

THE HIGH COURT

[2021] IEHC 790
[2014/4948 P]

BETWEEN

JOSEPH KEARNS

PLAINTIFF

AND

ERIC EVENSON

DEFENDANT

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 15th day of December, 2021.

Introduction

1. In this application, the plaintiff seeks an order pursuant to O.8 of the Rules of the Superior Courts ('RSC') renewing the plenary summons, issued on 30th May, 2014, for a period of three months from the date of the order. In the event of this order being granted, the plaintiff seeks an order pursuant to O.11, r.1(e) and/or O.11, r.1(b) granting him liberty to serve notice of the proceedings on the defendant, a Canadian national resident in the Isle of Man.
2. As we shall see, the proceedings have had a somewhat tortuous history to date, and have involved a number of applications to this Court. The present application is made as a result of a judgment of this Court of 14th May, 2020, reported at [2020] IEHC 257, in which I acceded to an application by the defendant pursuant to O.12, r.26 of the RSC for an order setting aside service of the notice of summons in the proceedings on the defendant, and for an order discharging the order of Eagar J of 2nd July, 2018 granting liberty to the plaintiff to serve notice of the proceedings on the defendant out of the jurisdiction. That judgment should be read in conjunction with the present judgment.
3. When the defendant's application pursuant to O.12, r.26 came before this Court in February 2020, the defendant also sought a stay of the proceedings "pursuant to the inherent jurisdiction of this Honourable Court and on the grounds of forum non-conveniens". Complex arguments concerning this issue were made by both sides over the course of three days. In the event, it was not necessary to decide the issue, as my finding that the order of Eagar J should be set aside on the basis that, at the time that order was made, the summons had already expired, was sufficient to decide the application.
4. The present application issued on 19th June, 2020, and was returnable for 14th July, 2020. Unfortunately, the matter did not proceed on that date, and was ultimately heard by me on 18th November, 2020. Both sides proffered very detailed written submissions in addition to the submissions made by counsel in court on the hearing date.
5. In the course of preparing a judgment subsequent to that hearing, the court became aware that the Court of Appeal had delivered judgment in *Sheila Murphy v. Health Service Executive* [2021] IECA 3 on 15th January, 2021. In the *Murphy* judgment, the Court of Appeal (Haughton J) conducted an extensive analysis of O.8 and the case law relating to it, including in particular two recent decisions of the High Court which had featured prominently in the written and oral submissions of both parties at the hearing before me. In addition, there had been a number of decisions of the High Court in relation to O.8

delivered around the time of, or subsequent to, the hearing before me, which the parties did not address. As these cases, and in particular the *Murphy* judgment, could have profound implications for the submissions and positions adopted by the parties, I convened a hearing of the matter in which I explained the situation to the parties and suggested that they might wish to make further submissions. Both parties accepted this invitation, and made further detailed written submissions on 26th February, 2021.

6. I understand that, in accordance with a suggestion made by me in my judgment of 14th May, 2020, it is the parties' wish that, in the event that I accede to the plaintiff's present application, I might then consider the jurisdictional objections to the proceedings made on behalf of the defendant to this Court in February 2020, perhaps after some further brief submissions. Given that such a course would not be necessary in the event that I refuse the plaintiff's present application, it is understood by the parties that I will deal only with the present application in this judgment, after which the parties may consider their respective positions.

Factual background and chronology

7. In order to consider the terms of O.8 in relation to the relevant facts, it is necessary to set out in some detail the background to the matter and the way in which events have unfolded in the litigation. While this is addressed at paras. 5 to 11 of my previous judgment, the parties in their respective submissions each set out a chronology of relevant events for the court, which is drawn from the statement of claim served by the plaintiff on two occasions, and various affidavits sworn by the parties in relation to various motions at different times.
8. The statement of claim alleges that the defendant "agreed to receive and hold...certain funds...as trustee to the Plaintiff in accordance with the Plaintiff's directions from time to time" [para. 3]. These were funds amounting to €965,000, paid on various dates in 2011 and 2012. While no defence has yet been delivered by the defendant pending his challenge to the present application – and if that challenge is unsuccessful, to the jurisdiction of this Court to entertain the matter – it is clear from the defendant's affidavits to date that he does not accept that he received any monies from the plaintiff, or that he invested same on the plaintiff's behalf [see para. 13 defendant's affidavit sworn 25th January, 2019].
9. Paragraphs 4 and 5 of the statement of claim are as follows: -
 - "4. By "Agreement of Understanding" dated 15th July 2011 signed by the Defendant, the Defendant acknowledged that the monies received from the Callary Pension Fund would be applied as part of an investment in a property at Strandgaten 56, Bergen, Norway. The Defendant acknowledged that the pension fund required to be protected from illiquidity and agreed to return all pension monies to the Pension Fund on demand by the Plaintiff. To this end, the Defendant executed a guarantee forming part of the same document guaranteeing repayment of the sum of €490,000.00 investment by the Callary Pension Fund from the date of investment.

5. The sum of €490,000.00 in respect of the self-administered Pension Funds was transferred to the Defendant and the Defendant guaranteed repayment of the said sum of €490,000.00 and agreed to return all pension monies to the Callary Pension Fund on demand made by the Plaintiff. The terms of this obligation was [sic] recited in an agreement of understanding dated 15th July 2011 and a Guarantee dated 13th December 2012.”
10. The defendant contends that these two documents - “the agreement of understanding” and the “guarantee” – are forgeries. This has particular significance for the argument on whether or not the Irish Courts have jurisdiction, as the guarantee has a jurisdiction clause providing that the alleged guarantee agreement “shall be governed by the laws of the Republic of Ireland, and by the Irish Courts...” [Clause 5]. As explained above, the jurisdiction of this Court only falls to be examined if I accede to the plaintiff’s present application, although it should be said that the consistent position of the defendant has been that he denies that the Irish Courts have jurisdiction in the matter.
11. Adapting the chronologies presented by the parties, the key events in the litigation to date may be summarised as follows: -
 - The plaintiff alleges that three payments of €50,000, €275,000 and €150,000 were made on 18th July, 2011, 9th March, 2012 and 26th March, 2012 respectively;
 - the plaintiff further alleges that a “self-administered pension transfer of funds” was made on 6th December, 2011 of €490,000;
 - the plaintiff therefore alleges that a total sum of €965,000 was paid to the defendant “to receive and hold...as trustee to the Plaintiff and [to] apply them in accordance with the Plaintiff’s direction from time to time...” [para. 3 statement of claim];
 - the documents on foot of which the plaintiff sues were the “agreement of understanding” and the “guarantee” which were allegedly executed on 14th July, 2011 and 13th December, 2012 respectively;
 - by letter of 14th April, 2014, the plaintiff demanded payment from the defendant of “monies acquired by [the defendant]”, and the demand was made on foot of the alleged documents referred to above;
 - the plaintiff responded to the foregoing letter through his Isle of Man solicitors by letter of 12th May, 2014, in the course of which it was stated that the documents relied upon were “fabrications”;
 - the plaintiff issued a plenary summons on 30th May, 2014. The summons included an endorsement under the Brussels Regulation 44/2001 on the plenary summons, notwithstanding that the defendant’s residence is in the Isle of Man, a jurisdiction not covered by the Brussels Regulation;

