

THE HIGH COURT

**[2023] IEHC 675
[Record No. 2017/662P]**

BETWEEN:

BARBARA NAUGHTON

PLAINTIFF

AND

IRISH EXAMINER LIMITED

DEFENDANT

[Record No. 2017/663P]

BETWEEN:

BARBARA NAUGHTON

PLAINTIFF

AND

INDEPENDENT STAR LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Siobhán Phelan, delivered on the 1st day of December, 2023.

INTRODUCTION

1. By separate Notices of Motion returnable to the 6th of April, 2022 (in the proceedings against “the Irish Examiner”) and the 5th of July, 2021 (in the proceedings against “the Irish Daily Star”) respectively, coming on together for hearing before me on the 3rd of July, 2023, the Defendants in both above-entitled proceedings seek orders pursuant to Order 8, Rule 2 of

the Rules of the Superior Courts 1986 (as amended) setting aside orders renewing the Plenary Summons in each case. Both proceedings relate to the alleged defamation of the Plaintiff arising from separate publications by each of the Defendants and plead identical relief. The proceedings against the *Irish Examiner* were issued by the Plaintiff in person whereas the proceedings against the *Irish Daily Star* were issued by solicitors on behalf of the Plaintiff.

2. In both cases the Plenary Summonses issued on the 25th of January, 2017 but were not served within twelve months as required under the Rules, with the result that the summonses required to be renewed in accordance with the provisions of the Rules of the Superior Courts, 1986 (as amended). In fact, in both cases the Plenary Summonses were not served until the 27th of July 2020, some two and a half years post issue of each summons. It has emerged that in each case an application to renew the summons was moved before Allen J. in August, 2019 and refused. On further application an order renewing the plenary summons was made in each case on the 29th of June 2020 by Cross J. It is these renewal orders which the Defendants seek to set aside by separate application in each case.

3. The renewal applications were presented pursuant to Order 8, rule 1(4). The Rules of the Superior Court with regard to renewal were amended pursuant to the provisions of Rules of the Superior Courts (Renewal of Summons), 2018 (S.I. 482 of 2018) and the new Rules came into effect from January, 2019. Under the amended Rules a new requirement to demonstrate “*special circumstances*” was introduced. Order 8 rule 1 (as amended) provides:

“(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.....”

Accordingly, the requirement is not only that “*special circumstances*” be demonstrated to the Court in grounding the application but also that the Court order recite the “*special circumstances*” relied upon in making a renewal order under Order 8 rule 1(4).

4. Provision is made to apply to set aside a renewal order made on an *ex parte* basis under Order 8 rule 2 in the following terms:

“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 an order.”

5. There are minor differences only between the two applications to set aside before me. Whereas the *Irish Examiner* were aware of a previous refusal of a renewal application by Allen J. if not the basis upon which the application was made, the *Irish Daily Star* were not aware at all that the application before Cross J. was the second renewal application when initiating this set-aside application and only became aware subsequently. Delivery of judgment in this matter has been delayed allowing an opportunity for the DAR record of the hearings before Cross J. and Allen J. to be obtained by the Defendants’ solicitor and shared with the Plaintiff and the Court. By email dated the 28th of November, 2023, the DAR transcripts were received from solicitors acting for one of the Defendants. The DAR record has been considered for the purpose of this decision.

THE PLAINTIFF’S CLAIM

6. Almost identical Statements of Claim have been delivered by the Plaintiff in each case. The Plaintiff previously waived anonymity in respect of the prosecution of her father for acts of abuse against her. In broad terms, her claim in these proceedings is advanced on the basis that both newspapers published articles in which the Plaintiff was identified as a person

involved in or associated with a group of survivors who advocate for legal consequences for those who know about abuse, including mothers in the cases of abuse by fathers, without acting to protect a child.

7. The Plaintiff says that she was never a member of this particular group. She claims that a person reading the articles would be led to believe that she considered her mother a criminal and wanted to have her mother prosecuted. The Plaintiff claims that she has never sought to have her mother prosecuted and that her mother was not aware of the abuse she suffered. The Plaintiff claims that she has been damaged by the publications, particularly in her relationship with family members and in her home community.

