

**THE HIGH COURT**

[2021] IEHC 656

**[Record No. 2014/666 P]**

**BETWEEN**

**DOMINIC WARD**

**PLAINTIFF**

**AND**

**HARMONY ROW FINANCIAL SERVICES LIMITED AND INDEPENDENT TRUSTEE  
COMPANY LIMITED**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Barr delivered electronically on the 16th day of September  
2021**

**Introduction**

1. The plenary summons in this action was issued on 21st January, 2014. The period within which it could have been served expired on 20th January, 2015. On 21st October, 2019, the plaintiff obtained an order from the High Court renewing the summons for a further period of three months.
2. This is an application brought by the defendants pursuant to O. 8, r. 2 of the Rules of the Superior Courts seeking to set aside the renewal of the plenary summons herein.

**Background to the proceedings.**

3. In the period 2004 to 2008 the second defendant carried out the role of administrator of the plaintiff's private pension fund.
4. In October 2007, the first defendant was appointed as adviser to the fund. In January 2008, the first defendant produced a detailed report on the plaintiff's financial circumstances, in which it advised in relation to the funding of his future retirement. That report was titled "The Pathway to Financial Freedom". In that report the first defendant recommended that certain investments should be made by the plaintiff with a view to funding his retirement.
5. The plaintiff borrowed money and invested some of his own money in a number of financial instruments and products in 2008, which had been recommended by the first defendant. These investments matured in or about 2013.
6. The plaintiff incurred heavy losses on his investments.
7. In very broad terms, the plaintiff's claim against the defendants can be summarised as follows: -
  - (i) Having regard to his personal and financial circumstances and his chosen risk profile of low/medium risk, the defendants acted negligently and in breach of contract and in breach of duty, in advising him to borrow and invest in the various investments and products;
  - (ii) while the plaintiff was aware that the defendants were connected, he was not aware of the level of connection between them and, in particular, that they stood to

make large profits by virtue of the plaintiff accepting the advice of the first defendant to invest in products marketed by the second defendant;

(iii) that in persuading the plaintiff to invest in these products, the defendants, their servants or agents, made a number of negligent misrepresentations to him, as to the nature of the proposed investments. It was pleaded that as a result of all of these matters, the plaintiff was caused to make investments, which ultimately led to him suffering a severe financial loss.

8. None of these matters were before Meenan J when he renewed the plenary summons on 21st October, 2019, as the statement of claim was only served on the defendants on 21st January, 2021.

**Chronology of relevant dates in the action.**

21st January, 2014	Plenary summons issued.
20th January, 2015	Expiry of period for service of plenary summons.
11th October, 2019	<i>Ex parte</i> motion docket issued seeking renewal of plenary summons, based on an affidavit sworn by the plaintiff on 7th October, 2019. The application was returnable for 14th October, 2019.
21st October, 2019	Order of Meenan J renewing plenary summons, due to the fact that there was a " <i>complex background</i> " to the proceedings.
15th January, 2020	Service of plenary summons on 2nd defendant.
8th May, 2020	Defendants issue present motion based on affidavit sworn by Mr. Tommy Nielsen on 23rd March, 2020.
6th July, 2020	Plaintiff's replying affidavit.
19th January, 2021	Responding affidavit from Mr. Nielsen.

21st January, 2021	Plaintiff delivers statement of claim.
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**Submissions on behalf of the defendants.**

9. On behalf of the defendants, it was submitted by Mr. Donogh Hardiman BL that, while the case was a commercial case, which involved an allegation of negligence on the part of the advisers to the plaintiff's private retirement fund, it was not an overly complex case. It was submitted that it was not a professional negligence action in the usual sense, which would have required expert evidence prior to service of the plenary summons. It was submitted that it was simply a case against two companies in relation to financial advice given and received in respect of certain investments.
10. It was submitted that there was no evidence tendered by the plaintiff that he had received advice from counsel that it was necessary to have expert evidence before proceeding to serve the summons. Even if such evidence was deemed by the court to be necessary, there was no evidence before the court in relation to any efforts that had been made by the plaintiff's previous solicitor to obtain the necessary expert evidence, nor that such expert evidence had ever in fact been given prior to the application to renew the summons, or prior to service of it in January 2020.
11. Counsel submitted that there was a difference between needing expert evidence to institute proceedings, which would be necessary where one was alleging professional negligence, for example against a doctor, and the requirement to have expert evidence to bring a case to a successful conclusion at the trial of the action. It was submitted that this case fell into the second category. There was no reason why the plaintiff, or his solicitor could not have served the plenary summons and proceeded then to obtain whatever expert evidence he required to draft the statement of claim and bring the matter on for hearing. It was submitted that in these circumstances, there was no substance to the assertion that had been made by the plaintiff at the hearing before Meenan J, that he could not serve the plenary summons herein due to some unspecified difficulty in obtaining expert financial evidence.
12. Counsel submitted that in the order of the High Court made on 21st October, 2019 renewing the summons the special circumstances which justified the making of the order were stated as follows: -

