THE HIGH COURT

[2023] IEHC 220

[Record No. 2021/3617 P]

BETWEEN

MICHELLE CONDON MURPHY

PLAINTIFF

AND

DEPUY IRELAND UNLIMITED COMPANY

DEFENDANT

JUDGMENT of Mr. Justice Barr delivered on the 28th day of April, 2023.

Introduction.

1. This is an application brought by the defendant seeking an order pursuant to O. 8, r. 2 of the Rules of the Superior Courts setting aside the renewal of the plaintiff's personal injury summons.

2. By order perfected on 30th May, 2022, Hanna J. allowed the plaintiff to renew her personal injury summons for a period of three months, on an *ex parte* application brought by the plaintiff.

3. These proceedings relate to a repetitive strain injury allegedly suffered by the plaintiff while in the employment of the defendant, due to the awkward postures she was required to adopt while working at the defendant's factory.

4. The plaintiff resists the defendant's application on the basis that there are special circumstances which justified the renewal of her personal injury summons.

Background.

5. It is necessary to set out some of the background to these proceedings in order to understand the basis on which the application is brought.

6. The plaintiff was employed by the defendant as a General Operative from in or around the year 2000, until May 2017.

7. The plaintiff sought authorisation from the Personal Injuries Assessment Board (hereinafter referred to as "PIAB") on 19th March, 2020 to pursue a claim for damages for personal injuries suffered by her while in employment with the defendant. PIAB issued an authorisation on 11th November, 2020, allowing the plaintiff to initiate proceedings.

8. In her personal injury summons issued on 7th May, 2021, the plaintiff claims that she was required to adopt an awkward posture; to hold herself in static positions for prolonged periods during her shifts; and to carry out repetitive tasks, without rotation, which resulted in her body being

exposed to vibrations and/or mechanical stress. The plaintiff claims that such stress caused injuries to her left shoulder and to both elbows, requiring her to cease work in or about May 2017.

9. The plaintiff set out extensive particulars of negligence on part of the defendant in her personal injury summons. It is not necessary to set out those claims in full, but suffice it to say that the plaintiff claims that the defendant failed in its duty to provide a safe system of work for her, which resulted in her suffering significant personal injuries.

10. The plaintiff failed to serve the personal injury summons on the defendant within the 12 months provided for by O. 8, r. 1(1) of the rules. The summons was required to be served by 7th May, 2022. By *ex parte* docket dated 17th May, 2022, grounded on an affidavit sworn by Ms. Anne O'Driscoll, the plaintiff's solicitor, the plaintiff sought an order granting leave to renew the personal injury summons. Hanna J. granted that relief on 23rd May, 2022, which order was perfected on 30th May, 2022. The summons was served on the defendant on 9th June, 2022.

11. On 20th July, 2022, Ronan Daly Jermyn LLP entered an appearance on behalf of the defendant, which stated on its face that they sought to 'Enter an Appearance for the Defendant in this action *without prejudice to any application that may be brought to set aside the renewal of the summons*.'

12. On 25th July, 2022, the defendant issued a motion to set aside the renewal of the personal injury summons, grounded on an affidavit sworn by Ms. Marianne Lonergan, the defendant's solicitor.

13. It is against that background that the defendant seeks to have the renewal of the personal injury summons set aside.

The Evidence.

14. The evidence before the court was contained in three affidavits, being the affidavit of Ms. O'Driscoll sworn on 17th May, 2022, grounding the plaintiff's ex parte application to renew the personal injury summons; the affidavit of Ms. Marianne Lonergan, solicitor for the defendant, sworn on 21st July, 2022, grounding the defendant's motion to set aside the renewal of the summons; and the replying affidavit of Ms. O'Driscoll sworn on 10th November, 2022.

15. Both affidavits of Ms. O'Driscoll were in very similar terms, although the replying affidavit appeared to contain more detail as to the reasons for the failure of the plaintiff to serve the summons within 12 months.

16. Ms. O'Driscoll averred that the claim being made by the plaintiff would require an expert's report from an engineer and/or ergonomist, which were not to hand at the time the summons was

issued. She further averred that there were in the region of 37 similar claims against the defendant, such that the defendant ought to have been familiar with the type and nature of the claim made by the plaintiff herein, prior to the service of the proceedings upon it.

17. She stated that she took over the plaintiff's file in late November 2021. She outlined that the solicitor who had been dealing with the file, had retired in January 2021, resulting in the redistribution of his work throughout the firm and causing significant logistical difficulties within the firm. Further, it was averred that his secretary was also out on sick leave for a number of months in 2021.