8. Although I am not deciding the merits of the Plaintiff's claim, in submissions before me, the Plaintiff sought to explain why the publications complained of were damaging of her and why these proceedings are so important for her. She stressed that she had obtained justice before the Courts through the conviction of her abuser and had moved on with her life, seeking to put the abuse and past hurt behind her. As I understand her submission, which was forcefully and impactfully made, she considered it damaging of her reputation and her close personal relationships to be falsely associated with a group of campaigners many years after the conviction of her abuser. She explained that this was because from her perspective, it suggested both that she had not moved on with her life and that she wished her mother to be pursued or penalised in some way. The Plaintiff made it very clear in submissions that she never had any wish to pursue her mother and found the imputation harmful and distressing. It was further clear from what was urged on me in submissions that she considered the articles she complains of as exploitative of the pain and suffering of persons she says she does not know but with whom she is associated in the publications, each of whose experiences are different from each other's and from her own.

BACKGROUND

9. I propose to set out the background to the application to set aside in each case separately.

The Irish Examiner Proceedings

10. In these proceedings, the Plaintiff seeks damages for alleged defamation arising from a newspaper article published by the Defendant in *The Irish Examiner* on the 30th of January, 2016. The Plaintiff also seeks a Correction Order pursuant to s. 30 of the Defamation Act 2009 [hereinafter “the 2009 Act”]. While the Plaintiff was represented by a solicitor in early correspondence, there has never been a firm of solicitors on record for her. The proceedings were issued by the Plaintiff as a litigant in person in January, 2017, just days before the one-year statutory time limit fixed by amendment to the Statute of Limitations Act, 1957 effected by s. 38 of the 2009 Act expired. The summons was not served at that time.

11. More than two and a half years later, on the 26th of August 2019, the Plaintiff applied for an Order renewing the Plenary Summons and her application was refused by Order of Allen J. (This Order was perfected on the 30th of August, 2019). The Plaintiff did not appeal against the refusal of her application.

A second application was moved on foot of a Notice of Motion issued by the Plaintiff on or about the 10th of February, 2020 and the application proceeded *ex parte*. The said Notice of Motion was not served on the Defendant or on its solicitors. By Order made on the 29th of June 2020, on foot of the Plaintiffs aforesaid *ex parte* application, Cross J. renewed the Plenary Summons for three months. The Order is expressed in simple terms providing only:

“It is ordered that the Plenary Summons herein be renewed as of this date for the period of three months from the date of such renewal inclusive”.

12. Notwithstanding the express requirements of O.8, r.1(4), the Order as drawn is silent as to the “*special circumstances*” which justified the extension. By further Order made on the 22nd of July 2020, Cross J. ordered that a copy of the Plenary Summons be sealed as the Original Plenary Summons “...which said *Original has been lost*”.

13. Upon service of the proceedings, the Defendant’s solicitors called upon the Plaintiff to furnish a copy of all documentation relied upon by her and submitted to both Allen J. and Cross J. in the context of her application to renew the Plenary Summons made in August, 2019 and June, 2020 respectively by letter dated the 25th of August, 2020 as follows:

"In order to assist us in understanding the grounds on which the Order for renewal was granted, please provide us by return with the Affidavits that grounded your application to renew the Summons in both 2019 and 2020. You might note that we are entitled to see them and in the circumstances our client is reserving its right to bring an application to set aside the order renewing the Summons"

14. No response was received to this request. The request was reiterated in a letter to the Plaintiff dated the 28th of September, 2020. Seemingly without responding to this correspondence, a Statement of Claim was delivered by the Plaintiff on the 14th of November, 2020 and the Plaintiff issued a motion for Judgment in Default of Appearance which was first listed on the 19th of April, 2021 but was adjourned generally by reason of COVID-19 restrictions at the time.

15. By letter dated the 26th of January, 2022, the Defendant's solicitor again wrote requesting the documentation relied upon in the application to renew the summons. On or about the 9th of March, 2022 the Plaintiff together with a third party contacted the Defendant's solicitor by phone regarding the said request for information. It is averred by the Defendant's solicitor that the Plaintiff and the third party both informed the Defendant's solicitor that the documentation requested would be hand delivered to the Dublin office of the Defendant's Solicitors.