*"In circumstances where there is a complex background to the proceedings herein".*

Counsel submitted that the fact that the plaintiff's case may have been one of a number of similar cases that were being handled by the plaintiff's previous solicitor, was not relevant to the issue of whether the summons, once issued, should have been served on the defendants.
13. Counsel pointed out that in the affidavit sworn on behalf of the defendants by Mr. Tommy Nielsen on 19th January, 2021, that of the twenty-five actions that had issued against the

defendants and which were being handled by the plaintiff's former solicitors, fourteen out of the twenty-five sets of proceedings had either been struck out, or had been discontinued. In fifteen sets of proceedings, Messrs Coleman Legal Partners had successfully applied to come off record; in only two of the cases had a statement of claim been delivered. Counsel submitted that the institution of a large number of proceedings by the same firm of solicitors arising out of broadly similar circumstances, did not justify the failure to serve the summons herein for a period in excess of five years. He pointed out that they had served summonses in the other cases without difficulty.

14. Counsel submitted that even if the court were to hold that there was certain complexity in the matter due to the number of cases which were being proceeded with simultaneously, that of itself did not prevent service of the summons, which was a very easy step to take, as it involved service on two companies registered in this jurisdiction. Therefore, the summons could have been served by simply posting it to the registered offices of the defendants.
15. It was submitted that in this case there had been extreme delay in that the application to renew the summons had not been brought until four years and nine months after the expiry of the period within which the summons could have been served under the provisions of the rules. Thus, it was at the very extreme end of the spectrum of delay. It was submitted that the court should not tolerate prolonged delay in the absence of very special circumstances: *Brereton v. Governors of the National Maternity Hospital* [2020] IEHC 172.
16. It was submitted that the fact that the plaintiff's action against the defendants would be statute barred if the summons herein was not renewed, could not in itself constitute a special circumstance justifying renewal of the summons: *Maloney and Maloney v. Lacey Building and Civil Engineering Limited & Ors.* [2010] IEHC 8; *Murphy v. HSE* [2021] IECA 3.
17. Counsel submitted that having regard to the very lengthy delay that had occurred on the part of the plaintiff in bringing the application to renew the summons and in ultimately serving same on the second defendant in January 2020, the second defendant had been prejudiced in its ability to defend itself at the trial of the action. It was submitted that, as had been averred to by Mr. Nielsen in his affidavits, the first defendant had ceased trading in 2009, when it had merged with the second defendant. More importantly, the person who had dealt with the plaintiff from the Maynooth office of the first named defendant had ceased to work for the company. It was submitted that if the summons were renewed at this stage, the action would probably not come on for hearing until the end of 2022, or 2023 at the earliest, which would entail the relevant witness, Mr. Walker, having to recall advices that he gave to the plaintiff in 2007/2008. It was submitted that in these circumstances his ability to recall precise dates and precise conversations that he had had with the plaintiff, would be adversely affected by the extreme delay. As such, it was submitted that the defendants had suffered significant prejudice due to the delay on the part of the plaintiff herein.

18. Finally, it was submitted that insofar as the plaintiff had referred to certain emails which passed between the parties in or about 2015, in relation to transfer of his remaining funds and the requirement that he provide a certificate of discharge, and subsequently, a request that he discontinue the proceedings against the defendants; that did not indicate a high level of knowledge on the part of the defendants as to the substance of his claim, as Mr. Nielsen had stated in his affidavit that he was only aware of the existence of the proceedings from a search that he had done of the Courts Service website. Thus, it was submitted that this was not a case where the defendants were at all times aware of the existence or substance of the plaintiff's claim against them, notwithstanding the fact that the plenary summons had not been served upon them.
19. It was submitted that having regard to all of the circumstances of the case, the plaintiff had not established special circumstances which would justify the renewal of the summons in October, 2019, some five years and nine months after it had issued.

