Neutral Citation [2015] IEHC 377
Record No. 2014/1286P

THE HIGH COURT

BETWEEN

ANN MURPHY

PLAINTIFF

AND

KEVIN MULCAHY AND THE HEALTH SERVICE EXECUTIVE

DEFENDANTS

Judgment of Mr. Justice Max Barrett delivered on 15th June, 2015.

Part I

Introduction and Chronology of Facts Arising

1. *Key Issue Arising*. This is an application made by Mr Kevin Mulcahy pursuant to O.8, r.2 of the Rules of the Superior Courts 1986, as amended, seeking a set-aside of an order made, *ex parte*, by the court (Hedigan J.) on 7th April, 2014, pursuant to O.8, r.1 of the Rules, renewing a Plenary Summons of 7th February, 2013, for a further six months.

2. *Chronology of events*. The court identifies below the key dates and events relevant to the within application:

> - *7th February, 2013*. Plenary Summons issues. The General Indorsement of Claim indicates that the plaintiff's claim is, *inter alia*, for personal injury, loss and damage suffered by the plaintiff by reason of alleged trespass to the person and alleged assault (including alleged sexual assault) perpetrated by Mr Mulcahy.
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> - *3rd February, 2014*. Summons-server instructed by solicitor for Ms Murphy to serve the Plenary Summons. Summons-server calls to address of Mr Mulcahy on the 3rd but does not succeed in serving the summons personally.
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> - *4th February, 2014*. Summons-server calls to address of Mr Mulcahy but does not succeed in serving the summons personally.
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> - *5th February, 2014*. Summons-server calls to address of Mr Mulcahy but does not succeed in serving the summons personally.
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> - *6th February, 2014*. Summons-server calls to address of Mr Mulcahy but does not succeed in serving the summons personally. He is advised by Mr Mulcahy's son that Mr Mulcahy will be home that evening. Summons-server returns that evening and is told by Mr Mulcahy's wife that her husband is not present and she is unable to advise when he will be home.
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> - *7th April, 2014*. Following an ex parte application, the High Court (Hedigan J.) makes an order pursuant to O.8, r.1 of the Rules of the Superior Courts renewing the Plenary Summons for a further six months, requiring service of the Summons and Order by ordinary pre-paid post on Mr Mulcahy at a stated address, with any other documents to be served personally.
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> - *7th July, 2014*. Mr Mulcahy is duly served.
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> - *13th November, 2014*. Ms Murphy consents to filing of late appearance. Thereafter, Mr Mulcahy's solicitor seeks the papers in relation to the previous application to renew.
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> - *12th January, 2015*. Mr Mulcahy's solicitor swears an Affidavit in which, inter alia, she (a) denies that her client ever sought to avoid service, (b) avers that the first attempt of service of the Plenary Summons of 7th February, 2013, was on 3rd February, 2014, nearly a year after the summons first issued, (c) avers that there was no reasonable attempt to serve the summons beforehand, (d) opines that the summons ought not to have been renewed, and (e) avers that as a result of the renewal *"the greater hardship will fall on [Mr Mulcahy]…than on [Ms Murphy]…who for many years delayed in prosecuting her claim"*. (The court notes that although such hardship has been alleged, no substantive detail of same has been forthcoming).
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> - *16th January, 2015*. Notice of Motion issues from Mr Mulcahy's solicitor indicating that Mr Mulcahy will seek, *inter alia*, an order setting aside the order of the previous April renewing the plenary summons. Notice of Motion is served by registered post of the 20th.
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> - *8th June, 2015*. Set-aside application heard by this Court.

3. There is a mis-match in the documentation between the address at which service was ordered to be made and the address at which, in reality, service fell to be made. It was common cause between the parties at the hearing of the within application that in reality it had been sought to serve the defendant, and the defendant was eventually served, at the correct address.

Part II

Order 8 of the Rules of the Superior Courts (1986), as amended

4. *Renewal of summons*. Order 8, rules 1 and 2, provide as set out below. (Rule 2 is quoted to show from where the court's jurisdiction in the within application derives.)

> *"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 named therein 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, and so from time to time during the currency of the renewed 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."

Part III

Case-law cited
5. *Overview.* Counsel have between them referred in some detail to a trio of cases, *viz. Chambers v. Kenefick* [2007] 3 I.R. 526, *Bingham v. Crowley and Others* [2008] IEHC 453, and *Moloney v. Lacey Building and Civil Engineering Limited* [2010] 4 I.R. 417. Passing reference was also made at the hearing to *O'Keeffe v. G & T Crampton Ltd*. [2009] IEHC 366.