- on 21st July, 2014, the plaintiff brought an application to amend the plenary summons to remove the Brussels Regulation endorsement in conjunction with an application for leave to serve notice of the amended plenary summons out of the jurisdiction;
- on 21st July, 2014, leave to amend the plenary summons and to serve notice of the amended plenary summons on the defendant was granted by the High Court (Hedigan J);
- the plaintiff did not amend the plenary summons within the time specified and brought an application to extend the time to amend, which application was granted by an order of this Court (White J) on 20th October, 2014;
- the defendant states that the plaintiff “effected service of the notice through The Hague Convention channels, and it appears that the request for service was made on 9 March, 2015...” [affidavit Eric Evenson sworn 10th July, 2020 in the present proceedings at para. 5.9];
- on 22nd July, 2016, evidently in response to a motion by the plaintiff for judgment in default of appearance, the defendant’s Irish solicitors entered a conditional appearance in order to contest the jurisdiction of the Irish Courts;
- by a notice of motion of 3rd October, 2016, the defendant applied to set aside service of notice of the plenary summons, and to discharge the order of Hedigan J of 21st July, 2014;
- this application was heard by Ní Raifeartaigh J on 13th April, 2018. The court delivered an *ex tempore* ruling on 24th April, 2018. A transcript of the ruling of Ní Raifeartaigh J was made available to this Court;
- by an order of 8th May, 2018, the court discharged the order of Hedigan J of 21st July, 2014 and set aside service of the summons. The court further ordered that the plaintiff pay the defendant the costs of the application when taxed and ascertained, but provided that execution on foot of the costs order be stayed until the application was listed before the court on 5th June, 2018. On that date, execution of the costs order was further stayed if a “fresh application” were made within 28 days;
- by letter of 17th May, 2018, the plaintiff’s solicitors wrote to the defendant’s Irish solicitors inquiring as to whether those solicitors “required to be put on notice of our application for service out against Mr. Evenson, in light of the Court’s determination that the current Order be set aside...having regard to the advanced nature of the engagement and the exchange of Affidavits to date, it would be more efficient if we were to place you on notice, so that any objections could be made in a timely fashion. This would avoid the substantial process of delay which intervened following service of the previous proceedings on your client in 2015...”;

- by letter of 30th May, 2018, Messrs William Fry on behalf of the defendant responded to the aforesaid letter stating that "...we have no further instructions as matters stand...we reserve our client's rights in relation to any application your client may make";
 - on 2nd July, 2018, the plaintiff applied *ex parte* to serve notice of proceedings on the defendant out of the jurisdiction pursuant to O.11, r.1(e) and/or O.11, r.1(b). No application was made to renew this summons, notwithstanding that it had been issued over four years previously;
 - on 2nd July, 2018, Eagar J ordered pursuant to O.11, r.1(e) of the RSC that the plaintiff be at liberty to serve notice of the proceedings, and that the defendant would have 35 days from the date of service of the proceedings within which to enter an appearance. It appears that purported service in accordance with this order was effected on 14th August, 2018;
 - by letter of 26th October, 2018, Messrs William Fry on behalf of the defendant served a memorandum of conditional appearance on the plaintiff. This appearance required delivery of a statement of claim, which was served – in terms identical to the statement of claim previously served – by letter of 16th November, 2018;
 - the defendant issued a second motion under O.12, r.26 to set aside service of the summons on 6th February, 2019;
 - after an exchange of affidavits, that application was heard by me on 25th – 27th February, 2020.
12. As is apparent from my judgment of 14th May, 2020, I held that, when the order of 2nd July, 2018 was made by Eagar J, the plenary summons had ceased to be in force according to the Rules of the Superior Courts. In those circumstances, I held that the order granting liberty to serve notice of the proceedings on the defendant at his residence in the Isle of Man could not be allowed to stand. This was sufficient to decide the defendant's application to set aside the order of 2nd July, 2018, and it was not necessary to decide the various jurisdictional objections to the proceedings raised by the defendant.

The present application

13. By notice of motion issued on 19th June, 2020, the plaintiff applied for an order pursuant to Order 8 RSC renewing the plenary summons and, in the event of such renewal, an order granting liberty to serve notice of the proceedings on the defendant in the Isle of Man. By agreement of the parties, the only issue argued before the court was that of renewal of the summons on the basis that, if the plaintiff were successful in his application, I could then consider in a separate judgment the arguments as to whether the court has jurisdiction in relation to the matter; if the plaintiff were unsuccessful in the application, that would be an end of the proceedings.
14. The plaintiff adverts to this agreement at para. 5 of his affidavit of 19th June, 2020 grounding the application. The plaintiff draws to the attention of the court the fact that his

solicitors had written to the defendant's solicitors prior to the application in July 2018, inquiring as to whether they wished to be placed on notice of the application ultimately made to Eagar J, and the response which indicated that the defendant's solicitors had no instructions "as matters stand". The plaintiff goes on to aver as follows: -

"10. No issue was raised by the defendant in relation to the non-renewal of the summons (which had not been adverted to), until the hearing date so that a further substantial interval intervened, prior to the date listed as it involved an issue of some complexity. The position is set out in the Judgment of the Court."

15. The plaintiff expresses the view that no prejudice has been caused to the defendant by any delay "in circumstances where he is aware of the nature and details of the narrative giving rise to the underlying dispute; where there is no suggestion that there was a belief on the part of the Defendant that a claim would not be pursued and, where the Defendant has, despite repeated requests, failed to account for the current whereabouts of [certain of the funds allegedly paid to the plaintiff...]" [para. 11].
16. In his replying affidavit of 10th July, 2020, the defendant contends that the chronology of events in the matter "...demonstrates that the Plaintiff has no good reason and there were no special circumstances to justify the failure to properly serve the Plenary Summons he now seeks to renew" [para. 6]. He avers that he has "...now succeeded in two applications to set aside Orders for service outside the jurisdiction on me, owing to the Plaintiff's lack of candour and lack of adherence to important procedural protections [para. 7]...I am prejudiced by the significant passage of time that has elapsed since the alleged events occurred on which the plaintiff purports to base his cause of action. On the Plaintiff's case, these events took place 9 years ago... [para. 9]".
17. Both affidavits were brief, on the basis that the court was supplied with all of the affidavits in the various previous applications, which contained considerable detail about the allegations of the plaintiff and the responses thereto of the defendant, and to which reference had been made in the course of the arguments before me in February 2020, so that the court was familiar with the background to the matter and the details of the cases made by the plaintiff and the defendant.

The court's jurisdiction to renew a summons

18. Order 8, as it applied at the time of the application to Ní Raifeartaigh J, was as set out at para. 17 of my previous judgment. The order was subsequently amended by the Rules of the Superior Courts (Renewal of Summons 2018 SI 482 of 2018) which came into effect on 11th January, 2019. The full text of the amended sub-rule is set out at para. 18 of my previous judgment, and for ease of reference is set out again here: -

"1(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.