**Submissions on behalf of the plaintiff.**

20. On behalf of the plaintiff, Mr. Jarlath Ryan BL accepted that the hearing before the court was a *de novo* hearing of the application to renew the summons. He further accepted the dicta contained in the *Murphy v. HSE* case that the plaintiff had to establish that there were "special circumstances" which justified the renewal of the summons. While that did not raise the bar to "extraordinary", it nonetheless suggested that some fact or circumstance that was beyond the ordinary or the usual, needed to be present.
21. Counsel submitted that it was clear from the *Murphy* case, that the court should take all of the relevant facts into consideration when considering whether there were special circumstances which would justify the renewal of the summons.
22. It was submitted that in this case, the special circumstances which had been identified in the order of the High Court related to the "*complex background*" to the litigation. It was submitted that the litigation was complex in two respects: Firstly, the substantive matter was complex, because it involved complex financial investments and the advice thereon that had been furnished to the plaintiff by the defendants. This involved an in- depth analysis of his risk profile and an analysis of the products that were actually advised as being suitable for him. This required that the plaintiff had to obtain expert financial evidence before he could mount the claim against the defendants.
23. It was submitted that in effect, this was a professional negligence action against the defendants and as such, the requirements of the Bar Council, code of conduct and the dicta in *Reidy v. National Maternity Hospital (Unreported High Court, 31st July, 1997)* applied, wherein it was necessary for the plaintiff to obtain the necessary expert evidence prior to serving the plenary summons.
24. The second aspect of complexity, lay in the fact that this case was one of a number of cases being brought by investors against the defendants. There were approximately thirty such cases being handled by the plaintiff's former solicitors. Given the complexity and volume of this litigation, efforts had been made to reach agreement that a "pathfinder" or

“test” case would be brought, whereby one set of proceedings would be chosen to determine the liability aspects common to all the actions. That issue was considered over a protracted period, until ultimately the defendants refused to allow one test case to determine liability in all the cases. It was submitted that it was reasonable for the plaintiff to hold off serving the plenary summons until that issue had been determined.

25. It was submitted that the court was entitled to have regard to the complexity of the litigation itself and its place in the overall scheme of litigation and having regard to these matters, it had been open to the court on the *ex parte* application and again on this application, to come to the conclusion that given the complexity in the matter, this constituted special circumstances justifying the renewal of the summons in October 2019.
26. It was submitted that the court could have regard to a number of other matters when reaching its overall determination as to whether there were special circumstances justifying the renewal of the summons. In particular, it was submitted that the court could have regard to the fact that, while the defendants did not have specific knowledge of the plaintiff’s action, as there had been no pre-litigation correspondence, nor had the summons been served on them, they had an intimate knowledge of the substance of his claim, as it was identical to the other claims in which summonses had been issued and served on the defendants. It was submitted that the only differences between that litigation and the present action, concerned the identity of the investors and the amounts that they invested in each of the investments.
27. Counsel submitted that having regard to the fact that the defendants were facing something in the order of thirty claims arising out of the disastrous investments that they had promoted, they were not prejudiced by any late notification of the plaintiff’s claim, as it was broadly speaking identical to the claims being brought by the other investors. In this regard counsel referred to the decision in *Ahern v. Motor Insurers Bureau of Ireland* [2012] IEHC 351 and *Chambers v. Kenefick* [2007] 3 IR 526.
28. It was submitted that the defendants had failed to point to any specific prejudice that they would suffer if the summons were renewed and the action was to proceed to a hearing. It was submitted that this was effectively a documents case. It would turn on the advices that had been given in the initial investment report furnished by the first defendant in 2008 and the nature of the investments which had been advised to the plaintiff as being suitable for his risk profile and retirement needs. All of that would be determined on documentary evidence.
29. Insofar as the defendants had asserted that Mr. Walker was no longer employed by the first defendant, after its merger with the second defendant in 2009, they had not stated that he was unavailable to give evidence, or was otherwise incapable of remembering relevant material. It was submitted that in these circumstances given the nature of the cause of action in this case, it was not going to turn on *vive voce* evidence as to specific events that had occurred, such as in relation to a car accident, or other such incident; it was submitted that in the circumstances, there was no real prejudice to the defendants.