A. *Chambers v. Kenefick*.
6. In *Chambers*, the plaintiff claimed that he had been injured in October, 1998, during a surgical operation. A plenary summons issued on 25th June, 2002. A copy of the summons was sent on 2nd September, 2002 to the defendant's insurers. The defendant's solicitors wrote on 12th December, 2002, indicating that they had authority to accept service. Because of inadvertence on the part of the plaintiff's solicitor, the plenary summons was not served on the defendant's solicitor within the time required by the Rules of the Superior Courts. On 15th December, 2003, the plaintiff applied *ex parte* for a renewal of the summons. The High Court (Kearns J., as he then was) renewed the summons for six months. On 5th March, 2004, the original summons and order were served on the defendant's solicitors. On 8th April, 2004, the defendant's solicitors entered a conditional appearance. On 6th January, 2005, the statement of claim was delivered by the plaintiff's solicitor. On 27th January, 2005, the defendant issued a notice of motion seeking to set aside the order renewing the summons. Refusing to set aside the order, Finlay Geoghegan J. made various helpful observations. These are considered below.

7. At para.4 of her judgment, Finlay Geoghegan J. referred with partial approval to the judgment of Morris J. in *Behan v. Bank of Ireland* (Unreported, High Court, 14th December 1995), at p.3, that:-

> *"[**1**] [I]n moving an application of this nature the defendant takes upon itself the onus of satisfying the court that there are facts or circumstances in the case which if the court which made the order in the first instance, ex parte, had been aware, it would not have made the order. It is clear, in my view beyond dispute, that [**2**] this application is not to be dealt with on the basis that it is an appeal from the original order and, accordingly, [**3**] it is incumbent upon the moving party to demonstrate that facts exist which significantly alter the nature of the plaintiff's application to the extent of satisfying the court that, had these facts been known at the original hearing, the order would not have been made."*

8. At para. 6 of her judgment, Finlay Geoghegan J. added to the foregoing that:-

> *"It appears to me that, in addition to the approach set out by Morris J., [**4**] 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 O8, r.2….It appears to me that the purpose of including O8., r.2 is to accord to a defendant fair procedures in the High Court…".*

9. At para.8 of her judgment, Finlay Geoghegan J. notes: -

> *"[T]he submissions made on behalf of the defendant lead me to the conclusion that [**5**] 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. [**5a**] Firstly, the court should consider is there good reason to renew the summons. That good reason need not be referable to the service of the summons. [**5b**] 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. [**5c**] 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 not made."*

10. As regards the contention in *Chambers* that the plaintiff might suffer a hardship by virtue of the Statute of Limitations, Finlay Geoghegan J. did not propound a principle as such but merely compared the respective purported hardships that each party might suffer. Thus she states, at para.12 of her judgment, that:-

> *"In relation to the defendant there is no particular prejudice asserted….[H]is solicitor points out…that the defendant has had to live with the threat of proceedings since 2002 [the judgment was handed down on 11th November, 2005]. I do not in any way wish to underestimate the pressure that may cause to a person such as the defendant. However, it does not appear to me to be a hardship or prejudice which would outweigh the potential hardship or prejudice to the plaintiff if this court were now to determine that the order for renewal should be set aside."*

11. The court derives the following principle from the foregoing, namely that [6] when a plaintiff claims that hardship or prejudice would arise under the Statute of Limitations by acceding to a set-aside application, the court must engage in a balancing exercise between this claimed hardship or prejudice and such hardship or prejudice that could arise for the defendant by a refusal of the set-aside application. This (derived) principle is expanded upon by Feeney J. in *Bingham*.

12. Finlay Geoghegan J. added one final, *obiter comment*, at para.13, namely that [**7**] she did "*not necessarily accept*" that there was no time limit for the bringing of an application, and that "*The application has to be brought before entering an appearance, and when one looks at the overall scheme it may well be that there are limits to the period in which a defendant should be entitled to bring and pursue an application under O.8, r.2.*" This is an aspect of matters that also received consideration by Feeney J. in Bingham.