- (2) The Master on an application made under sub-rule (1), 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 three months from the date of such renewal inclusive.
 - (3) After the expiration of twelve months, and notwithstanding that an order may have been made under sub-rule (2), application to extend time for leave to renew the summons shall be made to the Court.
 - (4) The Court on an application under sub-rule (3), may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive where satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order.
 - (5) The summons shall, where an order of renewal has been made, 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."
19. It is this amended sub-rule which governs the present application, and notwithstanding that it has come into effect relatively recently, there is already much case law in relation to how it is to be interpreted. A feature of the case law was a difference of opinion between members of this Court as to the test to be applied pursuant to O.8(1). In *Murphy v. ARF Management Limited* (*Murphy v. ARF*) [2019] IEHC 802, Meenan J held that the amended O.8 provided that a court cannot renew a summons on more than one occasion. In the course of doing so, he expressed the view that the test to be applied as to whether a renewal should be ordered was the sole test of whether there were "special circumstances" which justify a renewal. However, in *Ellahi v. Governor of Midlands Prison* [2019] IEHC 923, O'Moore J distinguished the decision in *Murphy v. ARF* on the basis that the dictum of Meenan J that the appropriate test was "special circumstances which justify renewal" was not the *ratio* of his decision. O'Moore J held that there was in fact a two-tier test: the existence of "special circumstances" justifying an extension of time in order to seek leave to renew the summons, and that there were "other good reason" which justified the renewal itself.
20. In *Brereton v. Governors of the National Maternity Hospital* [2020] IEHC 172, Hyland J remarked on the "distinct ambiguity in the wording of the new rule"; as she commented "...the reference to the Court ordering a renewal where satisfied there are special circumstances which justify an 'extension' suggests that the special circumstances test only applies to the extension of time application for leave to renew the summons and not to the renewal of the summons. Had the word 'renewal' been used rather than

'extension', the situation would have been far clearer. Nor is there any explicit disapplication of the good reason test...in all the circumstances, given that the matter was explicitly argued in *Ellahi*, but not, it appears, in *Murphy*, I will follow *Ellahi* and apply the good reason test to the renewal of the Summons here" [paras. 10-11]. This approach was subsequently followed by Simons J in *Downes v. TLC Nursing Home Limited* [2020] IEHC 465, a decision delivered on 30th October, 2020.

21. However, in a judgment delivered on the same day, Barr J took issue with the two-tier test. In *O'Connor v. Health Service Executive* [2020] IEHC 551, the learned judge preferred the approach of Meenan J in *Murphy v. ARF* to that adopted by the court in *Ellahi* and *Brereton*, holding that "...I am of the view that there is only one test applicable when an application is made to the High Court for renewal of a summons, which application is made more than one year from the date of issue of the summons. That test is whether there are 'special circumstances' justifying such renewal and such circumstances have to be stated in the order of the court. This is entirely consistent with the rules as currently drafted" [para. 57].
22. Due no doubt to its having been delivered shortly before the hearing before me on November 18th 2020, the parties did not advert to the decision in *O'Connor*, and the submissions of both parties, both written and oral, proceeded on the basis that the appropriate test was as set out in the *Ellahi/Brereton/Downes* line of authority. On being alerted subsequent to the hearing to the decision of the Court of Appeal in *Murphy v. Health Service Executive ('Murphy')*, the parties made further written submissions with respect to the Court of Appeal's determination that there is a single test for renewal of a summons of "special circumstances which justify an extension...".

The decision in *Murphy v. Health Service Executive*

23. The proceedings in *Murphy* involved a claim in respect of alleged medical negligence. The incidents alleged to give rise to the claim occurred in March 2016. The basic period of two years provided by the Statute of Limitations 1957 as amended for the issue of personal injury proceedings expired in March 2018. The plaintiff, who was a frail, elderly lady, received her medical records in July 2018, and her solicitor issued a protective personal injury summons on 31st August, 2018. The summons stated expressly that the plaintiff reserved the right "to adduce all details required by O.1A of the Rules of the Superior Courts upon receipt of all expert reports and medical records. The plaintiff relies on this statement for the purposes of Order 1A, Rule 6 of the Rules of the Superior Courts" [quoted at para. 6 of the judgment].
24. It appears that the plaintiff inadvertently failed to respond to a request made in September 2018 for payment of outlay until January 2019, which caused some delay. From March to August 2019, various steps were taken as a result of which an "initial report" from an expert was procured and statements were obtained from witnesses with a view to procuring a final report. The plaintiff was advised to obtain a separate report from a stroke specialist in relation to causation, and by mid-January 2020, both experts had furnished a final report, whereupon the plaintiff's solicitor wrote to the defendant indicating the conclusions of those reports. On 3rd February, 2020, an ex parte

application was made to this Court (Murphy J) for renewal of the summons – which had expired on 1st September, 2019 – and the court ordered renewal of the summons “in circumstances where delays had occurred in obtaining medical reports...”. The renewed summons was served on the defendant on 19th February, 2020, the defendant having first nominated solicitors to accept service, and on 6th May, 2020, the defendant issued an application to set aside the renewal order. The application was refused by this Court (Cross J) in a judgment delivered on 29th September, 2020 for the reasons summarised by the Court of Appeal at paras. 18 to 19 of its judgment, and the defendant appealed this decision.

25. The Court of Appeal (Haughton J) conducted a thorough analysis in its judgment of the text of the amended O.8 and all of the High Court authorities to which I have referred above. It concluded that the wording in O.8 did not justify a two-tier approach; see paras. 52 to 68 of the judgment in this regard.
26. Having concluded that the sole test as to whether a renewal of a summons should be granted was whether or not there were “special circumstances which justify an extension”, the court conducted an analysis of what might be comprised in this test. Its conclusions, set out at paras. 69 to 78 of the judgment, can be summarised as follows: -
 - (1) Whether special circumstances exist must be decided on the facts of a particular case;
 - (2) the test is a higher test than that of “good reason”;
 - (3) while use of the word “special” does not raise the bar to “extraordinary”, “...it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present...” [para. 72].
 - (4) the court considers whether it is in the interests of justice to renew the summons, which entails “...considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused” [para. 74];
 - (5) inadvertence or inattention on the part of legal advisors “will rarely constitute ‘special circumstances’”;
 - (6) where the trial judge is satisfied that special circumstances exist, the jurisdiction to grant leave to renew is discretionary;
 - (7) in reviewing a decision to renew a summons, the trial judge should be afforded a margin of appreciation “and [the Court of Appeal] should not interfere with the decision unless the trial judge has erred in principle or there is a clear error of fact or breach of the rules of natural justice” [para. 78].
 - (8) the extent to which the court may have regard to the Statute of Limitations in considering where the balance of justice lies has not changed under the amended

O.8; the fact that a plaintiff's claim would be statute barred but for a renewal is not of itself "good reason" or "special circumstances", but is a factor which may be taken into account.

27. In relation to point 4 above, the court expressed the view that the requirement of the court to consider the interests of justice is not a second tier or limb to the test, as the need for the court to consider the interests of justice, prejudice and the balancing of hardship is encompassed by the phrase "special circumstances [which] justify extension".
28. The court pointed out that the case was not one in which the summons was allowed to lapse through inadvertence or error. A deliberate decision had been made not to serve the summons within time because the required medical opinion had not been received. There was evidence from which the trial judge was entitled to conclude that there was no significant or culpable delay. No specific prejudice was alleged by the defendant. The trial judge was entitled to take into account the point that a refusal of renewal would likely render any fresh proceedings statute-barred. In all the circumstances, the court was satisfied "that the trial judge correctly addressed his mind to the balance of justice, and potential prejudice, and exercised his discretion in such a manner that this Court should not interfere with his discretion to dismiss the motion" [para 111].