16. The Defendant's solicitor subsequently received a letter by email from the Plaintiff on the 9th of March, 2022. The said letter states it is being delivered "*by hand*" and purports to deliver documentation to the Defendant's solicitors. While this email (dated the 9th of March, 2022) was sent, the letter forwarded in the email is dated the 14th of March, 2022. The Defendant's solicitor replied to this email on the same day, the 9th of March, 2022, noting that no documents were attached to the email and reiterating that the documentation requested had not previously been received. It is averred that no response was received to the Defendant's solicitor's email of 9th of March, 2022 prior to the issue of the application to set aside the renewal of the summons.

17. Although a replying affidavit was filed by the Plaintiff to the Defendant's application to set aside the renewal order, she does not provide any proof of service of the documentation relied upon in relation to the 2019 or 2020 applications at any time either before or since the

service of the proceedings. She maintained on her feet before me that this documentation has been served but she did not have copies in Court on the assigned hearing date on the 4th of July, 2023. On the other side, the Defendant maintained that it had still not had sight of the papers grounding either the 2019 or the 2020 application by the date of hearing. In this regard, the *Irish Examiner* is in a somewhat different position to the *Irish Daily Star*. As set out below, the *Irish Daily Star* received some, but not all, documentation in relation to the 2020 application in response to its request (unlike, on its account, the *Irish Examiner*) but was totally unaware of the 2019 application.

18. For completeness, I should note that the Plaintiff assured me on her feet during the hearing in July, 2023 that Cross J. had been made aware of the earlier decision of Allen J. to refuse her first application to renew the summons. This was not confirmed by her in her replying affidavit, albeit in circumstances where the Defendant did not explicitly identify a concern that Cross J. was not informed of the previous refusal of the application by Allen J. when asserting that it believed that there were likely factors which had not been communicated to Cross J.

The Irish Daily Star

19. In these proceedings the Plaintiff seeks damages for alleged defamation arising from a newspaper article published by the Defendant on the 29th of January, 2016. The Plaintiff also seeks a Correction Order pursuant to s. 30 of the Defamation Act 2009. The Plaintiff appears to have been represented by solicitor and counsel at the time of issue of her summons as a firm of solicitors engaged in pre-litigation correspondence on her behalf and counsel and solicitors' names are endorsed on the summons. It should be noted that a full response to this correspondence was received from the *Irish Daily Star* contesting the Plaintiff's claims and pointing to direct engagement with her in respect of the publication she now objects to. Although a summons was issued by solicitors on behalf of the Plaintiff just days before the expiry of the one-year time limit under the Defamation Act, 2009, it was not served at that time.

20. Unbeknownst to the Defendant, on the 26th of August, 2019, the Plaintiff applied for an Order renewing the Plenary Summons, and her application was refused by Order of Allen J. The order refusing to renew was perfected on the 30th of August, 2019. The Plaintiff did not

appeal against this refusal. The papers grounding this application were not before the Court on the date assigned for hearing of this application and the Defendant says they were never served on them and that they only became aware of an order made in the proceedings in 2019 after they had brought their application to set aside the renewal order.

21. A second application was moved on foot of a Notice of Motion issued by the Plaintiff on or about the 10th of February, 2020. Again, the said Notice of Motion was not served on the Defendant or on its solicitors and the application proceeded *ex parte*. Amongst the papers handed up to me in this matter is a handwritten Affidavit sworn by the Plaintiff on the 10th of February, 2020 from which it appears that reliance was placed on a breakdown in communication with the Plaintiff's former solicitors and medical issues affecting the Plaintiff's ability to pursue the proceedings as factors resulting in the non-service of the summons in time and as the basis for renewing the summons. This appeared to be the Affidavit relied upon in moving the second application to renew the summons.

22. By Order made on the 29th of June 2020, on foot of the Plaintiffs aforesaid *ex parte* application, Cross J. renewed the Plenary Summons for three months. The Order is expressed in simple terms providing only:

"It is ordered that the Plenary Summons herein be renewed as of this date for the period of three months from the date of such renewal inclusive".