30. It was submitted that there would be significant prejudice to the plaintiff if the summons were not renewed, because his action against the defendants would be statute barred. This would mean that he would be left without any redress against the defendants arising out of the disastrous investments that he had made acting upon their advice. It was submitted that while the fact that an action may be statute barred if a summons were not renewed could not, of itself, constitute a special circumstance justifying the renewal of the summons, it was something that the court was entitled to take into account when considering the balance of justice in relation to the matter.
31. It was submitted that the court was also entitled to have regard to the illness of the plaintiff's former solicitor as deposed to in the plaintiff's grounding affidavit.
32. It was submitted that, taking all of these matters into account, as was required by the test set down in the *Murphy* case, there were grounds upon which the court should come to the conclusion that there were special circumstances justifying the renewal of the summons in this case.

### **Conclusions**

33. While the relevant provisions of the rules are well known, it will be useful to repeat the relevant provisions, which are O. 8, r. 1 (3) and (4):

*"(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."*

34. Order 8, r. 2 of the Rules provides that 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.
35. The principles which the court should adopt when considering whether there are special circumstances which justify a renewal of a summons were set down by the Court of Appeal in *Murphy v. HSE* [2021] IECA 3 at paras. 69-78 of the judgment delivered by Haughton J. The court has had regard to these principles when reaching its conclusion herein.
36. There are two preliminary matters on which the court needs to rule prior to coming to its conclusions on this application. It was argued by the defendants that the plaintiff was restricted to the special circumstances identified in the *ex parte* order. It was submitted that the plaintiff could not rely on any additional grounds set out in the subsequent affidavit sworn by the plaintiff, that were not identified in the grounding affidavit and were not accepted by the judge hearing the *ex parte* application as constituting the special circumstances which justified the renewal of the summons.

37. In this regard counsel referred to the dicta of Simons J in *Downes v. TLC Nursing Home Limited* [2020] IEHC 465, at para. 71: -

*"...It will be recalled that, under the revised version of Order 8, rule 1, the 'special circumstances' must be stated in the ex parte order. It must be doubtful, therefore, whether a plaintiff is entitled to put forward new grounds at an inter partes hearing under Order 8, rule 2."*

38. Counsel for the defendant further referred to the decision of Heslin J in *Altan Management (Galway) Limited v. Taylor Architects Limited* [2021] IEHC 218, where the learned judge had stated that there was a requirement for candour on the part of the plaintiff when making the *ex parte* application. In particular, the plaintiff was required to set out an accurate and comprehensive picture of the litigation and of the matters said to constitute special circumstances, which justified the renewal of the summons. He went on to state that the plaintiff would normally be restricted to the matters that he had raised at the *ex parte* hearing as constituting "special circumstances". That was articulated in the following way towards the end of para. 91: -

*"... Indeed, it is impossible to conceive of a situation where a plaintiff could deploy, at the inter partes hearing, 'ammunition' which they decided not to use at the ex parte application stage. That approach would involve being less than candid at the ex parte stage and any lack of candour must be deprecated. It seems to me that, as a matter of first principles, it would only be permissible for a plaintiff to proffer new grounds at the inter partes hearing if those new grounds were said to have arisen after the determination of the ex parte application."*

39. As a broad statement of principle, the court agrees with the submission made by counsel on behalf of the defendants. A plaintiff cannot advance new matters as constituting special circumstances on the application by a defendant to set aside the renewal of the summons.
40. However, the court is satisfied that in this case the reference to the "*complex background*" to the proceedings is sufficiently broad to encompass the various facts put forward by the plaintiff in his grounding affidavit as constituting special circumstances, being: the complexity of the cause of action itself; the need for expert financial evidence; the fact that the action was part of a number of similar cases being handled by the plaintiff's former solicitor and the illness of his former solicitor. Notwithstanding that these matters were not specifically referred to in the *ex parte* order, the court is satisfied that they are encompassed within the phrase "*complex background*" which is the stated special circumstance in the order.
41. The second area on which the court must give a preliminary ruling is in relation to the burden of proof. This is a somewhat difficult issue, although in practice I am not sure that it gives rise to any practical difference in how the court considers the issue before it.