B. *Bingham v. Crowley and Others*
13. This was a case in which the plaintiffs, parents of a deceased person, sought to renew a summons in respect of a medical negligence claim in which there had been significant delays. The second-named defendant sought to set aside one or more renewal orders of the High Court. In the course of his judgment, Feeney J. touched comprehensively upon a number of points of interest concerning an O.8 application. These are considered hereafter.

14. *Second and further renewals*. The within application is concerned with a first renewal and so the issue of when second and further renewals may be ordered does not arise in the within proceedings. However, the court notes Feeney J.'s observation, at para.19 of his judgment, that [***8***] a renewed summons is incapable of further renewal unless an application to renew is made within the currency of the renewed summons.

15. *Refinement of the* Chambers *test*. It will be recalled that O.8, r.1 allows renewal of a summons, *inter alia, "for other good reason"*. At para.23 of his judgment, Feeney J. observes that: -

> *"[A] correct reading of Order 8, Rule 1 is that a reasonable effort to serve is one of a number of potential good reasons. However, good reason need not be referable to the service of the summons. If the Court is satisfied that there are facts and circumstances which constitute a potential good reason, including reasonable efforts to serve such summons, the Court must consider whether it is in the interests of justice between the parties to make an order for the renewal of the summons."*

16. [***9***] In other words, there is an overlap between the steps identified at [5a] and [5b] above.

17. *Particular grounds that do not offer a good reason to renew a summons*. [***10***] The plaintiffs in Bingham offered a number of purported 'other good reasons' to justify renewal, including the fact that a criminal complaint had been made by the first-named plaintiff and his wife, the fact of an ongoing inquest, the need to source expert evidence for use at any coroner's hearing, the need to obtain medical records and reports, and the subsequent requirement to receive still further reports, a necessity to change solicitors with a resulting delay and heightened cost, and a delay in drafting a statement of claim after the issue of the summons. Though each case falls to be judged on its own circumstances, the fact that the foregoing bases were rejected as grounds for renewal is perhaps of note.

18. *Is there good reason for renewal of the summons*? At para.35 of his judgment, Feeney J. observes that: -

> *"[**11**] The Court in considering the question of good reason does so not only by reference to service but also on the basis of whether there is good reason to renew the summons. In considering that matter it does so in the context of the overall interests of justice between the parties."*

19. [***12***] In the particular context of *Bingham*, it had been contended that it was a proper concern of the plaintiffs not to serve proceedings on a professional defendant without having a sound basis for doing so. In this regard, Feeney J., at para.35, adopted the approach taken by O'Sullivan J., at p.12 of his judgment in *Allergen Pharmaceuticals (Ireland) Limited v. Noel Deane Roofing and Cladding Limited & Ors* (Unreported, High Court, 6th July, 2006) in respect of a like contention that *"It would be ironic if such a concern could…lead to service after the expiration of the statutory six year period designed to protect all defendants including professional ones from the very mischief underlying such concern."*

20. *Statute of Limitations.* As regards a plaintiff claiming that hardship or prejudice would arise under the Statute of Limitations by a court's refusing a renewal, Feeney J. identified the court's role in this regard as follows, at para.37 of his judgment: -

> *"[**13**] This Court must approach the issue of the Statute of Limitations on a reciprocal basis and cannot conclude that the mere fact that the plaintiffs' claim would be statute-barred if a summons was not renewed is a good reason to renew the summons. The Court must do justice between the parties….[**14**] [I]n considering the overall interests of justice the Court must have regard to the delay by the plaintiffs after the issue of the plenary summons."*

21. Feeney J. also expressly addressed the issue of prejudice in this regard, rejecting a contention advanced for the plaintiff, by reference to the decision of O'Neill J. in *O'Grady v. Southern Health Board & Anor.* [2007] 2 I.L.R.M. 51, that it is necessary for a defendant in Order 8 applications to demonstrate in the clearest terms that there is actual prejudice. Per Feeney J., at para.39 of his judgment:-

> *"[**15**] 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 is not a good reason to renew a summons simply to prevent the defendant availing of the Statute of Limitations."*

22. The court accepts Feeney J.'s observations in this last regard as a correct statement of the applicable law.

23. *The European Convention on Human Rights*. Feeney J. notes the potential relevance of the European Convention on Human Rights to a determination of the overall interests of justice as between the parties, observing as follows at para.38 of his judgment:-