Notwithstanding the requirements of O.8, r.1(4), the Order as drawn is silent as to the "*special circumstances*" which justified the extension of time for the application seeking leave to renew the summons.

23. By further Order made on the 22nd of July 2020, Cross J. ordered that a copy of the Plenary Summons be sealed as the Original Plenary Summons "...which said Original has been lost" on foot of an affidavit sworn on the 15th of July, 2020 in which the Plaintiff sought an order under O.8, r.4 sealing a copy summons as an original in circumstances where she claimed she had "*foolishly posted*" the original summons to the Defendant without first obtaining an order renewing it. It is noted for completeness that for its part, the Defendant denies ever receiving a summons until served with the renewed summons in July, 2020. The Plaintiff exhibits a typewritten note of medical appointments attended by her between January, 2017

and April, 2018 as well as a letter dated the 28th of January, 2020 from her doctor which stated that due to her health needs, she was “*unable to engage in legal activities for a significant period of time, including the during the time of her libel matter.*” The letter confirmed that the Plaintiff was under the care of a number of different health specialties.

24. The Defendant maintains that the first notice it had that proceedings had issued was in July, 2020 when a summons was served with the Court Order of the 29th of June, 2020 renewing the plenary summons and the Order of the 22nd of July, 2020 allowing the copy summons to be served as the original had been lost. Upon receipt of this documentation from the Defendant, its solicitor wrote seeking the affidavits upon which the Plaintiff made her application to the High Court on foot of her motion dated the 10th of February, 2020 as well as her further *ex parte* docket seeking leave to deliver a copy of the Plenary Summons as the original had been lost. It was pointed out in this correspondence which was dated the 31st of July, 2020 that the court orders referred to a Notice of Motion, an affidavit of service and further affidavits. It was clear that the Defendant wished to see these documents.

25. The Plaintiff’s response to this correspondence dated the 10th of August, 2020 does not address the Defendant’s request for documentation. By follow up letter dated the 17th of August, 2020, the Defendant’s solicitor repeated the request for documentation and expressly reserved the Defendant’s position in relation to making an application to court to have the proceedings dismissed on the basis that there should be no extension of time given for the delivery of the Plenary Summons or on grounds of delay. In a response dated the 26th of August, 2020, the Plaintiff furnished:

- i. A Notice of Motion dated 10th of February, 2020;
- ii. Affidavit sworn on the 15th of July, 2020;
- iii. Ex Parte Docket.

26. Notably, she did not furnish a copy of the affidavit grounding the renewal applications before Allen J. in August, 2019 or Cross J. in June, 2020. Furthermore, the exhibits referred to in the affidavit sworn on the 15th of July, 2020, seemingly for the purpose of grounding an application to serve a copy of the summons in lieu of the original lost summons, were not provided.

27. By letter dated the 27th of August, 2020, the Defendant's solicitor replied to point out that the exhibits referred to in the Affidavit had been omitted, no affidavit of service has been provided (although it was referred to in the order) and the order of the 29th of June, 2020 referred to affidavits (plural) but these had not been provided. The request that these documents be provided was repeated. The Defendant's solicitor wrote in similar terms on the 28th of September, 2020 and the 12th of November, 2020 in response to the Plaintiff's warning that she would proceed to motion for judgment in default of appearance.

28. The Plaintiff issued a motion for Judgment in Default of Appearance in January, 2021 which was first listed on the 19th of April, 2021 and appears to have been adjourned generally by reason of COVID-19 restrictions at the time. The Plaintiff also delivered a Statement of Claim in which she identified an article published on the 29th of January, 2016 in the *Irish Examiner* as defamatory, even though the proceedings were against the *Irish Daily Star*. The Statement of Claim makes no reference to any publication by the *Irish Daily Star*, but a copy of an article which appears to have been published in that newspaper is an exhibit in papers handed into court and is the subject of the solicitor's pre-litigation correspondence.

29. By letter dated the 15th of March, 2021, the Defendant's solicitor further referred to its repeated requests for documentation (by then repeated in five separate letters). It was pointed out that the Plenary Summons issued on the 25th of January, 2017 but the application to renew was brought over two years after the summons was issued. It was repeated that the Defendant required sight of the documents that were produced in court to support the application to renew the summons. The Plaintiff was advised that if the outstanding documentation was not received it was intended to issue a motion challenging the renewal of the summons without further notice.