42. The court is satisfied from the wording of O. 8 that at the *ex parte* stage the burden rests on the plaintiff to persuade the judge that there are special circumstances to justify the renewal of the summons.
43. On an application under O. 8, r. 2, the burden rests on the defendant to show why the order made renewing the summons, should be set aside. The burden rests on the defendant to show that there were not in fact special circumstances justifying the renewal of the summons. This is necessary because the defendant must be given an opportunity to be heard in relation to a significant application that affects his interests. The defendant may be able to point to additional facts, or arguments, or legal authorities, that were not opened to the judge at the *ex parte* application, which may persuade the judge hearing the application under O. 8, r. 2 to come to a different conclusion.
44. The hearing pursuant to the application under O. 8, r. 2 is, as described by Heslin J in the *Altan* case, a *de novo* hearing, but subject to the caveat that it is restricted to the analysis of the grounds stated in the *ex parte* order as constituting special circumstances justifying the renewal of the summons.
45. Turning to the substance of the application, the first thing that must be noted is that the delay in this case is at the extreme end of the scale. In the *Downes* case, Simons J pointed out that on an application to renew a summons, the plaintiff must explain not only the failure to serve the summons within the one year provided for under the rules, but must also explain the delay in the period after the expiry of that period and the date when the renewal application was actually made.
46. The court must approach the question within the prism that delay in litigation is no longer tolerated to the extent that may have been the case in the relatively recent past: see dicta of Hyland J in *Brereton v. the Governors of the National Maternity Hospital* [2020] IEHC 172, where the judge noted that the delay in that case had been a relatively short one, being ten weeks from the date upon which the summons expired. She went on to state that had the period of delay been longer, even by a month or two, her approach to the case would have been different.
47. That the extent of the delay is a factor to which regard must be had in determining whether special circumstances exist, was recognised by Heslin J in the *Altan* case, where he stated that delay on the part of a plaintiff, the extent of that delay, whether an explanation had been offered for that delay and the credibility of that explanation, were all factors which properly formed part of the court's consideration of whether there were special circumstances which justified an extension of the period within which to serve the summons.
48. It is against that background, that the court must look at the delay between 21st January, 2014, when the summons was issued, and 21st October, 2019, when the renewal application was first moved; a period of five years and nine months in total, and four years and nine months since the expiry of the period for service of the summons under the rules. By any reckoning this is a case of extreme delay.

49. The plaintiff's principal argument as to why the summons should be renewed, was that this was complex litigation, which required the input of an expert before it would have been appropriate to serve the plenary summons. He relied on the cases involving difficulties encountered by plaintiffs in obtaining medical liability reports in medical negligence cases, as an example of cases where the courts have recognised that in professional negligence actions, it is not appropriate for proceedings to be served until the plaintiff has a report from a suitably qualified expert to the effect that the plaintiff has an arguable case in negligence against the professional concerned.

50. The difficulty about that argument is that in this case there is just a bare assertion that the plaintiff needed expert evidence before he could serve the summons. At para. 17 of the plaintiff's grounding affidavit sworn on 7th October, 2019, he stated as follows: -

*"I say and believe that this complexity together with the difficulty in obtaining expert financial reports to do with the proposed litigation was the reason that the plenary summons herein was not served".*

51. That averment in relation to the need for expert evidence and the difficulty in obtaining same, is insufficient for two reasons. Firstly, this is not a professional negligence case *per se*, which needed an expert report prior to serving the summons. The reason for that requirement in both the code of conduct of the Bar Council and in cases such as *Reidy v. NMH*, is due to the fact that once proceedings are issued against a professional person, that of itself can have a very detrimental effect on their ability to carry on their livelihood. The fact that proceedings are served upon them, also places an obligation on them to inform their insurers, which can have adverse consequences for them pending the determination of the action. It is in these circumstances that it is thought appropriate that proceedings should not be served on a professional person, claiming damages for professional negligence, until the plaintiff is in possession of a report from an expert to the effect that he or she has a stateable cause of action against the professional concerned. Those considerations are not applicable where one is suing a company in relation to alleged negligent advice furnished by it. Accordingly, the court finds that it was not necessary for the plaintiff to obtain a report from a financial expert prior to serving the plenary summons on the defendants.

52. Even if the court is wrong in that conclusion, it is not sufficient to simply say that expert evidence was required and that that justified a delay of over five years in serving the summons that had already been issued.