> *"[**16**] The Courts have become increasingly vigilant of the risk of injustice from allowing an action, requiring oral testimony, to proceed long after the accrual of the cause of action. The Supreme Court in Gilroy v. Flynn [2005] 1 I.L.R.M. 290, emphasised that the enactment of the European Convention on Human Rights Act 2003 meant that the Courts had an obligation to ensure that actions were determined within a reasonable time. That is a matter which this Court takes into account in considering the overall interests of justice as between the parties."*

24. *Time Limit for O.8 applications*. Feeney J. effectively rejects Finlay Geoghegan J.'s (*obiter*) half-suggestion in *Chambers* that there may be a time limit arising in the context of an O.8 application. However, Feeney J. accepts that delay by a defendant can be factored into the decision whether to set aside a renewal order, upon application being made under O.8, r.2. Per Feeney J., at para.44 of his judgment: -

> *"[**17**] There is no time limit provided for in Order 8. It is therefore difficult for the Court to identify a basis for an express identifiable time limit. There is no doubt but that in considering applications pursuant to Order 8, Rule 2, the Court should and must take into account any delay by a defendant in bringing its application. It is one of the factors which the Court must take into account in considering whether or not there is good reason to renew a summons and in considering the overall interests of justice between the parties. It is therefore necessary to look to the facts of this case in considering the issue of delay."*

25. The court accepts these last observations as a correct statement of the applicable law.

26. *Access to affidavit upon which application to renew moved*. Specifically, in the context of delay, Feeney J. observes, at para.44,

that:-

> *"[**18**] The Court is satisfied that it is an essential requirement, in according a defendant fair procedures, that a defendant has access to the affidavit upon which the application to renew was moved. A defendant cannot properly or adequately consider the issue as to whether or not to bring an application to set aside an order renewing a summons unless that defendant has sight of the grounding affidavit."*

C. *Moloney v. Lacey Building and Civil Engineering Limited*
27. In *Moloney*, the plaintiffs instituted proceedings by plenary summons issued on 9th January, 2004, against the defendants. The summons expired without being served on the defendants. By order dated 11th May, 2009, the High Court (Peart J.) renewed the summons following an *ex parte* application by the plaintiffs. The second and third defendants sought successfully to set aside the order renewing the summons. In setting aside the renewal, Clarke J. considered the decisions in *Chambers* and *Bingham* and certain other judgments, several of which are referred to above. This Court confines itself to such observations of Clarke J. as might be considered supplementary to or departing from those referred to above, though it would be fair to say that Clarke J. found much to agree with in both *Chambers* and *Bingham*.

28. *Expert reports*. Clarke J. observes, at para.19 of his judgment, that it is clear from *Bingham* that the absence of an appropriate expert report may provide in certain circumstances a "*good reason*" for not serving a plenary summons pending the receipt of such a report. Clarke J. adds that the absence of an appropriate expert report would of course only justify a failure to serve a plenary summons where the existence of the report concerned would be reasonably necessary in order to justify the commencement of the proceedings in the first place. He amplifies a little further on the issues arising in this regard, concluding as follows, at para.20: -

> *"[**19**] In summary, therefore, insofar as the absence of an appropriate expert report may be put forward as a good reason for not serving a plenary summons it seems to me to follow that [**19a**] the expert report concerned must be reasonably necessary in order to justify the decision to responsibly maintain proceedings in the first place, rather than be necessary in order to take further steps in the proceedings (such as the drafting of a statement of claim or bringing the case to trial) and [**19b**] it must also be established that any delay occasioned by the absence of the expert report concerned was reasonable in all the circumstances, such that appropriate expedition was used by the party placing reliance on the absence of the expert report concerned in attempting to procure same."*

29. *Relevance of cases on delay to O.8 cases.* Referring, *inter alia*, to cases such as *Gilroy* and *Allerge*n, Clarke J. indicates, at para.21 of his judgment, that [***20***] while the test to be applied in the context of an application to dismiss for want of prosecution is not identical to the test to be applied in a renewal application, he considers that there are significant similarities (in the context of delay and having regard to the general justice of a case). Being of this view, Clarke J. concludes, at para.22 of his judgment, that: -

> *"[21] I am, therefore, satisfied that the general 'tightening up' of the approach of the courts to delay which can be identified in the dismissal for want of prosecution jurisprudence applies also to cases involving an application to renew a summons, such that the question of whether a reason put forward may be deemed a 'good reason' may be looked at with greater scrutiny, and the factors which can properly be taken into account in assessing the balance of justice may need to be looked at from a perspective that places a greater emphasis on the need to move with expedition."*