30. Although the Defendant's Notice of Motion issued more than two years ago in April, 2021, no replying affidavit is before me from the Plaintiff in respect of this application. The Plaintiff is of the view that a replying affidavit was prepared but none has been received by the Defendant. Helpfully, the Defendant is prepared to accept that a reply in the same terms as was provided in the *Irish Examiner* case may be treated as being before the Court in this case also. The Plaintiff did not express any dissatisfaction with this approach. As noted above, however, the replying affidavit filed in the *Irish Examiner* application did not provide any proof

of service of the documentation in relation to the 2019 or 2020 applications. It did not set out what was said before Allen J. or Cross J. nor confirm that Cross J. was made aware of a previous refusal of the application by Allen J.

SET ASIDE APPLICATIONS

31. Both applications are moved and grounded on separate solicitor's affidavits.

32. In the affidavit grounding the application to set aside the renewal order in the *Irish Examiner* case, the Defendant's solicitor deposes to a belief that it is very likely that there are facts or circumstances in the case which, had same been disclosed by the Plaintiff to the Court in June, 2020, would have resulted in the application to renew the Plenary Summons being refused. Potential relevant and material facts identified by the Defendant's solicitor include the fact that an application by the Plaintiff to renew the Plenary Summons had previously been made, and refused, in August, 2019. The Defendant's solicitor maintains that had full disclosure been made by the Plaintiff at the hearing of the application before Cross J., the Court would not have made an Order renewing the Plenary Summons. The Defendant's solicitor further maintains that upon a proper application of the relevant legal principles, the Order for renewal should not have been made.

33. In the affidavit grounding the application in the *Irish Daily Star* case, particular emphasis is placed on the passage of time between the alleged defamatory event and the service of proceedings – a period of more than four years. The point is made that the proceedings were initiated by way of plenary summons just four days short of the expiration of the Statute of Limitations. The case is made that the Defendant was entirely unaware that proceedings had issued until the end of July, 2020. The Defendant's solicitor refers to the speed with which defamation actions are required to be advanced and the failure to the Plaintiff to advance her case until she moved to renew the Plenary Summons. Reference is also made to the amendments to the Rules of Court which came into effect on the 11th of January, 2019 (pursuant to the provisions of Rules of the Superior Courts (Renewal of Summons), 2018, S.I. 482 of 2018 referred to above) and the requirement to demonstrate "*special circumstances*".

34. It is contended on behalf of the Defendant on affidavit in grounding the set aside application that "*special circumstances*" have not been demonstrated and have not been stated

on the order renewing the plenary summons notwithstanding the requirement under the Rules to do so. The Defendant maintains that it is prejudiced by being required to defend a defamation action based on an article published more than 6 years ago. It is deposed that there have been two changes of editor since the article was published and two changes of ownership of the company, in 2018 and 2020. Due to the failure to serve proceedings in a timely manner, provision was not made to cover the defence of same from year to year.

35. In her replying Affidavit in the *Irish Examiner* case, which is adopted also in respect of the *Irish Daily Star* case on consent of the *Irish Daily Star*, the Plaintiff says that she was medically unwell when she moved her first application to renew the summonses before Allen J. She refers to a letter from a doctor with Earls Court Medical Centre, London dated the 28th of January, 2020. This letter states:

“Her health needs placed under tremendous strain and because of this, she was unable to engage in legal activities for a significant period of time, including during the time of her libel matter.”

36. She avers that she was advised by consultants in the UK that stress was a contributory factor to her various conditions. She maintains that the actions of the Defendants contributed to that stress. She says that when she felt well again, she reapplied to the courts to renew her plenary summons and was given a hearing by “Justice Mulligan” who she says advised her to better prepare her documentation. This is understood as a reference to a Court Registrar, as there is no “Justice Mulligan” sitting in the High Court. She says that when she had better prepared her documentation she was given a hearing before Cross J.