53. It is necessary to show what efforts were made to obtain the expert evidence and to state when that evidence actually came to hand. It is clear from the case law that the plaintiff and his legal advisers must establish that they were reasonably active in trying to obtain the necessary expert evidence, where such is required prior to service of a summons. There was no evidence here of what efforts were made to obtain the expert evidence; nor as to when it was actually received. Thus, the court is not satisfied that even if it were necessary, the absence of such expert evidence has been established as a special circumstance in this case.

54. Furthermore, there is a difference between needing expert evidence to initiate professional negligence proceedings and requiring such evidence to bring a claim to a successful conclusion of the trial of the action. The fact that such evidence may be necessary to secure success at the trial, is not a basis for holding off serving the summons. This was clearly stated by Clarke J (as he then was) in the *Maloney* case where he stated as follows at para. 5.8: -

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

55. The court is not persuaded that the vague assertion of the need for expert evidence as made by the plaintiff herein, is sufficient to constitute a special circumstance justifying renewal of the summons some five years and nine months after it had issued.
56. The second main ground of complexity put forward by the plaintiff, was the fact that the plaintiff's action was one of a large number of similar actions being handled by the plaintiff's former solicitor. While it may well have been the case that initially the plaintiff's former solicitor was handling litigation for a number of dissatisfied investors, including the plaintiff, and while that may have provided certain logistical difficulties for the solicitor, it also provided certain savings, for example, an expert would only have had to examine the performance of the investment funds once, as that fact would be common to all the cases.
57. More importantly, the fact that the plaintiff's action may have been one of a number of similar actions, did not relieve the plaintiff or his solicitor, of the obligation of serving the plenary summons that had been issued. Each case stood on its own facts. The existence of the other actions, could not justify the plaintiff's former solicitor in holding off serving the summons in this case for over five years. It is also relevant that the solicitor was able to serve summonses in the other cases without difficulty. The plaintiff has not established any grounds why his action was unique, or even different from the other actions, such as to require the solicitor to hold off serving the summons in this case. Indeed, as shall be seen in relation to the prejudice issue, he has argued the exact opposite; namely that the plaintiff's case is identical to the cases in which summonses have already been served.
58. The plaintiff relied on the fact that a suggestion had been made by his former solicitor that a "pathfinder" or "test" case should be chosen to deal with liability in all of the cases. It was submitted that it was reasonable to await the outcome of that suggestion before serving the summons.

59. The court is of the view that this submission is not well founded for a number of reasons. Firstly, the suggestion in relation to a pathfinder case was made after the expiry of the period within which the summons could have been served under the rules. More importantly, the existence of that suggestion, did not prevent the summons being served. Indeed, the service of the summons may have strengthened the case being made by the former solicitor that there should be a pathfinder or test case, if the solicitor could have pointed to the plaintiff's case as having been added to the overall number of cases in which liability may have been resolved if a test case were agreed upon as determining liability in all of the cases.
60. The plaintiff also relied on the fact of the illness of his former solicitor as being something that should be taken into account when considering whether there were special circumstances justifying the failure to serve the summons. There was no evidence put forward of when the illness arose, nor as to the level of incapacity that resulted therefrom and, most importantly, there was no evidence that others in the firm could not have taken the simple and necessary step of serving the summons, or making the necessary application for its renewal. In the absence of such evidence, the court is not satisfied that this would constitute a special circumstance justifying renewal of the summons.
61. Insofar as there may be an oblique suggestion that there was inadvertence on the part of the plaintiff's former solicitor, or the partners or employees in his or her firm, it is well settled that inadvertence on the part of a plaintiff's legal advisors cannot be seen as constituting a special circumstance justifying the renewal of a summons: see *Moynihan v. Dairygold Cooperative Society Limited* [2006] IEHC 318 and *Murphy v. HSE* at para. 77.
62. Insofar as it was submitted on behalf of the plaintiff that a further factor which supported the renewal of the summons was the fact that the defendants already had an intimate knowledge of the case that would be made by the plaintiff in the proceedings, the court is not satisfied that this submission has been made out. It was accepted that there had been no pre-litigation correspondence in relation to the plaintiff's case. The plenary summons had issued in January 2014, but had not been served on the defendants.
63. Insofar as the plaintiff referred to the content of a certificate of discharge which had been furnished by the defendants in relation to the transfer of the plaintiff's remaining funds and which required the plaintiff to acknowledge that he had no claim against the defendants, the court accepts the evidence of Mr. Nielsen in his affidavit that such conditions are common place in virtually all certificates of discharge, when funds are being transferred from one fund to another.
64. The plaintiff further relied on certain emails that had been exhibited to his affidavit, wherein the defendants specifically required the plaintiff to discontinue his proceedings and were able to identify same by title and record number. However, Mr. Nielsen stated that he had obtained that information from a perusal of the Courts Service website. The court is not satisfied that these requests or demands, which were made in 2015, are indicative of any significant knowledge on the part of the defendants as to the specifics of the plaintiff's claim against them.

