submissions from each side, and in the Books of Authorities submitted by each, I have been referred to a very significant number of past cases. I have read the preponderance of them, saving some in which the relevant judgments were not available, and would include in my consideration a recent judgment of Costello J. delivered on 23rd October, 2014, in a matter entitled *Andrew Mangan (a person of unsound mind not so found) suing by his mother and next friend and Lorraine Mangan, plaintiff, and Julian Dockery, defendant*. In that matter, Costello J. refused relief setting aside renewal of the Plenary Summons, and her Judgment was upheld as recently as Tuesday last, 12th May, 2015, in an extempore Court of Appeal Judgment delivered by Kelly J. Having read and considered these authorities, I shall as already indicated, before giving Judgment, summarise what seemed to me the most relevant matters that have been addressed overall, and which should be considered in arriving at determinations in applications such as the present one.

11. Before deciding the matters in issue, it seems to me helpful if, rather than quoting extracts from the sizable number of judgments opened to me, I sought to summarise pivotal factors which those cases indicate should be borne in mind. Firstly, there is undoubtedly in recent years evident a somewhat more stringent approach to significant delay on the part of plaintiffs in the context of this type of application than was the case at the time of *Baulk v. Irish National Insurance Company Ltd* [1969] I.R. 66. This, as stated by Clarke J. in *Maloney v. Lacy Building and Civil Engineering Ltd*, 2010 4 I.R. 417 may in part have resulted from the stricter approach taken by the courts in relation to delay in the prosecution of proceedings giving rise to dismissal for want of prosecution jurisprudence. The decision of Feeney J. in *Bingham v. Crowley* [2008] IEHC 453 is a further recent instance in this regard, and it will be necessary to return to that decision in the context of the possible relevance to the particular circumstances evident in regard to Mr. Graham Gibbons. Secondly, it is increasingly clear that a more sceptical approach has been taken by the courts than formerly where the main reason for a renewal is to prevent time running out under the Statute of Limitations and similarly in the context of procurement of expert reports. Arguments to such effect can still carry weight, but certainly are in themselves unlikely to be looked upon as

determinative. As observed by O'Flaherty J. in *Roche v. Clayton* [1998] I.R. 596:

> "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".

Thirdly, notwithstanding this line of authority, the authorities opened by both sides are replete with decisions by judges covering a wide spectrum, from Ó'Dalaigh C.J., Walsh J., Hamilton J., McMenamin J., O'Neill J., Dunne J., McMahon J. and Cooke J., *inter alia*, granting equivalent relief, and perhaps, as stated by Lynch J. in the Supreme Court in *Martin v. Moy Contractors Ltd and Others* (Judgment of 11th February, 1999), "….the learned High Court judge has a measure of discretion in these sorts of matters, and so long as he does not exceed the bounds of that discretion, his decision should not be interfered with". This obviously supposes a reasoned and considered evaluation of the opposing arguments on each side. As stated in *Delaney and McGrath* at 2-63, "the net effect of the case law in this area would seem to be that the phrase 'other good reason' is, in practical terms, treated by the courts as being synonymous with interests of justice". Fourthly, various proposed approaches have been suggested in relation to how a court should approach contested applications of this nature. These include seeking to suppose that both the *ex parte* application to extend time for service of the summons and the defendant's later considered response were initially heard together, and then decide whether or not the extension should be ordered. But probably the most regularly invoked dictum is that of Finlay Geoghegan J. in *Chambers v. Kennefick* [2007] 3 I.R. 526, when she stated as follows:

> *"that the proper approach of this court to determining whether or not it should exercise its discretion under O. 8, r. 1, 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 referrable 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."*

I believe that approach is entirely correct and balanced, and propose to follow it.

DECISION

12. What is common case to all three plaintiffs is that the arguments made on their behalf in relation to both the application of the Statute of Limitations, and the procurement of expert evidence, is tenuous and unconvincing. The case may have taken appreciable preparation, and there may indeed have been disagreements between the two experts initially retained to prepare reports warranting the proceedings against a professional such as Mr. Kelly. 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 most cursory and belated manner.

13. As in the very recent case involving a similar application, and in several earlier ones, this matter in the ultimate turns on the interests of justice, and in particular on the relative degree of prejudice which an adverse outcome would be likely to occasion to either side.

14. For Mr. Kelly and his representatives, a continuation of the claims against him will undoubtedly mean having to meet an appreciably stale claim in relation to which he had received little or no intimation before he was belatedly served. But it does seem a case that is predominantly documented-based, and if, as deposed in his affidavit, his initial investigations have produced only limited documentation, it would seem likely, as observed by Lynch J., that by discovery and/or dealings with co-defendants, he would as a probability be enabled to be fully aware of all that is alleged against him. If a case proves to be weak and frail against him, he will in all probability be awarded his costs if it ultimately fails. While delay is undoubtedly evident, it is not of such proportions as have been encountered in other cases, including cases such as the very recent one, in which plaintiffs successfully resisted similar applications brought by the defendants.

15. In contrast, the contingencies facing the three plaintiffs, if unsuccessful in resisting the present applications, are on any appraisal stark. In proceedings in which the arguments advanced by both sides demonstrate how pivotal at all times has been the issue of fire safety, they will be statute-barred and precluded from any possibility of recovering against the defendant most centrally connected with that aspect. The demise of the company that was the developer and uncertainty in relation to other defendants suggest much diminished prospects of success, if any, if matters proceed on an attenuated basis.

16. Nor, in the wide spectrum of types of claims brought in the High Court, can what is sought by the plaintiffs in these claims be equated with matters such as marginal whiplash or other limited personal injury claims. It may fairly be surmised from the pleadings that the claims were in no sense in relation to alleged defects in investment properties or second homes. Clearly, if what is alleged against 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 resultant probability of very significant damages or other remedies.

17. On this basis, it appears to me that the relative degree of likely prejudice to either side consequent on the outcome of these applications is relatively clearly in the plaintiffs' favour, and were these factors the only substantive issue, I would be disposed to refuse the applications made in relation to all three plaintiffs.

18. However matters do not end there. Mr. Bredin argues that Mr. Gibbons faces the further hurdle of surmounting the argument that he did not affect service on Mr. Kelly within the extended period provided for, and did so only in the early stages of a further period of six months procured on another *ex parte* application. It is argued by Mr. Bredin that, on a proper construction of the relevant Rule, and on foot of the judgment of 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 a 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 carefully 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 Order 42, Rule 20.

19. From such reading of the full judgment of Feeney J. on more than one occasion, it seems to me that his reasoning and finding is unassailable, and I have to take the view that a similar finding has to made in relation to Mr. Gibbons. I am conscious that service was affected only marginally into the early stages of the purported extra renewal, but that does not entitle me to effectively reverse engines, and I believe I am left with no option but to accede to Mr. Bredin's application insofar as it affects Mr. Gibbons. Nor can I see realistic force in Mr. Conlon's contingency argument as to application of the Rule earlier referred to. However that might apply to

limited technical defects or the like, as indeed conceded in a different portion of Mr. Bredin's submission, it cannot realistically be invoked as a *deus ex machina* in aid of Mr. Gibbons after substantive arguments have been determined.

20. For these reasons I refuse the applications in respect of Ms. Crowe and Mr. Barry O'Neill, and accede to the application in relation to Mr. Graham Gibbons. I will hear counsel in relation to costs, or any other aspect that may arise.