37. Referring to the hearing before Cross J. the Plaintiff says she explained the history of the case and gave him an extensive list of the medical treatment she had received over the period as detailed in an exhibit to her replying affidavit. The list in question gives dates and some minimal information relating to medical appointments between January, 2017 and April, 2018. Based on this information, the Plaintiff says that Cross J. renewed the summons. Despite the fact that the *Irish Examiner* moved their set-aside application on the asserted basis of a belief that there had been a failure to alert Cross J. to the fact that an application had been previously made by the Plaintiff to renew the Plenary Summons and had been refused in August, 2019, the Plaintiff’s replying affidavit does not confirm that she told Cross J. about the

previous unsuccessful application, although in oral submissions before me in July, 2023 the Plaintiff was adamant that she had.

Documentary Deficit in both cases

38. Following the conclusion of the Defendants' applications and as the Plaintiff is a litigant in person, I afforded her a further opportunity to produce the documentation grounding her renewal applications which she claimed had already been provided to the Defendant(s) but which they say were never received. I directed that she provide copies to the Registrar by close of business on the 7th of July, 2023. I also indicated that the Registrar would inspect the Court file and identify what relevant documents were on file and provide copies. My purpose in providing an opportunity for this documentation to be put before the Court and made available to the parties was both to provide an evidential basis for assessing whether there were differences between the grounds advanced for the successive applications to renew the summons and whether Cross J. was informed that an earlier application for an extension of time for leave to renew a summons in each case had been refused by a different judge. It seemed to me that proper establishing the evidential basis upon which the successive applications were moved before both Allen J. and Cross J. was necessary in the interests of a fair determination of these applications.

39. On foot of further investigation by the Registrar to assist the Plaintiff in producing relevant documents and the Plaintiff's own efforts in this regard, documentation was circulated on the 7th of July, 2023 to all parties being the only relevant documents on the files maintained by the Court Services present in almost identical terms in each case:

- Copy of the Order of Mr. Justice Cross dated the 22nd day of July 2020;
- Copy of the Ex Parte Docket dated the 20th day of July 2020;
- Copy Affidavit of the Plaintiff filed on the 3rd day of July 2020;
- Copy of the Order of Mr. Justice Cross dated the 29th day of June 2020;
- Copy of the Notice of Motion filed on behalf of the Plaintiff on the 10th day of February 2020;
- Copy of the Affidavit of the Plaintiff filed on the 10th day of February 2020;

- Copy of the Ex Parte Docket dated the 26th day of August 2019;
- Copy of the Order of Mr. Justice Allen dated the 26th day of August 2019;

40. The Affidavit referred to in the Order of Mr. Justice Allen as “*sworn and to be filed*” in each case was not on the Court file, is not recorded as having ever been filed and has not been produced by the Plaintiff. Further, while “*affidavits*” in the plural is referred to in the Order of Cross J. in each case, the only affidavit on file in support of the application to renew before him is a handwritten document filed on the 10th of February, 2020. Although the Order refers to an affidavit of service as having been before the Court, no copy is held on the Court file or is recorded as having been filed and none has been produced by the Plaintiff referable to the renewal application.

41. By reason of the absence of any affidavit evidence in relation to the applications before Allen J., the only indication of what was said to him when the matter came on for hearing before me in July, 2023 was contained in the *ex parte* dockets dated the 26th of August, 2019 which recite that the order is sought due to the “*procrastination*” of the Plaintiff’s solicitor in serving the plenary summons in the first instance.

42. In her subsequent handwritten affidavit grounding the later applications before Cross J. the Plaintiff states that due to acute medical conditions, both mental and physical, the two summonses were not served. She says a breakdown in communication occurred with her solicitor and the two cases stalled. She further refers to medical advice that due to her medical conditions she avoids stressful situations and she states that the libel complained of in the proceedings contributed to her ailments. She does not in this document refer to her previous application before Allen J., the basis upon which it was moved or the basis upon which it was refused. A further affidavit was filed in July, 2020 in each case in relation to the application to seal a copy summons as the original. This affidavit refers again in broad outline to the Plaintiff’s medical issues and to this extent is in similar terms to the affidavit filed in reply to these applications.