18. There were further averments made as to the extent of the effect of Covid-19 on the plaintiff's solicitor's firm, detailing extensive staff absences which were particularly damaging, owing to the relatively small size of the firm. These absences occurred mostly between 1st May, 2021 and 1st June, 2022. She averred that these circumstances resulted in a 'perfect storm', which led to the failure to serve the summons in time. She averred that the circumstances should be viewed collectively, as amounting to sufficient special circumstances to justify renewing the summons.

19. She averred that an associate solicitor took over the plaintiff's file in October 2021 and emailed the defendant's solicitor on 28th October, 2021 inquiring as to whether they were authorised to accept service of the proceedings. The defendant's solicitor replied on 2nd November, 2021, confirming they had such authority. However, that the email was not forwarded to the solicitor dealing with the file. She exhibited the relevant correspondence. She further averred that the response from the defendant's solicitor was not sent to her firm in hard copy. She stated that it appeared that the defendant's email had not been directed to the correct solicitor dealing with the file at that time in the plaintiff's solicitor's firm.

20. Ms. O'Driscoll went on to state that the associate solicitor had gone on maternity leave in November 2021, which was not readily anticipated by the firm in its allocation of the retiring partner's files in early 2021. There was further pressure caused within the firm, due to the solicitor, who was going on maternity leave, having to hand over her files to other solicitors in the firm.

21. It was averred that due to oversight, the proceedings were not served within the time limit provided for in the rules. She outlined that it was only upon a detailed review of all the cases of a similar nature against the defendant, which was carried out on 13th May, 2022, that the deponent discovered that the summons in this case had not been served.

22. It was averred that because the plaintiff was now statute-barred from issuing a fresh summons against the defendant, as the statute expired on or about 11th May, 2021; failure to obtain

a renewal of the summons, would cause great hardship to the plaintiff in precluding her from prosecuting her claim against her former employer.

23. She further averred that when the failure to serve the summons was identified, the time limit for service had only expired six days previously, and that the plaintiff had acted expeditiously to bring an application to renew the summons within two days thereafter. The application to renew the summons was moved on 17th May, 2022; 10 days after the period for service had elapsed.

24. As a result of this short delay, Ms. O'Driscoll averred that the defendant had suffered no prejudice in the failure to serve the summons within time. She noted that the defendant ought reasonably to have been aware of the plaintiff's injuries as a result of internal complaints made by the plaintiff during her employment. Further, she noted that the defendant would have received correspondence from PIAB when the plaintiff's claim was lodged and when authorisation was granted to the plaintiff to proceed with her action, in or around June 2020.

25. Ms. O'Driscoll averred that the defendant had not pointed to any specific prejudice it would suffer if the personal injury summons were renewed. Further, she outlined that the defendant's claim that they would be precluded from pleading the statute of limitations if the summons were renewed, was incorrect, and that that avenue was still available to plead in its defence to the action.

26. Ms. Lonergan swore the affidavit grounding the defendant's motion to set aside the renewal of the plaintiff's personal injury summons. She averred that the relevance of the lack of expert reports from an engineer and an ergonomist was not clear from the plaintiff's affidavit, given that the personal injury summons had already issued at that stage.

27. She further questioned the relevance of the defendant's familiarity with claims of this nature and outlined that service was still required within the time limits provided for in the rules.

28. She noted that it was not clear from Ms. O'Driscoll's affidavit what the relevance was of the sick leave issues and the Covid-19 pandemic, as the file had come to the solicitor's attention in November 2021, with 6 months still on the clock for the service of the summons.

29. It was further averred that the defendant could not be at fault for the email of 2nd November, 2021, confirming their authority to accept service on behalf of the defendant, not having reached the relevant solicitor within the firm acting for the plaintiff. It was further noted that the oversight on part of the solicitors in serving the summons, was entirely a matter within the control of the plaintiff's solicitors.

30. She averred that it was perfectly possible for them to have served the summons on defendant from November 2021, when Ms. O'Driscoll took over the file, despite any restrictions imposed due to the Covid-19 pandemic.

31. It was averred that prejudice would naturally accrue to the defendant if the renewal of the summons was not set aside; specifically, where the plaintiff's injuries related to a repetitive strain injury, allegedly incurred over a long period of time.

32. Further, it was averred that the defendant would be precluded from pleading the statute of limitations, if the order of Hanna J. was not set aside, which significantly prejudiced it in its defence of the action. The potential difficulty for witnesses recalling evidence at trial was also noted in the affidavit, which difficulty would be exacerbated by the delay in serving the proceedings.

The Law.