65. This case is different to the circumstances that arose in the *Kenefick & Aherne* cases, where the defendants in each case were intimately aware of the specific nature of the case that was proposed to be made by the plaintiff in the lapsed proceedings. While it is true that in this case the defendants may have suspected that they would possibly be sued by the plaintiff, given that he had been an investor in the funds and other investors had maintained actions, that is a long way short of saying that they had an intimate knowledge of his case, without sight of the proceedings.
66. One only has to look at the detailed nature of the matters pleaded in the plaintiff's statement of claim, to appreciate that, while there may be similarities between the plaintiff's action and the actions being brought by other investors, each case is likely to turn very much on its own facts. Indeed, the court cannot even find that there are similarities between the actions, as there is no evidence before the court as to the nature of the other actions, merely that such actions exist to the extent outlined by Mr. Nielsen in his affidavits. In the circumstances, the court is not satisfied that the defendants had anything like the requisite level of knowledge, such that the balance of justice would require the renewal of the plenary summons.
67. The court is also satisfied that the defendants would be prejudiced in their defence of the action, if the summons were to be renewed at this stage. If the summons were renewed, the action would probably not come on for hearing until late 2022, or early 2023. Given that the matters in respect of which complaint is made arose at or around the time that the investments were made in or about 2008, this would mean that the defence witnesses would have to recall matters that occurred fourteen/fifteen years ago.
68. While it was argued on behalf of the plaintiff that this is essentially a documents case, the court is not persuaded that it is solely a documents case. Much will depend upon the advice that was given to the plaintiff by the persons named in the statement of claim. In particular, extensive misrepresentations are pleaded at para. 35 of the statement of claim. It would appear that Mr. Walker and the other witnesses named therein will be required to recall what advices they may have given orally to the plaintiff and what instructions he may have given in advance of his making investments in 2008.
69. The court notes the dicta of Clarke J at para. 6.7 in the *Maloney* case that the architects in question would suffer prejudice by being required to give evidence in relation to matters that had occurred eight or nine years after their retainer had been terminated. Where the delay is considerably longer, as in this case, the court is satisfied that the defendants will suffer prejudice in being called upon to defend themselves many years after the events, as it is well settled that the memory of witnesses diminishes considerably over time. Thus, even though witnesses may still be available, their ability to recall events accurately will have diminished greatly. The court is satisfied that the defendants have suffered specific prejudice by the delay.
70. Finally, in relation to the fact that the plaintiff's action against the defendants will be statute barred if the summons is not renewed, it is well settled that of itself, such eventuality cannot constitute a special circumstance which would justify the renewal of

the summons: see *Maloney v. Lacey Building and Civil Engineering Limited* [para. 24]; *Ahern v. MIBI* [p.13]; *Downes v. TLC Nursing Home Limited* [para. 72].

71. For the reasons set out herein, the court is satisfied that it should set aside the renewal of the summons as directed by order of the High Court dated 21st October, 2019, because the court is not satisfied that there are special circumstances which justify the renewal of the summons in this case.
72. The court has considerable sympathy for the plaintiff. It appears that he gave instructions to his former solicitor to issue proceedings against the defendants. Those proceedings issued on 21st January, 2014. The plaintiff says that he was shocked to learn in 2018, that his proceedings had not been served on the defendants. That was undoubtedly both a shock and a serious setback for the plaintiff. It effectively spelt the end of his action against the defendants. He had lost his opportunity to pursue the defendants for redress. Whether he has any further avenue of redress arising out of that state of affairs, is a matter on which his current solicitor and counsel will have to advise him.
73. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that arise.