Subsequent cases

29. Since delivery of the Court of Appeal judgment in *Murphy*, there have been several decisions of this Court in which the issue of whether there were "special circumstances which justify an extension" was considered: See *Altan Management (Galway) Management Limited v. Taylor Architects Limited* [2021] IEHC 218 (Heslin J), *Young v. St. Vincent's Health Care Group Limited* [2021] IEHC 386 (Barr J), and *Nolan v. Trustees of Bridge United AFC* [2021] IEHC 335 (Barr J).
30. In *Altan* the court was of the view that the evidence before it established that the two special circumstances set out in the order renewing the summons did not in fact exist, and that taking into account the interests of justice and issues concerning hardship or prejudice, there were no special circumstances which justified renewal of the summons. The delay on the part of the plaintiff of two years and two months between the expiry of the twelve-month period for service of the summons after issue and the application for the renewal order was "at the *extreme* end of delay" [para. 89, emphasis in original]. It was "also, on the evidence before this Court, delay for which no credible excuse whatsoever has been given".
31. In expressing this view, Heslin J had regard to the views regarding delay set out by Hyland J in *Brereton* as follows: -

"The application to renew the summons was made on 28th May, 2019, and the period of delay is therefore a relatively short one, being 10 weeks from the date upon which the summons expired. In the context of the cases open before the court, given a spectrum of delay ranging from extreme (see for example *Moynihan* – elapse of 2 years and 2 months from the expiry of the 12 month period, or

Moloney v. Lacey Building and Civil Engineering Ltd & Ors. [2010] IEHC 8 – elapse of 5 years 4 months from the expiry of the 12 month period) to moderate (*Roche v. Clayton* [1998] 1 IR 596 – elapse of 6 months from expiry of the 12 month period or [*Allergan Pharmaceuticals v. Noel Deane Roofing and Cladding* [2004] 4 IR 438] –elapse of 10 months from expiry of the 12 month period), a period of 2 ½ months is at the lesser end of the spectrum. I am of course conscious that with the change in the legal test to ‘special circumstances’, much shorter periods of delay are likely to be treated as sufficient to justify a refusal to renew a summons. Had the period of delay been longer, even by a month or two, my approach to this case would have been different. However, in the context of a 12 month period within which to issue a summons, in my view a 10 week delay in the context of this case is sufficient to persuade me that the balance of justice favours upholding the decision to renew the summons”.

32. In his decisions in *Young* and *Nolan*, Barr J in each case held that there were no special circumstances justifying renewal of the summons. In *Nolan*, the plaintiff relied on the inadvertence of his solicitor in failing to serve the summons within the appropriate period. This inadvertence occurred due to a combination of factors set out on affidavit. However, Barr J held that inadvertence on the part of a solicitor as to the expiry of the period within which to serve a summons could not be a special circumstance justifying the renewal of the summons, firstly because “mere inadvertence cannot be seen as being special, or out of the ordinary, such as is required to bring one within O.8, r.1(4). Secondly, if mere inadvertence was allowed as a special condition to justify renewal of a summons, that would effectively render the time limit provided for in the rules, redundant” [para. 62]. While the court was prepared to accept that inadvertence could arise in circumstances which were special or unusual – such as serious injury to the solicitor or a member of his family in the period leading up to the expiry of the twelve-month period, or where the solicitor’s office was “subject to some form of calamity, such as an extensive fire or flood...” - a court could perhaps hold that there were special circumstances which caused the solicitor’s omission to serve the summons due to the fact that “his mind was elsewhere at the time”. However, in *Nolan*, the inadvertence could not be seen as “unusual” or “out of the ordinary”, and could not constitute a “special circumstance justifying renewal of the summons” [paras. 63 to 64].

The special circumstances contended for by the plaintiff

33. The grounding affidavit of the plaintiff does not purport to enumerate specific grounds on which it is alleged that special circumstances exist in the present case, other than in setting out the matters referred to at paras. 14 and 15 above. At para. 19 of the more recent submissions – the “post-*Murphy*” submissions as it were – it is submitted that the plaintiff “very pointedly” did not rely on inadvertence in the context of the renewal application; reference was made instead to a list of matters set out at para. 30 of the plaintiff’s earlier submissions: -

“...where the circumstances giving rise to the good grounds/special circumstances were enumerated. In summary these were the specific course of the proceedings

and the manner and point at which the issue regarding the summons was raised, the fact that the defendant was fully conversant with the plaintiff's case, the absence of any prejudice, the fact that the defendant was still in possession of the plaintiff's money and refused to account for it and, finally, the fact that the defendant was alleging forgery."

34. The plaintiff's position was that inadvertence was not offered as a good reason or special circumstance; as counsel expressed it, the inadvertence in relation to the need to apply to renew the summons after service had been set aside by Ní Raifeartaigh J was the explanation, but not the justification, for the delay. The plaintiff took issue with what he saw as an attempt to characterise the present application as predicated on the inadvertence in relation to the renewal of the summons. In the later submissions, the plaintiff accepted that "inadvertence will rarely be sufficient to establish a special circumstance", citing dicta of Simons J in *Downes* and Haughton J in *Murphy* to that effect. Notwithstanding this, the plaintiff's position was that there were special considerations in the peculiar circumstances of the case which justified an extension and renewal.
35. As regards inadvertence, counsel placed particular emphasis on the fact that the necessity to apply to renew the summons as a result of the judgment and order of Ní Raifeartaigh J did not become apparent to the plaintiff until the written submissions of the defendant were proffered at the commencement of the defendant's application under O.12, r.26 on 25th February, 2020. It was suggested that, given that this point had never been flagged by the defendant in advance of the hearing or referred to on affidavit, it was very likely that the point had not occurred to the defendant's legal team until the written submissions were being prepared – in effect, that for the best part of the period between May 2018 and February 2020 both sides had, as counsel for the plaintiff put it, failed to "twig" the necessity to renew the summons.
36. It is also submitted on behalf of the plaintiff that, unlike many cases in which renewal is sought in circumstances where the defendant is entirely unaware of the proceedings, this defendant has at all times been aware since correspondence was first initiated by the plaintiff's then solicitors in August 2013 that the plaintiff intended to proceed if necessary against the defendant for recovery of the sum of €965,000. Notice of the summons was served in April 2015, and a statement of claim was delivered on 27th July, 2016. The application by the defendant to set aside the service of the summons, ultimately heard by Ní Raifeartaigh J, involved a full exchange of affidavits in which the issues in the case were traversed at length.
37. In these circumstances, it is suggested that, not only is the defendant fully aware of the case being made against him, but that it is quite clear that the defendant has had the opportunity to assess that case and marshal the evidence against it. He can identify the witnesses he requires to rebut the plaintiff's allegations, and there is no suggestion that there is any difficulty with availability of witnesses, or as to their recall of events.

38. Further, it is submitted that it is clear from the affidavit evidence that the case is not one in which the evidence will be heavily dependent on the recollection of witnesses, which one might reasonably anticipate would have diminished over time. The plaintiff's case is based primarily on two documents, and the defendant's position is that these documents are forgeries. It is suggested that the authenticity or otherwise of these documents, and the issues in the case generally, will be tested mainly by reference to extrinsic documentation, and there is no suggestion by the defendant that any documentation has disappeared or become unavailable. Indeed, much of it is exhibited to the affidavits in the proceedings to date.
39. It is also submitted that the court is entitled to take into account the fact that, if the renewal is not granted, the defendant is very likely to rely upon a statute of limitations defence in respect of any new proceedings issued by the plaintiff.
40. The plaintiff also relies on what he alleges is the failure by the defendant to account for the monies advanced by him. It should be said that it is clear from the affidavits in support of the defendant's first application to set aside service of the summons, ultimately determined by Ní Raifeartaigh J, that the defendant vehemently denies any liability to the plaintiff. He avers that he was initially involved in facilitating an investment by the plaintiff's private pension fund in a property in Bergen, Norway for a sum of €490,000, but was not a party to that investment. Further payments of €475,000 to Gorak Investments Limited, a British Virgin Islands company of which the defendant was a director, were made by the plaintiff. The defendant avers that the agreement "...was in truth a capital investment by the Plaintiff in a BVI company involved in financial trading and property" [para. 23, affidavit 30th September 2016]. The defendant alleges that the plaintiff made these investments due to "difficulties with his Irish creditors at the time...", and avers that the documents which purport to render him personally liable for the investments are forgeries.