33. The relevant parts of Order 8 are as follows:

> *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) […]*
>
> *(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.*
>
> *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.*

34. The parties were in agreement that the test for what might constitute 'special circumstances' which would justify an extension of time within which to serve the summons, was comprehensively set out by Haughton J. in *Murphy v. Health Service Executive* [2021] IECA 3.

35. At paras. 70-78 of that judgment, under the heading "Special Circumstances", Haughton J. set out the following principles, which are sufficiently important to quote in full:

"70. Firstly, whether special circumstances arise must be decided on the facts of a particular case, and it would be unwise to lay down any hard and fast rule.

71. Secondly it is generally accepted that it is a higher test than that of "good reason". This would seem to follow from the fact that the application to the Master is made before the summons lapses, and O. 8 does not require the Master to state the "good reason" in the order.

72. It also follows from the use of the word "special". While this 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.

73. Hyland J. in Brereton usefully points by way of analogy to the test of "special circumstances" as it applies resisting a claim for security for costs. Although O. 29 RSC, which concerns the provision of security for costs, does not use the phrase "special circumstances", caselaw has long held that once a defendant establishes that there is a prima facie entitlement to security for costs the onus shifts to the plaintiff to show special circumstances as to why security should not be granted. At para. 21 Hyland J. stated –

> *"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."*

74. I agree with Hyland J. that this applies by analogy to a court deciding whether "special circumstances …justify an extension". 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.

75. This reflects the principle enunciated by Finlay Geoghehan J. in 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 good reason to renew 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.

77. At the level of principle a question also arises as to whether inadvertence on the part of a plaintiff or their solicitors can ever amount to or be relied upon as a special circumstance. As far as a plaintiff is concerned this is very fact dependant and it is probably not helpful to speculate in a vacuum. As far as legal advisors are concerned in my view inadvertence or inattention, for example in effecting service of the summons, will rarely constitute "special circumstances". Legal advisors must be taken to be aware of the twelve month time limit for service of the original summons, and the consequences of allowing it to lapse. Peart J., in the context of "good reason", in Moynihan v. Dairygold Co-operative Society Limited [2006] IEHC 318, said –

> *"38 …This is an opportunity to give a timely warning to 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." If inadvertence of this nature would not reach the threshold of "good reason" it is even more unlikely to amount to "special circumstance".*

78. Finally, provided the trial judge is satisfied that "special circumstances" exist, the jurisdiction to grant leave to renew is discretionary. It follows from that that this court, in

reviewing a decision to renew a summons, should afford the trial judge a margin of appreciation and 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."

36. Also of relevance are the dicta of Noonan J. in *Nolan v. Board of Management of St. Mary's Diocesan School* [2022] IECA 10, wherein he said as follows:

"25. Counsel for the plaintiff submitted that this meant that whether a special circumstance existed was to be considered in tandem with the question of prejudice, there being no second limb to the test, and that the law had "moved on" since Chambers was decided. In my judgment, this is incorrect and a misinterpretation of Murphy. Haughton J. recognised that special circumstances alone are not enough and placed emphasis on the requirement for those circumstances to justify extension. His reference to there not being a second tier or limb to the test refers to the fact that special circumstances and the justification for renewal are not two separate and distinct matters, but fall to considered together in the analysis of whether it is in the interest of justice to renew the summons. Prejudice is a component of that analysis.

26. However, before that analysis can be arrived at, it must be established that there are special circumstances. This follows from the court's approval of the Chambers approach and accords with common sense. The plaintiff's contention that the court is required to consider prejudice from the outset is to put the cart before the horse and would lead to a result diametrically opposed to the clear intent of the new rule."

37. 36. In relation to differing periods of delay in cases regarding the renewal of a summons, Hyland J. made the following distinction in *Brereton v. National Maternity Hospital & Ors* [2020] IEHC 172 at para. 31:

"The application to renew the Summons was made on 28 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 opened before the court, given a spectrum of delay ranging from extreme (see for example Moynihan – elapse of 2 years 2 months from the expiry of the twelve month period, or Moloney v. Lacey Building & Civil Engineering Ltd. & Ors. [2010] IEHC 8 – elapse of 5 years 4 months from the expiry of the twelve month period) to moderate (Roche v. Clayton [1998] 1 IR 596 – elapse of 6 months from expiry of the twelve month period or Allergen – elapse of 10 months from expiry of the twelve 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."

Submissions.

Conditional Appearance.

38. Counsel for the plaintiff, Mr. William Abrahamson SC, raised a preliminary issue in his submissions, to the effect that the defendant had entered an unconditional appearance in this matter, which precluded it from raising any issues concerning service of the summons.