30. *Statute of Limitations*. Clarke J. also emphasises the need to respect the policy decision that is reflected in the establishment of statutory limitation periods, the need not to undermine that policy decision through renewals of summonses, and the relevance of such considerations to a determination by the court of where the balance of justice lies. Per Clarke J., at para.23 of his judgment: -

> *"It seems to me that an application for the renewal of a summons in this court needs to be viewed against the background of the statutory policy that proceedings must be commenced within the relevant limitation period. The purpose behind that policy is to prevent claims from being brought outside what has been determined to be a reasonable period for the category of case concerned. Given that proceedings in this court are said to have been commenced once issued, it follows that it is possible to formally notify a defendant (by service) of the existence of proceedings outside the limitation period….[**22**] It seems to me that a renewal of a summons outside the limitation period so as to further extend the time (by reference to the limitation period) within which service can be effected, amounts at least to a stretching of the principles behind the existence of a statute of limitations….Such considerations should, in my view, inform decisions relating to both the question of what might be taken to be a 'good reason ' for the renewal of a summons and also in weighing the factors that might be put in the balance in considering where the balance of justice lies."*

31. *Frustrating a defendant's reliance on the Statute of Limitations*. Clarke J. refers, at para.24 of his judgment, to the Supreme Court decision in *Roche v. Clayton* [1998] 1 I.R. 596, as support for the proposition that [***23***] it is not a good reason to renew a summons simply to prevent the defendant availing of the Statute of Limitations. He adds that:-

> *"[**24**] It does seem that the history of events up to the time when the statute might have applied and, in particular, the extent to which the potential defendant knew of the existence of the claim and, most especially, the fact that the proceedings had been brought on foot of it, can constitute good reasons for the purposes of the rules."*

32. *Significance of non-renewal.* Clarke J. expresses the view, at para.25 of his judgment, that [***25***] it is *"[not] appropriate to characterise a failure to renew a summons as amounting to a penalty for procedural mishap"*. To so proceed, he considers, is to place little or no weight on the policy considerations behind the creation of a statutory limitation period. An aspect of those considerations is to ensure that cases come to trial sufficiently close to the events giving rise to the relevant proceedings as to minimise the risk of injustice. [***26***] In balancing the interests of justice in a renewal application, Clarke J. suggests, at para.26 of his judgment, that the court should have regard to any "*real risk of prejudice*" to justice presenting in such an application.

33. *Complaints against professional advisors*. In the course of applying the principles he had identified, Clarke J. also intimates, at para.36 of his judgment, by analogy with the case-law on dismissal for want of prosecution, that [***27***] the fact that a plaintiff may have a legitimate complaint against his advisors and be able to make claim in that regard is a factor which (in a 'want of prosecution' case) leans against absolving a party for failures on the part of those advisors. Although he does not say as much, Clarke J. clearly intimates that it would also be a factor that would count against a renewal of a summons.

Part IV

Other sources
34. One further, final source cited before the court was Delany, H. and D. McGrath's *Civil Procedure in the Superior Courts* (3rd ed., 2012), para.2–43, at which it is stated as follows, under the heading "*Reasonable Efforts to Effect Service*":-

> *"The question of whether reasonable efforts have been made to effect service is relatively straightforward though questions may sometimes arise as to the reasonableness of the efforts that have been made. The court will seek to ensure that alleged difficulties in service are not used to conceal dilatoriness on the part of the plaintiff. So, it has been held that reasonable efforts to effect service had not been made where the insurers of a defendant had failed to respond to a letter from the plaintiff's solicitors requesting them to nominate a solicitor to accept service and the plaintiff failed to proceed to serve the summons on the registered office of the defendant company."*

35. The authority cited for this last assertion is *O'Keeffe v. G & T Crampton Ltd* [2009] IEHC 366 at p.7.

Part V

Summary of Key Principles Affecting Set-Aside Applications under O.8(2)
36. The consideration of case-law and commentary above suggests that the below-mentioned key principles inform and affect the determination of applications made under O.8(2). (The square-bracketed numerals refer back to the square-bracketed numbers contained in the above text). Not all principles may be of application in any one case.

1. Burden on Moving-Party
(i). The moving-party must satisfy the court that there are facts or circumstances which, if known to the judge who ordered the ex parte renewal, would have had the result that such renewal would not have been ordered. [1], [3].