The defendant's perspective on the plaintiff's failure to renew

41. Counsel for the defendant was sharply critical of the present application, speculating that there had never before been a case in which the plaintiff had applied three times to the court for liberty to serve outside the jurisdiction. It was submitted that it was significant that the defendant had from the outset challenged the jurisdiction of the Irish Court, but had never objected to the merits of the case being decided, and would not contest the jurisdiction of the Isle of Man Courts if he were sued there. The plaintiff had known that this was always the defendant's position, and it was incumbent on him to bring the defendant before the Irish Courts in a manner consistent with the rules of court. Counsel submitted that such rules are not technicalities, and that the considerations which underpin rules of court are those of justice and fair procedures. It was submitted that the plaintiff must abide by those rules, and was asking the court to excuse a "litany of failure" in this regard.
42. It was also suggested that an unusual feature of the present case is that the summons issued well within the appropriate period of limitation, unlike many cases in which a renewal is sought. Following the setting aside by Ní Raifeartaigh J of service of the

summons, it was open to the plaintiff to “start again” with a fresh summons; if he had done so, no necessity to renew the summons would have arisen. Indeed, this step could have been taken at any time until 11th May, 2020, at which point it would seem that six years would have elapsed from the date of accrual of the cause of action. Counsel makes the point that, even if the need to renew the summons was not appreciated in the aftermath of the decision of Ní Raifeartaigh J, the plaintiff was undoubtedly aware of the point from the first day of the hearing to set aside service pursuant to the order of Eagar J – 25th February, 2020 – and could have issued fresh proceedings between then and 11th May, 2020, and an application to serve those proceedings outside the jurisdiction. It is submitted that this step should have been taken to prevent against the situation – as ultimately transpired – that this Court would find that the order of Eagar J should be set aside on the basis that the summons had expired.

The approach to “special circumstances”

43. It is clear that there are two starkly diverging approaches by the plaintiff and the defendant as to how the court should apply the test of “special circumstances which justify an extension”. The plaintiff, perhaps conscious of decisions such as *Moynihan v. Dairygold Cooperative Society Limited* [2006] IEHC 318 (Peart J) and *Murphy* itself in which the view is expressed that inadvertence will “rarely” constitute special circumstances, seeks to side-step the whole issue of inadvertence by arguing that he does not rely on it as a special circumstance, but contends instead for a holistic approach in which all factors, including the interests of justice and the balance of hardship, are taken into account in assessing whether the peculiar circumstances of the case constitute “special circumstances”.

44. The approach of the defendant, on the other hand, is set out succinctly at para. 43 of his later written submissions as follows: -

“The court in *Murphy* very clearly separated out its analysis of ‘special circumstances’ from its analysis of the balance of hardship between the parties. It is submitted that this is undoubtedly the correct approach. If it were to be otherwise, the Plaintiff would not have to show that they acted reasonably or diligently after the summons was issued in respect of service, or there were other compelling reasons why service could not have been effected, so long as they could show that a greater hardship would befall them than the Defendant if the summons was not renewed. This was not the approach of the courts under the old Order 8, and it would undermine the aim of the amendments to the order, which was to ensure that the Plaintiffs proceed with expedition to effect valid service of their proceedings.”

45. In *Murphy*, Haughton J cited at paragraph 73 the following passage from the judgment of Hyland J in *Brereton*: -

“In *West Donegal Land League v Udaras Na Gaeltachta* [2006] IESC 29 Denham J, as she then was, noted that in considering the concept of special circumstances it should be remembered that the essence of the order for security for costs is to

advance the interests of justice and not hinder them, and that it is for a court on such an application to consider and balance the interests of the plaintiff company and those of the defendant in a fair and proportionate manner.”

46. Haughton J agreed that this passage “applies by analogy to a court deciding whether ‘special circumstances’...justify an extension”. He went on to state that the court should consider “... whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused” [para. 74].

47. The court went on to state as follows:

“75. This reflects the principle enunciated by Finlay Geoghegan J. in *Chambers v Kenefick* [2005] IEHC 526, in describing the approach the court should take under the original O.8 to deciding ‘other good reason’:

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

That decision has been followed on many occasions – see for example Clarke J., as he then was, in *Moloney v Lacy Building and Civil Engineering Ltd* [2010] 4 I.R. 417.

76. In my view this is not a second tier or limb to the test. The need for the court to consider under sub-rule (4) the interests of justice, prejudice and the balancing of hardship is in my view encompassed by the phrase ‘special circumstances [which] justify extension’. Thus there may be special circumstances which might normally justify a renewal, but there may be countervailing circumstances, such as material prejudice in defending proceedings, that when weighed in the balance would lead a court to decide not to renew. The High Court should consider and weigh in the balance all such matters in coming to a just decision.”

48. These dicta seem to take as their premise that the plaintiff, in seeking the renewal, will advance specified “special circumstances” such as inadvertence – on which the plaintiff successfully relied in *Brereton* – or the need to obtain expert medical advice – on which

the plaintiff successfully relied in *Murphy* itself. The plaintiff in the present case does not adopt this approach; in fact, other than a brief parenthetical reference to inadvertence in para. 10 of the grounding affidavit, the plaintiff does not proffer evidence as to the cause of the delay at all. Rather, the plaintiff relies on the general circumstances of the case as constituting special circumstances which, when weighed in the balance, should dispose the court to renew the summons.

49. The plaintiff considers that *Murphy* “supports the plaintiff’s argument that the primary consideration is the facts of the case and that *special circumstances* do not require exceptionality or anything close to it...it is wholly dispositive of the defendant’s argument that *interests of justice* considerations are of no relevance to the question of special circumstances...” [para. 27, later submissions].
50. The question, then, as regards the court’s approach to the issue of whether or not there are “special circumstances” which “justify an extension”, is whether, as the defendant contends, the court must first find whether or not “special circumstances” exist before proceeding to an analysis of the interests of justice or the balance of hardship, or whether, as the plaintiff contends, the existence or otherwise of special circumstances is something to be discerned from the general circumstances of the case, and to be determined solely by interests of justice considerations.
51. It is clear from the cases under the original O.8 that a consideration of “other good reason” for the purpose of O.8, r.1 did not preclude a consideration of the interests of justice. In the excerpt from the judgment of Finlay Geoghegan J in *Chambers v. Kenefick* quoted at para. 75 of the judgment in *Murphy*, the court stated that it should firstly “...consider is there a good reason to renew the summons. That good reason need not be referable to the service of the summons...”. In *Allergan Pharmaceuticals (Ireland) Limited v. Noel Deane Roofing and Cladding Limited* [2009] 4 IR 438, O’Sullivan J did not agree with the submission that “there are three separate and watertight sequential steps, the effect of which would be to exclude consideration of questions relating to the interests of justice when the court addresses itself to the question whether there is a good reason to renew the summons” [para. 15]. At para. 76 of the judgment in *Murphy*, quoted at para. 47 above, it is made clear that there is no consideration of whether or not there are special circumstances which is separate from the consideration of the interests of justice, prejudice and the balance of hardship. The court must engage with any special circumstances advanced by the plaintiff together with any countervailing circumstances “such as material prejudice in defending proceedings...”, and the court “...should consider and weigh in the balance all such matters in coming to a just decision”.
52. Having regard to the approach of the court under the original O.8, and the approach of the courts in relation to the amended order, it is clear that the correct approach is to consider, not just any specific circumstances proffered as excusing the delay, but whether or not there are “special circumstances which justify an extension” by reference to the wider circumstances of the case, and in particular the interests of justice. However, this raises the issue in the present case of what weight should be attached to the delay

caused by the failure of the plaintiff's representatives to advert to the necessity to renew the summons after service of the notice of summons had been set aside by Ní Raifeartaigh J.