39. He pointed out that the appearance entered by the defendant indicated that when the defendant entered an appearance on 22nd July 2022, although it purported to be conditional, based on a challenge to service of the summons; what it had actually done was to enter an appearance in the normal way. In that regard, counsel relied on the decision of the Court of Appeal in *Lawless v. Beacon Hospital & Ors* [2019] IECA 256 as support for the proposition that it was not permissible under the rules to enter a condition appearance "under protest" and that entry of an appearance cured any defects in serve. It was submitted that if the defendant wanted to contest renewal of the summons, its avenue of redress, was an application under O. 8, r. 2, prior to the entry of its appearance.

40. In response to this point, Mr. Frederick Gilligan BL, on behalf of the defendant, referred to the case of *Kearns v. Evenson* [2020] IEHC 257, which post-dated the decision in *Lawless.* At para. 25 of that judgment, Sanfey J. had noted the existence of a practice of entering conditional appearances for the purposes of contesting jurisdiction pursuant to O. 12, r. 26.

41. Counsel submitted that there appeared to be some tension between the *Lawless* decision and the *Kearns v. Evenson* decision. However, it was submitted that *Lawless* could be distinguished from this case as the appearance was entered in that case "under protest", whereas the defendant here had specifically entered an appearance "without prejudice to any application that may be brought to set aside the renewal of the summons". It was submitted that the *Kearns* decision was the more relevant case to the appearance as entered by the defendant here, and should be followed by this court in allowing the motion to proceed.

Defendant's Submissions on 'Special Circumstances'.

42. Counsel for the defendant, in moving the substance of the motion, submitted that the reasons outlined by the plaintiff in explaining why the personal injury summons was not served within the relevant time period, did not amount to "special circumstances" within the meaning of the rules.

43. First, counsel submitted that the plaintiff could not rely on the lack of expert reports in their possession as a special circumstance to justify non-service of the summons on the defendant. In that regard, counsel relied on *Murphy v. HSE* and also on a decision of this court in *Ward v. Harmony Row Financial Services Ltd & Anor* [2021] IEHC 656.

44. Secondly, counsel outlined that the fact that the plaintiff was engaged in a multiplicity of actions against the defendant, did not obviate their obligation under O. 8 to serve the summons within 12 months. It was submitted that each case must rest on its own facts, relying on the decision in *Ward v. Harmony Row*.

45. Counsel then submitted that the maternity leave, sick leave and Covid-19 pandemic issues, were not relevant to the failure to serve the summons within time, as the former partner had retired in January 2021 and the solicitor, who took over the file, had not gone on maternity leave until roughly November 2021. Counsel highlighted that the plaintiff's solicitor had had 11 months to hand over files and ensure that the summons was served. Further, counsel pointed out that while sick leave may be somewhat unexpected for a solicitors' firm, maternity leave was not. It was submitted that the firm had ample time to prepare for a handover from the solicitor going on maternity leave in November 2021, such that the maternity leave of the solicitor handling the file, could not constitute a special circumstance under the rules.

46. Counsel also relied on the correspondence that passed between the parties, beginning with an email from the plaintiff's solicitors on 28th October, 2021, confirming the authority of the defendant's solicitor to accept service of the summons. Counsel stated that this exchange of correspondence showed that the case was 'live' at that point in time; when there was still 6 months on the clock to serve the summons, at that stage.

47. Counsel submitted that the Covid-19 pandemic could not be relied on by the plaintiff where service was readily possible, due to the adaptions of the legal world from May 2020 onwards. Counsel submitted that after May 2020, the pandemic was not a fact 'beyond the ordinary and usual', which meant that it could not be considered a special circumstance. In that regard, counsel relied on the decision of Hyland J. in *Brady v. Byrne & Anor* [2021] IEHC 778.

48. Counsel submitted that it was not possible to criticise the defendant's solicitor for the email of 2nd November 2021, confirming that they had authority to accept service of the summons on behalf of the defendant, not having been brought to the attention of the correct solicitor dealing within the plaintiff's solicitor's firm. The response had simply been sent back to the address from which the initial email had come. Counsel submitted that if that response has been lost, that was entirely the fault of the plaintiff's solicitor's inadvertence.

49. In that regard, counsel submitted that inadvertence on the part of a solicitor, could not constitute a special circumstance justifying renewal of the summons: *Downes v. TLC Nursing Home Ltd* [2020] IEHC 465; *Nolan v. Trustees of Bridge United AFC & Anor* [2021] IEHC 335.