43. The Plaintiff did not produce any affidavit not already on the court file in response to my order that the papers relied upon would be provided to the Court. In particular, she did not provide a copy of the affidavit(s) relied upon before Allen J. and referred to in his order as “*to*

be filed". The handwritten affidavits which appear to have been relied upon before Cross J. refer "*to documentary evidence*" that can confirm "*medical issues*" but no document appears as a formal exhibit or is held on court file. It is noted, however, that the letter exhibited by the Plaintiff in response to the set aside application in the *Irish Examiner* case is dated the 28th of January, 2020 and appears to emanate from a doctor working with Earls Court Medical Centre. This letter appears to have been exhibited in the affidavit sworn in July, 2020 in the application to seal a copy of the summons as the original, if not in the application to renew the summons moved before Cross J. in June, 2020.

44. When submitting copy documents from the Court file to the Court on foot of my direction, the Plaintiff made further unsolicited emailed submissions. I directed that this be circulated to the parties on the basis that I would not receive or consider them until I had heard the parties in this regard. I also invited the parties to indicate whether they considered I should listen to the DAR of the applications before Allen J. and Cross J. in circumstances where the factual parameters of the applications presented remained uncertain. No objection was taken to me receiving the Plaintiff's email as a written submission on the condition that there would be no further unsolicited correspondence with the court. Separately, the parties all indicated agreement to my listening to the DAR and the Defendants undertook to pay for the cost of a transcript of the DAR between them and agreed to share a copy with the Plaintiff.

DAR TRANSCRIPTS

45. Subsequently, the DAR transcripts of the proceedings before Allen J. on the 26th of August, 2019 and Cross J. on the 29th of June, 2000 and the 22nd of July, 2020, were taken up by the Defendants pursuant to an order made by me in July, 2023. It appears from the DAR transcript of the hearing before Allen J. that he was dissatisfied with the basis advanced for the application stating:

"The grounding affidavit of Mrs Naughton discloses that the actions were brought arising out of a publication in the Irish Examiner newspaper on the 30th of January 2016 and in the Irish Daily Star on the 18th of February 2016. The application in each case alleges procrastination in serving the summons in the first instance and the affidavits on which the applications are grounded deposed that the case was in the hands of Mrs Naughton's solicitors who it is said for some unexplained reason have not "issued/progressed" the summons. What is put before the Court as copies of the

summonses are obviously not copies of the summonses but from the record number, the Court can be confident that the summonses were both issued in January 2017 and they have not been served. There's no evidence as to what, if any, attempt was made to serve either of the summonses and there's no evidence as to what happened in the two and a half years and upward since the summonses were issued or the 18 months since the summonses expired. The relevant rule empowers the Court to extend a summons once, if satisfied that reasonable efforts have been made to serve the summonses or that there's other good reason for the renewal. I am sorry to say there is simply no evidence of any attempt to serve the summonses and I can't be satisfied either that there is another good reason to extend them and so I'm compelled in law to refuse these applications.”

46. In response to this ruling, the Plaintiff stated:

“There are reasonable grounds, Judge, in relation to I had serious medical issues that can be substantiated by medical consultants in the United Kingdom. I was emailing the attorney at hand very regularly to keep me abreast regarding information so –”

47. Allen J. then advised the Plaintiff that he had made his decision based on the information she had put before the Court and had given his reasons.

48. The DAR transcript of the subsequent hearing before Cross J. on the 29th of June, 2020 confirms that Cross J. was not advised that a previous application for an order renewing the summons had been refused by Allen J. In agreeing to make the order Cross J. states that he accepts *“the life-threatening circumstances”* which the Plaintiff had urged on him as being the reason why the summonses had lapsed. Cross J. added that he would, in the circumstances, extend time for the service of the summons.

49. It appears, however, that when the Plaintiff re-appeared before Cross J. on the 22nd of July, 2020, seeking an order permitting her to treat a copy of the summons as an original, he had been made aware of the existence of a previous refusal by Allen J. and he pointed out to her that she had not told him about the previous refusal. The Plaintiff explained that she was *“amateur”* and referred to her ill-health and Cross J. stated:

“Right. Well I accept that you didn’t realise you should have told me about the previous order but, you see, at the moment then there is two contradictory orders, one from myself and one from Mr. Justice Allen in relation to the matter and what is the situation now about the summonses?”