Delay/inadvertence

53. In the present case, the plaintiff, in a case in which, by July 2018, over four years had elapsed since the issue of the summons, sought an order for service of the summons out of the jurisdiction. It is clear that the necessity to seek the renewal of the summons before doing so was not appreciated by the plaintiff's advisors until it was drawn to their attention in the defendant's written submissions at the commencement of the defendant's application to set aside service on 25th February, 2020. If they had adverted to the necessity for renewal, the application could have been made to Eagar J on 2nd July, 2018, when the application for service out of the jurisdiction was made. Two consequences flow from this omission: firstly, the question of renewal was not addressed by the plaintiff until after the hearing in February 2020 and my subsequent judgment of 14th May, 2020. The present motion was issued on 19th June, 2020, just under two years after the application could and should have been made to Eagar J. Secondly, if an application for renewal of the summons had been made to Eagar J, and the order had been granted, an application could have been made by the defendant at that stage pursuant to O.8, r.2 to serve a notice of motion to set aside the renewal order.
54. It is clear, then, that the failure to address the need to renew the summons has contributed substantial delay to a case in which very considerable delay in effecting service since the issue of the summons had already occurred. In such circumstances, the plaintiff does not rely on this failure as constituting "special circumstances". It seems in any event unlikely that such an error could ever be regarded as a special circumstance. This would appear to follow from the *dicta* of the Court of Appeal at para. 77 of *Murphy*, and the *dicta* of Peart J in *Moynihán* to which the Court of Appeal refers in that paragraph, by which a salutary warning is given to legal practitioners that "...proper attention must be given to the question of service of proceedings after issue, especially where there is a likelihood that after expiration of one year from the date of issue, the Statute will have expired". At para. 70 of his judgment in *O'Connor v. HSE*, Barr J was unequivocal in his view that such an error could not constitute special circumstances: -
- "It is not possible for the plaintiff's solicitor to plead in aid of the plaintiff's position, the fact that he mistook the legal position. The period of six months was provided for under the old O.8. While it was regrettable that the plaintiff's solicitor was not aware of this fact, either from his knowledge of the rules, or by taking up a copy of the Master's order, he cannot plead his lack of knowledge as a means to resist the defendant's application."
55. However, as I stated above, the plaintiff regards the failure to advert to the need to renew the summons following the decision of Ní Raifeartaigh J as the "explanation" of the delay rather than a special circumstance, and urges that the interests of justice, when the circumstances of the cases are taken in the round, justify a renewal. Those circumstances are drawn, not just from the affidavit grounding the present application, but from the

affidavits supporting the various applications to Hedigan, Ní Raifeartaigh and Eagar JJ, and to myself.

56. The defendant submits as set out at para. 44 above, that, if the court does not firstly and separately analyse the "special circumstances" before proceeding to the balance of hardship between the parties, "the plaintiff would not have to show that they acted reasonably or diligently after the summons was issued in respect of service...so long as they could show that a greater hardship would befall them than the defendant if the summons was not renewed...".
57. I do not think that the approach to the test in O.8 set out in *Murphy* means in the present case that no weight is given to delay, or that its effect on the consideration by the court of the interests of justice is somehow bypassed by the plaintiff not relying on it as a special circumstance. The purpose of O.8, r.1 is to ensure expedition of proceedings; the original version required the court to be satisfied, in the absence of reasonable efforts made to effect service, that there was "good reason" to permit renewal, and the court under the amended version must be satisfied of "special circumstances which justify an extension". A renewal could not be granted unless these criteria were satisfied. It seems clear that the requirement for "special circumstances", while not raising the bar to "extraordinary", imposes a more exacting test than "good reason".
58. The amendment must be seen in the context of emphases by the courts in recent years on expedition in the process of litigation, and a less tolerant attitude towards delay generally. In the context of a renewal application, Clarke J (as he then was) in *Moloney v. Lacey Building and Civil Engineering Limited* [2010] 4 IR 417 noted a number of decisions of the Supreme Court and High Court regarding applications for dismissal for want of prosecution, commenting that "...it would be fair to summarise the jurisprudence which emerges from those cases as imposing a stricter view in relation to delay..." [paragraph 21]. The court professed itself: -
- "...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" [Paragraph 22].
59. The delay caused by the plaintiff would be considered as part of the court's deliberation as to whether there are "special circumstances which justify an extension". However, it is not only the impact of the delay on the parties which must be taken into account; the purpose of the order and the increased requirement for expedition which the amended test imposes will be significant influences on the court's discretion.

60. In assessing the delay, it is instructive to consider the periods of delay in other cases. At para. 31 of her judgment in *Brereton* – coincidentally quoted above at para. 31 – Hyland J. refers to the delays in *Moynihan*, *Moloney*, *Roche v. Clayton* and *Allergan*, in each of which cases the court found that there was not “good reason” to renew the summons. In *Brereton* itself, a medical negligence case, the plenary summons issued on 13th March, 2018. It was not served within the twelve-month period, although letters of claim from the plaintiff’s solicitors on 10th March, 2018 indicating an intention to bring proceedings were sent to the defendants. The summons was renewed by order of the High Court on 28th May, 2019 and served on 14th June, 2019. The court was satisfied that the plaintiff’s solicitor intended to serve the summons before the expiry of the twelve-month period, but did not do so due to inadvertence. The delay between 12th March and 28th May was therefore ten weeks. While the court granted the renewal, Hyland J indicated that if the delay had been longer “...even by a month or two...”, her approach to the case “would have been different”.
61. In *Altan*, *Young* and *Nolan*, the court considered periods of two years and two months, one year and nine months and one year and five months respectively in determining whether or not there were special circumstances. In each case, renewal of the summons was refused.

Application of the test

62. In accordance with the dicta of Haughton J at para. 74 of the judgment in *Murphy*, “...the court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused”.
63. The factors which the plaintiff contends support the existence of “special circumstances” are considered at paras. 33 to 40 above. The prejudice and hardship alleged by the defendant must also be considered. The defendant has at all times refused to accept the jurisdiction of the Irish courts, and has made substantial submissions in this regard which await determination if necessary. The defendant strenuously denies liability, pointing out that he was not a party to the investments made by the plaintiff. He avers in his affidavit of 25th January, 2019 which grounded his application to set aside the order of Eagar J that the documents put before the court in his application to set aside the order of Hedigan J make it clear that he never received money from the plaintiff or the plaintiff’s pension fund, and indeed that the plaintiff had accepted on affidavit that no money had been received by the plaintiff from the latter source, although the subsequent statement of claim delivered on 16th November, 2018 repeated allegations to this effect on behalf of the plaintiff.
64. The defendant alleges that the “agreement of understanding” and the “guarantee” by which the plaintiff primarily seeks to impose liability on him are forgeries, and sets out at length in his affidavits of 30th September, 2016, 16th January, 2017 and 25th January, 2019 the facts upon which he relies in this regard.

65. In his affidavit of 21st November, 2016, the plaintiff addresses the allegation of forgery, stating that he agreed with the defendant that the originals of the documents were to be held by Derry Grant James, a retired accountant in the Isle of Man who had met the plaintiff in 2006 and introduced him to the defendant in 2007 or 2008. He avers that he met Mr. James on 7th July, 2011 "to confirm arrangements" [para. 6], and in an email of 13th April, 2014 to the defendant, exhibited to the defendant's affidavit of 30th September, 2016, he states as follows: -

"At an arranged meeting on 24.10.2013, with Mr. Derry Grant James, and Mr. McEvoy and myself, Mr. Derry Grant James handed over the fiduciary and other documents he held to Mr. McEvoy. Mr. Derry Grant James in our discussions explained about the fiduciary arrangements he had advised on and put in place with Eric Evenson and Eric Evenson IOM Asset Trust Company, Gorak Assets Limited. He also confirmed his intention to retire shortly as a licensed fiduciary.