50. Counsel for the defendant stated that, although the plaintiff may argue that the cumulative effect of all these matters was sufficient to constitute special circumstances justifying renewal of the summons; it was submitted that the cumulative effect was only the sum of its parts, and those parts did not stand up to individual scrutiny. He submitted that if none of the points could constitute a special circumstance justifying renewal on their own, their cumulative effect could not justify renewal either. He submitted that if the parts of the argument were weak individually, the cumulative effect argument fell away.

51. Finally, counsel submitted that the defendant would be prevented from raising the Statute of Limitations in its defence if the plaintiff was successful in having its summons renewed. Counsel submitted that the Statute must be available for both sides in the litigation to plead, relying on the judgment of Faherty J. in *Chandler v. Minister for Defence & Ors* [2022] IECA 132 in that regard.

Plaintiff's Submissions on 'Special Circumstances'.

52. Mr. Abrahamson SC, for the plaintiff, submitted that the critical factor in this case was the mere 10 days between the lapse of the time limit for service of the summons within time, and the issuing of the *ex parte* docket seeking its renewal. He argued that that time must be considered *de minimis*, and the averments in the affidavits of Ms. O'Driscoll should be considered in that light.

53. It was submitted that a 10-day delay could be justified by the 'perfect storm' of circumstances set out by Ms. O'Driscoll in her affidavits. He relied on the judgment of Hyland J. in *Brereton v. National Maternity Hospital*, wherein the learned judge had drawn a distinction between extreme delay and moderate delay: see para. 31. Hyland J. indicated that much shorter periods of delay are treated differently in the context of these applications, favouring renewal rather than refusal.

54. It was submitted that the defendant had not pointed to any prejudice that it would suffer if renewal of the summons was not set aside; except for the point made in relation to the Statute of Limitations. It was submitted that this point was irrelevant in the context.

55. Counsel pointed to the 4 years and 9 months delay that had occurred in the *Ward v. Harmony Row* case, wherein this court had indicated that inadvertence could not constitute a special circumstance by which to allow the renewal of a summons. Counsel submitted that the inadvertence in this case, being the handover of the documents, sick leave and maternity leave, would not be of a sufficient nature to justify the renewal of a summons which had not been served for 4 years and 9 months, but that it was sufficient to justify the renewal where the delay had been merely 10 days.

56. In relation to the cumulative effect of the circumstances, it was submitted that there appeared to be some divergence in the approaches taken by the Court of Appeal. It was submitted that Haughton J. in *Murphy v. HSE* had indicated that the balance of justice should be considered with the special circumstances, considering all such matters as a whole, in reaching a decision. It was submitted that Noonan J. in the case of *Nolan v. Board of Management of St. Mary's Diocesan School*, suggested that there must exist some special circumstances to justify renewal, before the court embarks on an analysis of the balance of justice.

57. It was submitted that the approach of Haughton J. ought to be preferred, considering the special circumstances and the balance of justice cumulatively, as one analysis, to arrive at a decision. Counsel submitted that when this analysis was undertaken in this case, it was clear that the special circumstances outlined by Ms. O'Driscoll, justified the very short period of delay, being 10 days, and weighed the balance of justice in favour of renewing the summons.

Conclusions.

58. The first issue which the court must determine is the point made by Mr. Abrahamson SC that the defendant was effectively estopped from bringing this application, due to the fact that it had entered a conditional appearance when the renewed summons was served upon it.

59. It was submitted that there was no provision under the rules of court for entry of a conditional appearance, save in certain specified cases e.g. under order 11A of the rules, where a defendant wished to contest the issue of jurisdiction in a matter covered by the Brussels Recast provisions. It was submitted that it was for this very reason, that O. 8, r. 2 provided that prior to entering an appearance, a defendant could bring an application seeking to set aside the renewal of a summons that had been served upon it. It was submitted that that avenue of redress, was the only way in which a defendant could validly challenge the renewal of the summons.

60. It was submitted that if a defendant entered an appearance to the renewed summons, even an appearance which purported to be a conditional appearance, that appearance would be treated as being unconditional in nature and would therefore cure any defect in the service of the originating document on the defendant. In support of that submission, counsel relied heavily on the decision of the Court of Appeal, delivered on 15th October, 2019, in *Lawless v. Beacon Hospital* [2019] IECA 256.