(ii). The moving-party may also demonstrate that even on the facts before the judge at the ex parte stage, the renewal order ought not to have been made. [4].

2. Three-limb test to be applied by court.
(i). The proper approach to determining whether to set aside a renewal order comprises three limbs. (1). Is there good reason to renew the summons? (That good reason need not be referable to service of the summons). (2). Is it in the interests of justice between the parties to make an order for the renewal of the summons? (3) In approaching the second question the court should ask, *inter alia*, what is the balance of hardship for each of the parties if the order for renewal is not made? [5, 5a-c].

(ii). The first and second steps identified in the preceding principle overlap. So if the court is satisfied there is good reason, it must consider whether it is in the interests of justice between the parties for there to be a renewal order. [9].

3. Limitation periods
(i). Limitation periods must be approached on a reciprocal basis. One cannot conclude that the mere fact that a plaintiff's claim will be statute-barred if a summons is not renewed is a good reason to renew. [13], [23].

(ii). A renewal of a summons outside the limitation period so as to further extend the time (by reference to the limitation period) within which service can be effected, amounts at least to a stretching of the principles behind limitation periods. This consideration should inform decisions as to (a) what is a 'good reason' for renewal and (b) where the balance of justice lies. [22].

(iii). The history of events to the time when the limitation period might have applied, in particular, the extent to which the potential defendant knew of the claim and that proceedings had been brought, can be 'good reasons'. [24].

(iv). A failure to renew should not be treated as a penalty for procedural mishap. [25].

4. Interests of Justice (as between the parties)
(i). In considering the overall interests of justice, the court must have regard to any delay by the plaintiff after the plenary summons issued. [14].

(ii). Prejudice is a factor to take into account in considering the interests of justice; its presence or absence is not conclusive as to same. [15].

(iii). The obligation of the courts to ensure actions are determined within a reasonable time is a relevant matter when considering the overall interests of justice. [16].

(iv). In balancing the interests of justice, the court should have regard to any real risk of prejudice to justice presenting in a renewal application. [26].

5. Time Limit and Delay
(i). There is no time limit provided for in O.8 but in considering applications pursuant to O.8, r.2, the court must take into account any delay by a defendant in bringing its application when considering (a) if there is good reason to renew and (b) the overall interests of justice between the parties. [17].

(ii). A defendant cannot properly/adequately consider whether or not to bring an application to set aside unless that defendant has had sight of the grounding affidavit. [18].

(iii). The general 'tightening up' as regards delay that is discernible in 'dismissal for want of prosecution' cases applies also to renewal cases. [21].

6. Miscellaneous
(i). An application under O.8, r.2 is not an appeal. [2].

(ii) A renewed summons is incapable of further renewal unless an application to renew is made within the currency of the renewed summons. [8].

(iii). A concern of the plaintiffs not to serve proceedings on a professional defendant without having a sound basis for doing so is unlikely to be good basis for renewal. [12].

(iv). If absence of an appropriate expert report is put forward as a good reason for not serving a plenary summons, that expert report must be reasonably necessary to justify the decision to responsibly maintain proceedings; and any delay occasioned by the absence of same must have been reasonable in all the circumstances. [19. 19a, 19b].

(v). The fact that a plaintiff may have a legitimate complaint against his advisors and be able to make claim in that regard is a factor that would count against renewal. [27].

Part VI

Application of Principles to Facts Presenting

37. *Burden on Moving-Party*. The moving-party has not satisfied the court that there are any facts or circumstances presenting in this case which, if known to Hedigan J. when he ordered the renewal that is the subject of the within application, would have had the result that the renewal would not have been ordered. Nor do there appear to be facts that were before Hedigan J. at the *ex parte* stage which demonstrate the renewal order ought not to have been made. It seems to the court that the height of the moving-party's case is that late in the initial one-year lifetime of the summons several efforts were made to serve the summons and were unsuccessful. There is nothing to suggest that the efforts of the summons-server in this regard were deficient, albeit that they were unsuccessful. And while those efforts came late in the initial one-year lifetime of the summons, they appear nonetheless to have been *bona fide* efforts at service during that initial one-year lifetime. It is perhaps worth recalling the applicable chronology in this regard to show just how assiduous the summons-server was in seeking to effect service:-

> *3rd February, 2014*. Summons-server calls to address of Mr Mulcahy but does not succeed in serving the summons personally.
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> *4th February, 2014*. Summons-server calls to address of Mr Mulcahy but does not succeed in serving the summons personally.
>
> *5th February, 2014*. Summons-server calls to address of Mr Mulcahy but does not succeed in serving the summons personally.
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> *6th February, 2014*. Summons-server calls to address of Mr Mulcahy but does not succeed in serving the summons personally. He is advised by Mr Mulcahy's son that Mr Mulcahy will be home that evening. Summons-server returns that evening and is told by Mr Mulcahy's wife that her husband is not present and she is unable to advise when he will be home.