Mr. Derry Grant James confirmed to us that he was disgusted that Eric Evenson did not repay the money, and felt badly let down by Eric Evenson's behaviour. He confirmed this was the first time it ever happened to any other clients as far as he was aware. Mr. Derry Grant James stated that he would pursue the return of the money with Eric at a meeting that week".

66. However, Mr. James swore an affidavit on 20th January, 2017 in support of the application to set aside service ultimately determined by Ní Raifeartaigh J in which he states that his first sight of the allegedly forged documents was in May 2014, when shown them by the defendant's legal advisors. He avers that, while he is a director of the company which owns 100% of the shares in Gorak Investments Limited, he had no involvement in the plaintiff's investment in that company, and was unaware of the terms "of any such alleged agreement". He states that, contrary to what is suggested by the plaintiff in his affidavit of 21st November, 2016, he "...did not advise on or set-up any agreement between Strandgaten 56 AS and the Callery Pension Fund...I was not given originals or copies of the two forged agreements by Mr. Evenson or anyone else [paragraph 6 to 7]". Mr. James' affidavit goes on to deal with various averments by the plaintiff in relation to Mr. James' alleged involvement as an intermediary in procuring from the defendant the return of the money; Mr. James denies having any such role, or that he had "...any discussions with Mr. Evenson in relation to the return of the funds in dispute in these proceedings [paragraph 9]".

67. In his affidavit of 25th January, 2019, the defendant avers at para. 46 as follows: -

"Derry Grant James is 72 and resides in the Isle of Man. He has deposed that he suffers from ill-health and has reduced mobility. He has averred that he would only be able to testify close to his home in the Isle of Man...I feel it is prudent to note that Mr. James' health and mobility have deteriorated significantly since the time of swearing his Affidavit; he now requires a mobility scooter to leave home and would therefore require substantial physical and medical support if compelled to travel abroad".

68. The plaintiff argues that the issues between the parties, and particularly the question of whether the documents on which the plaintiff relies are forgeries, are set out *in extenso* in the affidavits, and that the defendant is fully aware of the detail of the plaintiff's allegations and has been in a position to engage with them throughout these proceedings. Counsel for the plaintiff argues that the case is a "documents" case which will require some cross-examination on the affidavits. It is not – as he colourfully puts it – a "fight outside the chipper at 3am" case, *i.e.* a case in which the only relevant evidence is the oral testimony of participants and witnesses. He submits that, in these circumstances, there is no prejudice to the plaintiff arising from the delay.
69. However, it is very clear from a perusal of all of the affidavits to date that the court's view of the authenticity or otherwise of the documents, and of the credibility of the plaintiff and the defendant in that regard, will depend to a substantial degree on the evidence regarding the relationship between the parties and the circumstances surrounding the entry by the plaintiff and his pension fund into the investments in question. It is therefore a matter of considerable concern to the court that the delays have given rise to a situation whereby it is now ten and almost nine years since the alleged execution of the agreement of understanding and the guarantee respectively, and over seven years since the issue of the proceedings, and yet the plaintiff is no further along in progressing service of the summons on the defendant.
70. A perusal of some of the many recent judgments of the superior courts in relation to applications to strike out proceedings for want of prosecution reveals a sharply decreasing tolerance of delay in progressing cases. As Irvine J commented in *Millerick v. Minister for Finance* [2016] IECA 206, "...recent decisions of the Superior Courts emphasise the constitutional imperative to bring to an end the all too long standing culture of delays in litigation so as to ensure the effective administration of justice and basic fairness of procedures". It seems clear that, as the Court of Appeal pointed out in *Murphy*, the test of "special circumstances which justify an extension" appears to impose a higher bar than "good reason". It is not unreasonable to infer that its introduction was intended to bring about a more exacting test in line with judicial pronouncements deprecating failure to progress litigation, and in support of the court's obligations to ensure expedition of proceedings.
71. It seems to me that, while it is true that the documents are of central importance to the case, the evidence of the parties and other witnesses will be of importance in determining the truth or otherwise of the respective positions of the parties. Even if the plaintiff prevails in the present application, and survives the defendant's challenge to jurisdiction which must then be determined, the proceedings will only truly commence at that stage, and may take several years to progress to trial. I think it is inevitable that the recollections of the parties and witnesses as to events or conversations will be impaired by the delay.
72. Also, the position of Mr. Derry Grant James must be considered. The defendant does not assert definitively that Mr. James will be unavailable for cross-examination on his

affidavit, or ultimately at trial. It might be that, if he is unable to travel to Ireland, examination could be conducted remotely in some fashion. It does however appear that there is a risk that the delays in the proceedings have impinged adversely on Mr. James' ability to give evidence, and that this difficulty may increase with any further delay.

73. In all the circumstances, it seems to me that the assertion on behalf of the plaintiff that the defendant has suffered no prejudice from the various delays is incorrect. The defendant suffers moderate but not insignificant prejudice, and this prejudice is likely to increase in the future.
74. It is also clear that responsibility for the delays must be laid at the plaintiff's door. While the proceedings were initiated well with the statutory limitation period, the defendant is a Canadian national, domiciled and resident in the Isle of Man, a jurisdiction not subject to the Brussels Regulation. It was clear from the outset that the defendant did not accept that the dispute had any connection with Ireland, and that he would contest jurisdiction. In these circumstances, there was an onus on the plaintiff to ensure that all appropriate steps were taken to bring the defendant before this Court, even if only so as to allow him to contest jurisdiction in an appropriate manner. Unfortunately, over seven years later, that onus has not yet been discharged.
75. As we have seen in the chronology set out at para. 11 above, there were various errors from the date of issue of the summons on 30th May, 2014 which necessitated applications to court to amend the plenary summons to remove the Brussels Regulation endorsement, and to then extend the time to make this amendment. The application of 3rd October, 2016 by the defendant to set aside service of the summons was determined by Ní Raifeartaigh J on 24th April, 2018. On that occasion, it was held that the court which ordered service on 21st July 2014 (Hedigan J) "...was [not] sufficiently informed of relevant facts in order to have enough information before it to make an informed decision about whether leave should have been given". The court stated that it was setting aside the order for service out on the ground of "lack of candour" [Transcript, p.7]. Ní Raifeartaigh J stated that: -
- "...what is significantly absent, in my view, is information about, or sufficient information about the mechanics of the transactions, the involvement of Gorak, the involvement of the Callary Pension Fund and more specifically, the fact that there was a share purchase agreement which designated Norway as the choice of law jurisdiction. And it seems to me that, in those circumstances, the court was really only being given the tip of [the] iceberg and particularly not being told something that was of importance and materiality on the choice of law issue". [Transcript p.6].
76. The order of Ní Raifeartaigh J clearly contemplated a further application by the plaintiff for service out; however, no application for renewal of the summons, which had by that stage expired, was made to the court. This error was not apparent to the plaintiff until receipt of the written submissions of the defendant on 25th February, 2020, the first day of the hearing before me.