61. It was submitted that in the *Lawless* case, it had been clearly stated that there was no provision in the rules for entry of an appearance "under protest" in order to preserve any entitlement to contest the validity of service at some later stage. The court had held that it was clear from the rules that if the defendant claimed that the service upon him of proceedings was in some way invalid; then, before entering an appearance, the defendant must bring an application by way of notice of motion under O. 12, r. 26 RSC to have service set aside. The court further held that if a defendant entered an appearance, the effect thereof was to waive any objection to the manner in which service had been effected and to cure any such defect (see para 13).

62. In particular, counsel relied on the following dicta from the judgment of Peart J. at paragraph 47:

> *"I have addressed the appeal on its merits and on the basis of the grounds argued, but I wish to add some further remarks since for the reasons I will come to, it is my view that no application to renew the personal injury summons in this case needed to be brought in the first place once the respondents had entered what can only be regarded as an unconditional appearance. The fact that the respondents' solicitor intended to reserve their position so as to contest the validity of service by intimating in correspondence that they were entering an appearance "under protest" does not mean that the appearance in fact entered was in any way conditioned. It was not. The only appearance that could have been entered, and in fact was entered, was an unconditional appearance, and one accordingly that cured any defect in service occasioned by the failure to have obtained an order renewing the summons under O. 8, r.1 RSC."*

63. The decision in *Lawless* was followed by McGrath J. in a judgment delivered on 2 April 2020 in *AIB v. O'Driscoll* [2020] IEHC 253. Having summarised the findings in the *Lawless* case at para. 37, McGrath J. went on to state as follows at paras. 48 and 49:

> *"48. In Lalwess [sic], Peart J. did not agree the defendants were not under any obligation to bring an application under O. 12, r. 26 RSC where they wished to question the validity of*

the service of proceedings outside the period of 12 months from date of service absent a renewal order. He stated that they ought to have done so, as stated already, and prior to the entry of an appearance as specified by the rule.

49. To adopt and adapt dicta of Feeney J. in Bingham, it seems to me that if the court is obliged to give effect and meaning to the wording of O. 8, r. 1, it must equally give effect to the meaning and wording of O. 8, r. 2, as interpreted by Peart J. That rule has thus been interpreted as meaning that a defendant who wishes to make application to set aside a summons which has been renewed on an ex parte application must do so before entering the appearance. On the face of it, therefore, the entry of appearance cures any defect or irregularity in service."

64. Counsel also referred to the decision in *Bank of Ireland v. Roarty* [2017] IEHC 789 as authority for the proposition that it was not possible to enter a conditional appearance, save as specifically provided for under the rules: see paragraph 19 of the judgment.

65. In response to that argument, Mr. Gilligan BL relied on the decision in *Kearns v. Evenson* [2020] IEHC 257. In a judgment delivered on 14th May, 2020, Sanfey J. noted that a practice had developed whereby the courts had recognised the entry of conditional appearances by defendants. He noted that the entry of such conditional appearances had been recognised in *Fox v. Taher* (Unreported, High Court, Costello J., 24th January 1996); in *Minister for Agriculture v. Alte Leipziger AG* [2000] 4 IR 32; and in *Kutchera v. Buckingham International Holdings* [1998] IR 61. Having referred to those authorities, the learned judge came to the following conclusion at paragraph 27:

"*Thus it would appear that the manner in which the defendant has brought the present application before this Court, while not according strictly with the terms of Ord.12 r.26, adheres to a practice which is established and has been recognised by the courts in this jurisdiction. The wording in the memorandum of conditional appearance in the present case makes it clear that the appearance is entered "strictly without prejudice to any application to contest jurisdiction which may subsequently be brought". This seems to me to be sufficiently conditional to make it clear that there is no acceptance of or acquiescence to the jurisdiction of this court by the defendant, save as will enable it to make an application to court to contest jurisdiction or, in this case, to apply to set aside service of the proceedings*."

66. Having considered these authorities, I am satisfied that while the *Lawless* case may seem at first sight, as being a clear statement that it is not possible to enter conditional appearances, when one looks at the judgment in more detail, such a conclusion is far from clear. There are a

number of features in the case which would cause one to doubt whether Peart J. was in fact laying down such a hard and fast rule.

67. First, while the defendant had attempted to enter the appearance under protest and indeed, had written in correspondence that they were so doing, it appeared that for whatever reason, the appearance that was actually entered did not appear to be conditional on its face, because the words "under protest" had been struck out prior to the filing of the appearance in the central office. Secondly, after service of the summons on the defendants, but prior to any renewal thereof, the defendants had participated in the action by service of a notice for particulars and subsequently by consenting (albeit on certain terms) to an amendment of the personal injury summons. Thirdly, while Peart J. referred in paragraph 13 of the judgment to a dictum of Walsh J. in *Baulk v. Irish National Insurance Company Limited* [1969] IR 66, at p. 71, it was clear that that dictum referred to the entry of a non-conditional appearance, because it stated as follows "*if (the summons) had been served after that period and a non-conditional appearance had been entered, the appearance would have cured the defect in service*".