38. If the rule of law means anything, it must be that law has meaning. So when O.8 refers to reasonable efforts being made to serve during the lifetime of the initial summons, it must mean at any point in the initial lifetime of that summons. And here reasonable efforts appear to have been made, even if this came late in the day.

39. Counsel for Mr Mulcahy appeared to intimate at the hearing that there is an unspoken requirement in O.8 that making reasonable efforts to serve during the initial 12-month lifetime of a summons must embrace making those efforts early enough so that one has time to seek an order for substituted service. In truth, however, there is no mention in O.8, nor does the court consider it appropriate or necessary to read into O.8, that within the one-year lifespan of an original summons there is an implicit shorter lifespan conditioned upon (and in effect created by) the reference to making reasonable efforts to effect service during that one-year period.

40. *Three-limb test to be applied by court*. As to whether there was good reason to renew the summons, it appears to the court that although Ms Murphy may have prosecuted her claim slowly thus far, the serious nature of the allegations that she makes – and the court emphasises that thus far they are but allegations – means that there would be considerable injustice to her if her summons had not been renewed. With regard to whether it was in the interests of justice between the parties to make an order for the renewal of the summons, the court likewise considers that the potential injustice that arose for Ms Murphy if her claims are not litigated outweigh the potential injustice to Mr Mulcahy at having to resist claims that could, perhaps, have been pursued more expeditiously, but which have been pursued nonetheless.

41. *Limitation periods*. Notably, this is a case in which, if the plenary summons had not been renewed, Ms Murphy would have been time-barred from litigating allegations of the utmost seriousness. Of course, limitation periods must have meaning but so too, it seems to the court, must O.8. Moreover, while Mr Mulcahy, thanks to the renewal of the summons, is now subject to the undoubtedly unpleasant and unwelcome stresses and strains of litigation, a factor which of itself requires to be weighed in the scales of justice, neither he nor his counsel have been able to point to any concrete prejudice which he would suffer as a result of the renewal of the original summons. This, it seems to the court, is further good reason for the renewal that was ordered. The court is mindful of the onus upon it to ensure that actions are determined within a reasonable timeframe but it does not appear to the court that when reasonable efforts are made to effect service during the initial one-year lifetime of a summons concerning serious allegations, and when service is effected during the first renewal thereafter, the timeframe then (or now) arising is unreasonable.

42. *Delay.* As mentioned above, the court does not consider that leaving matters until late in the initial one-year lifetime of a summons to seek service has the effect that a plaintiff is to be treated as not having acted reasonably or having been guilty of delay. A plaintiff has a year within which to make those reasonable efforts and there is no requirement in O.8 that those reasonable efforts must be made at the start of, in the middle of, at the end of, or throughout that one-year lifetime. As mentioned above, the court does not consider that the effective requirement to make reasonable efforts has as a consequence that the one-year period for making service is in practice foreshortened by an implicit requirement to make those reasonable efforts at a point sufficiently early in the one-year lifetime of the summons so that one can come to court and seek an order for substituted service if same seems preferable. As for any limitation period affecting the cause of action, that, to the court's mind, becomes and is of relevance at the point of deciding whether a renewal is merited. For the reasons mentioned above, the court does not consider that the limitation dimension to this case is or was a reason for not granting renewal, not least because neither Mr Mulcahy nor his counsel has been able to point to any concrete prejudice which Mr Mulcahy would suffer as a result of the renewal of the original summons.

Part VII

Conclusion
43. For the reasons stated above, the court declines to set aside the order made, *ex parte*, by the court (Hedigan J.) on 7th April, 2014, pursuant to O.8, r. 1 of the Rules of the Superior Courts (1986), as amended, renewing the above-mentioned plenary summons of 7th February, 2013, for a further six months.