77. An attempt was made on behalf of the plaintiff to attribute some responsibility for the delays to the defendant. In particular, it was pointed out that the defendant had declined an opportunity to participate in the hearing before Eagar J, at which it could have raised the issue of renewal of the summons. Counsel for the plaintiff also suggested that it was a reasonable inference that the point raised by the defendant about renewal had only occurred to the plaintiff's advisors close to the hearing in February 2020, so that the plaintiff's advisors were only marginally more culpable in not spotting the point than the defendant's advisors.
78. I find it very difficult to see how the defendant or his advisors can be blamed in respect of the delays which have arisen. It was the plaintiff's sole responsibility to ensure that the defendant was properly served, particularly in circumstances where the defendant was clearly going to contest jurisdiction. A defendant is not obliged to assist the plaintiff in this regard, or to be proactive in bringing defects of procedure to the attention of the court, other than appropriately in the course of a contested hearing. Even if counsel is correct in suggesting that the defendant's advisors did not advert to the necessity for renewal of the summons until shortly before the defendant's application to set aside service in February 2020, this is in my view entirely irrelevant to the test to be applied by the court.
79. The plaintiff submits that the court is entitled to take account of the likelihood, if the renewal is not granted, that the defendant will rely on the statute of limitations. It is clear from the case law that, while not determinative of the application, this is a factor which the court can take into account. However, it would seem that the plaintiff has passed up a number of opportunities to ensure that he does not fall foul of the statute of limitations. As he initiated proceedings approximately two years after his alleged cause of action would appear to have accrued, he had the opportunity to avoid becoming statute-barred by the issue of a fresh summons at any time over the following four years, if six years is indeed the appropriate period of limitation. In particular, the plaintiff could have decided to "start again" after the decision of Ní Raifeartaigh J and issue new proceedings which would have obviated any difficulty with the statute of limitations. Also, as counsel for the defendant points out, a new summons could have been issued by the plaintiff on being alerted on 25th February, 2020 to the failure to renew the existing summons. However, this precaution was not taken.
80. It should also be emphasised that the defendant continues to assert that he will not contest the jurisdiction of the Isle of Man courts if he is sued there. There is no evidence before me as to the position regarding limitation periods in the law of the Isle of Man. However, it would presumably have been possible, and perhaps advisable, for the plaintiff to initiate proceedings in the Isle of Man as a "fall back" position in the event that the defendant's challenge to the jurisdiction of the Irish Courts were successful. Indeed, it has not been asserted to me that the plaintiff has not done so.
81. As regards the merits of the proceedings, it is alleged on behalf of the plaintiff that the defendant has failed to account for the monies advanced to him, and that a refusal of renewal of the summons will result in the plaintiff being unable to recover his investment.

I am reluctant to enter upon any investigation, much less determination, of the respective merits of the positions of the parties. However, it is very clear that the proceedings are hotly contested by the defendant, who alleges that he did not receive any monies from the plaintiff, and is under no obligation to account personally for them. The defendant asserts that the plaintiff continues to hold the investments; in his affidavit of 25th January, 2019, the defendant avers that the Callary Pension Fund "purchased a shareholding in Strandgaten 56 AS and still holds that shareholding..." [para. 37]. He also avers that Gorak Investments Limited has written to the plaintiff "...confirming that a transfer of [a property in Ireland] can take place immediately in order to fully unwind Mr. Kearns' investment in Gorak" [para. 44], although the plaintiff, for reasons stated in his affidavit of 29th March, 2019, regarded this latter offer in particular with suspicion, and vehemently complained that requests for information as to the investments and their value were "completely ignored".

82. In short, the defendant acknowledges that investments were made by the plaintiff and his pension fund, and that the investments continue to exist. Whether these investments can be unwound is not a matter for this Court in the context of the present application. What the plaintiff really seeks is to impose personal liability on the defendant for these investments, which could only be done by persuading a competent court, in this or some other jurisdiction, that the agreement of understanding and the guarantee were authentic documents which had the effect for which the plaintiff contends. It was the responsibility of the plaintiff, and the plaintiff alone, to ensure that such allegations were brought before such a court. In proceedings before this Court, it has signally failed to do so.

Conclusions

83. The court is required to consider the interests of justice, prejudice and the balance of hardship in deciding whether there are "special circumstances [which] justify extension". In doing so, I have come to the conclusion that there are no special circumstances which justify extension in the present case.
84. While it is the plaintiff's position that he does not rely on inadvertence as a special circumstance, it seems to me that one must consider the explanation for the delay in considering the interests of justice. In *Brereton*, the plaintiff's solicitor failed to serve the summons, but realised her error and applied for a renewal some two and a half months after the expiry of the summons. The summons was intended to be served with the letter sent three days before the expiry, but the solicitor inadvertently omitted to include the summons with the letter.
85. This sort of administrative mishap, which can occasionally occur even in well-regulated systems, must be contrasted with the series of errors which occurred in the present case. Unfortunately, the defendant's description of a "litany of failure" seems apt. There were repeated failures to observe the rules of court, in circumstances where the defendant had made it clear that he did not accept that the Irish Courts were an appropriate forum and would contest jurisdiction. It was solely the responsibility of the plaintiff to bring the matter before the court properly and in accordance with the Rules of the Superior Courts.

The failure to do so has resulted in a situation where the present application was issued just over five years after the expiry of the summons.

86. Even if one were to consider only the delay from the order of Eagar J – 2nd July, 2018 – until the issue of the present application – 19th June, 2020 – that is a delay of almost two years. That this delay occurred due to a failure to appreciate the need to apply for a renewal of the summons does not cause the court to regard it in a more benign fashion. In circumstances where there had already been substantial delay, due primarily to what Ní Raifeartaigh J described as a “lack of candour” on the part of the plaintiff, the need for perfect observance of the Rules of the Superior Courts should have been uppermost in the mind of the plaintiff’s advisors. The case law suggests that a delay of this length would have been regarded as being at the extreme end of the spectrum, even under the less exacting standard of “good reason”.
87. In my view, extremely compelling circumstances would be required to persuade the court ever to overlook or excuse a delay of almost two years, much less a delay of just over five years. The fact that there is now a more demanding test (special circumstances) suggests to me that less tolerance of delay is now required to be shown by the court than was the case before O.8 was amended. In considering the interests of justice in the exercise of the court’s discretion, recognition must be given to the higher standard now in force, and the necessity to encourage observance of the court’s own procedures in the future.
88. For the reasons set out above, I am satisfied that the defendant will suffer significant prejudice if a renewal is granted. While there is a countervailing prejudice in that it is certainly possible or even likely that the plaintiff will be statute barred in any fresh proceedings, I do not consider this to weigh heavily in the balance, given that the plaintiff had numerous opportunities to ensure that he would not be in this position.
89. Taking all of the foregoing into account, I find that the plaintiff has failed to establish “special circumstances which justify an extension”, and therefore refuse the relief sought at para. 1 of the notice of motion. In those circumstances, the relief sought at para. 2 of the notice of motion does not arise.
90. I would encourage the respective solicitors to agree the terms of the orders to be made on foot of this judgment. If that does not prove possible, the parties may make a written submission, within fourteen days from delivery of this judgment, in relation to the terms of the orders to be made. The submissions should relate to all costs in the matter, including the costs of the previous application determined by me on 14th May, 2020. The submissions should not be longer than 1,000 words. On receipt of the parties’ submissions, I will make appropriate orders without further reference to the parties.

Postscript

91. This judgment was prepared in September 2021. Before it could be delivered, the parties requested that delivery be postponed in order to allow the parties to confer with a view to resolving their differences. I readily agreed to this request, and was kept apprised from

time to time by the parties of their continuing efforts in this regard. I was told, *inter alia*, that the situation is somewhat complicated by the existence of related proceedings in another jurisdiction.

92. Unfortunately, I was informed by counsel on 9th December, 2021 that it has not been possible to agree a compromise, and was requested to proceed with delivery of this judgment. I expressed the hope to counsel that the parties might continue, notwithstanding my determination on the present application, to engage in an effort to resolve their differences in a mutually satisfactory manner.