68. Fourthly, it is clear from a reading of the entirety of the judgment, that the Court of Appeal did not decide the appeal on the appearance point. Indeed, having examined the merits of the case, they held that there were "good reasons" for the delay in serving the summons, as required under the previous iteration of O.8, r.1.The court allowed the appeal against the refusal by the High Court to renew the summons. Thus, it can be plausibly argued that the *dicta* of Peart J. on the entry of appearance issue, are *obiter dicta*. Indeed, the finding of the court in favour of renewing the summons, means that they must have been *obiter*. Accordingly, they are not binding on this court.

69. Thus, it appears to me that the decision of the Court of Appeal in the *Lawless* case does not rule out the entry of a conditional appearance by a defendant for the purpose of contesting either jurisdiction, or the service of the summons upon it. Insofar as there is a conflict on the authorities between the *Lawless* case and the decision in *AIB v. O'Driscoll*, on the one hand; and the decision in *Kearns v. Evenson*, on the other hand; I find the reasoning in the *Kearns* case to be the more persuasive, based as it is on established practice, as recognised in previous decisions of the Supreme Court.

70. While there may not be a general provision in the rules for the entry of a conditional appearance by a defendant, I am satisfied that where a practice has developed of permitting such appearances to be entered, it would be contrary to the principles of fairness and justice, to hold that a defendant, who enters such a conditional appearance, should be deemed thereby to be estopped

from raising any objection to service of the summons upon them and be held to have acquiesced in the service of the summons upon them, when that was the very thing that they were objecting to. It would be absurd to hold that a party who had clearly entered a conditional appearance under protest, should be held to have entered an unconditional appearance and thereby remove any objection that they may have had, to service of the proceedings upon them.

71. One is mindful of the dictum of Barrett J. in *Bank of Scotland plc v. McDermott* [2017] IEHC 77, where at para 11, he referred to "*The oft quoted maxim that 'the rules of court are the servants of justice, not her master'*".

72. I hold that notwithstanding that there was a procedure provided to the defendant to contest the renewal of the summons pursuant to an application under O.8, r. 2; that did not prevent the entry of a conditional appearance on behalf of the defendant. Accordingly, I hold that the defendant is not estopped from bringing the present application, due to the fact that it purported to enter a conditional appearance, when the renewed summons was served upon it.

73. Turning to the substantive issue of the renewal of the summons, I am satisfied that the defendant's application to have the renewal of the summons set aside, should be refused.

74. At the outset, I accept the submission of counsel for the plaintiff that the application must be considered in light of the *de minimis* delay of 10 days, from the expiry of the period within which the summons could be served. There is a distinction in the caselaw between extreme delay and moderate delay. Hyland J., in *Brereton v. National Maternity Hospital*, indicated that the length of the delay must alter the approach to be taken by the court to the circumstances.

75. In *Brereton*, the learned judge considered a delay of 10 weeks to be a relatively short period in the context of a 12-month period within which to serve the summons. In this case, the delay is merely 10 days, which must be considered *de minimis*. The solicitors for the plaintiff acted expeditiously in bringing a motion to renew the summons, once they realised that the summons had not been served within time.

76. Although counsel for the plaintiff submitted that there was some divergence in the approach to be taken to the analysis of 'special circumstances' and the balance of justice in applications for renewal of a summons, it is noteworthy that Noonan J. in *Nolan v. Board of Management of St. Mary's Diocesan School* considered himself to be following the *dicta* of Haughton J. in *Murphy v. HSE* (see paras. 24-26). The court is satisfied that the correct approach to be taken is to identify the special circumstances, and move to consider the special circumstances in light of the balance of justice between the parties, as one point of analysis.

77. I am satisfied that the difficulties as incurred by the solicitors for the plaintiff, being the several absences of staff on sick leave and for other reasons, during the relevant period, amount to sufficiently special circumstances to justify renewal of the summons. Ms. O'Driscoll averred at para. 8 of her affidavit that between 1st May, 2021 and 31st December, 2021, 133 staff days were lost in her firm due to illness. She averred that a further 85 days were lost from 1st January, 2022 to 1st June, 2022. The court views these averments as significant, detailing the somewhat chaotic nature of the firm in the time period in which the summons ought to have been served. Although some of the absences would have been foreseeable, being the retirement and the maternity leave, I am of the view that, along with the unforeseeable absences due to Covid-19 and other illnesses, they constitute special circumstances when taken cumulatively in light of the very short period of delay.

78. It is clear from the affidavit sworn by Ms. O'Driscoll, that the plaintiff's solicitor inadvertently failed to serve the summons within time. That was not due to mere inadvertence, but was due to inadvertence caused by a "perfect storm" of factors that occurred both within the firm and in the country at large at that time. The court is entitled to have regard to that excuse for the inadvertence that occurred on the part of the plaintiff's solicitors to serve the summons within time.

79. While it is correct that in the *Ward* and *Nolan* cases, this court stated that the mere inadvertence on the part of a party's solicitor to serve the summons within time, would not constitute special circumstances justifying the renewal of the summons: those statements are in accordance with the judgment of the Court of Appeal in the *Murphy* case, see in particular para. 77 of the judgment. In the *Nolan* case the court specifically noted that where inadvertence was due to other circumstances that are in themselves special or unusual, in such circumstances the inadvertence might amount to 'special circumstances' justifying the renewal of the summons. The court gave as examples of circumstances which would justify the inadvertence: the fact that the plaintiff's solicitor may have been involved in a serious accident; or if a member of the plaintiff's family were involved in a serious accident either at home or abroad; or where the solicitor's office was subjected to some form of calamity, such as a fire or flood. Thus, while it is correct to say that mere inadvertence by a plaintiff's solicitor will rarely constitute a special circumstance, there may be reasons which excuse the inadvertence, thereby rendering it a special circumstance within the meaning of the rule.

80. One must also have regard to how quickly the plaintiff's solicitor acted in seeking to have the summons renewed. In the *Brereton* case, this factor was considered, inter alia, as being a special circumstance by Hyland J. (see paragraph 31).

81. Further, the defendant was on clear notice of the claim as early as November 2020, as the PIAB authorisation would have been sent to them, as well as to the plaintiff. Further, the defendant was informed of the proceedings in November 2021, when the plaintiff's solicitor emailed the defendant's solicitor seeking confirmation they were authorised to accept service of the proceedings and the defendant's solicitor replied stating that she did have the required authority. Therefore, the defendant knew of the existence of the action and did not suffer any prejudice of foot of late service of the proceedings upon it.

82. Unfortunately, the email confirming the authority to accept service of proceedings, went astray. I make no criticism of the defendant that the said email did not find the correct inbox in the plaintiff's solicitor's firm. That was a matter entirely within the control of the plaintiff, with the defendant having replied to the email addresses from which the original email had come.

83. However, coupled with the other 37 claims against the defendant of a similar nature, and notwithstanding that this did not relieve the plaintiff of her obligation to serve the summons within time; I am satisfied that these factors indicate that the defendant was on clear notice of at least the broad nature of the claim being made against it. This factor weighs in favour of allowing the renewal of the summons; particularly, in light of the fact that the defendant has not suffered any material prejudice, due to the delay in service of the summons for a period of 10 days.

84. In considering the balance of justice, it is difficult to see how a delay of 10 days could prejudice the defendant at all, in its defence of the action. The defendant has not pointed to any specific prejudice that it may suffer in defending the proceedings against it, due to the delay of 10 days in serving the summons. I am satisfied that the defendant's argument that it would be in a much stronger position to plead the Statute of Limitations were the summons not renewed, is a factor which ought to cause the court to lean in favour of renewing the summons, because it is clear that the plaintiff will suffer enormous hardship if her summons is not renewed, because her action against the defendant will be statute-barred.

85. I am satisfied that, although the circumstances in this case would not amount to special circumstances justifying a much longer period of delay in another action, they are sufficient to justify the renewal of a summons, wherein the delay is *de minimis*, being merely 10 days, and where the defendant will suffer no material prejudice in its defence of the claim.

86. I am satisfied that taken cumulatively: the factors which adversely affected the operation of the plaintiff's solicitors' firm, as referred to by Ms. O'Driscoll in her affidavits; the very short period of delay in having the summons renewed; and the absence of any prejudice having been suffered

by the defendant in the conduct of its defence due to such delay; constitute special circumstances which justified the renewal of the plaintiff's personal injury summons. Accordingly, I refuse the defendant's application to set aside the renewal of the plaintiff's summons.

87. As this judgment is being delivered electronically, the parties shall have two weeks within which to furnish brief written submissions on the terms of the final orders that should be made and on costs and on any other matters that may arise.

88. The matter will be listed for mention at 10.30 hours on 19th May, 2023, for the purpose of making final orders.