50. Cross J. asked the Plaintiff why Allen J. had refused her application and she said it was because she had relied on the discharge of her solicitor only in making the application. The Plaintiff further advised the Court that she had served the out-of-date originals and no longer retained the originals with the result that she required permission to serve copies. Cross J. granted this order.

51. It appears quite clear from the DAR records that, contrary to what the Plaintiff had submitted on her feet before me, Cross J. was not informed by the Plaintiff in June, 2020 that Allen J. had previously refused an application. He was clearly perturbed by the fact that there were two contradictory orders of the High Court when he subsequently became aware of the earlier order in July, 2020. When responding to questioning from Cross J. as to why the application had been refused by Allen J., the Plaintiff did not confirm that it was because Allen J. considered that there was no evidence of an attempt to serve the summons nor of a good reason to extend time.

SUBMISSIONS

52. The application to set aside was moved before me on several grounds. It was contended that it was an abuse of process for an application to be moved on successive occasions before different judges. Reliance in this regard was placed on the decision of McKechnie J. in *F.G. v. Child and Family Agency* [2018] IESC 28 where consideration was given to whether repeat applications for leave to proceed by way of judicial review where a refusal of leave was not appealed gave rise to *res judicata* or constituted an abuse of process.

53. It was further contended that renewal orders should not have been made as no “*special circumstances*” had been identified upon which to base the exercise of a power to renew the summons under the O.8, r.1 (4). Reliance was placed on the decision of Haughton J. in *Murphy v. HSE* [2021] IECA 3 where he referred to the different approaches to the new rule being taken by High Court judges before identifying the correct test on a proper interpretation of O. 8, r.

1(4). He found that where renewal of a summons is sought outside the twelve-month period after the issuance of the summons addressed the requirement to show “*special circumstances*” under O.8, r.1(4) is a singular test. The threshold for renewal of the summons is “*special circumstances justifying an extension*” which is a higher threshold than “*good reason*” which applies when the application for renewal is made before the expiry of the initial twelve months.

54. I was also referred to *Nolan v. Board of Management of St. Mary’s Diocesan School* [2022] IECA 10 where the Court of Appeal (Noonan J.) were not satisfied that “*special circumstances*” were established by a solicitor’s evidence that he wished to protect his client, who had a diagnosis of depression, from litigation stress. In *Nolan*, the Court of Appeal also squarely rejected the proposition that any “*special circumstances*” arise from a desire to prosecute a separate claim first (in that case a retirement claim). A mistake as to the effect of the Long Vacation on the running of time was found to be a mistake the nature of which could never constitute a good reason. The Court of Appeal in *Nolan* found that where no “*special circumstances*” are demonstrated such as would qualify within the terms of Order 8, then there is no requirement to go on and consider separately the issue of prejudice as that only arises for consideration where a special circumstance has been shown.

55. The Plaintiff submitted that she was unable to attend to the prosecution of her cases in a timely manner following the issue of proceedings due to health issues which she in part attributes to the distress occasioned by the publications complained of as defamatory in the within proceedings. She further referred me to a list of her medical appointments between January, 2017 and April, 2018. The list suggests that she was attending for treatment with various doctors for different ailments during this period. The list appears to be compiled by the Plaintiff herself and is not supported by any further correspondence from doctors or hospitals. The Plaintiff contends that the order renewing the summons was properly made in the special circumstances of her case based on a breakdown in communication with her solicitor and her medical situation which meant she was unable to deal with the litigation matters.

56. She stressed in submissions that when the summons was renewed *ex parte* it was because the Judge hearing her application considered the substance of her case and was persuaded by her that she should have her “*day in court*”. She urged me not to interfere with the decision of another judge. She also urged me to have regard to the underlying case and

objected to the technical nature of the application which from her perspective meant that little attention was paid to the damaging nature of the publications. The Plaintiff reacted strongly to any suggestion that she did not appraise the court when seeking to renew her summons that a previous similar application had been refused and disputed this. She accepted that there may have been issues with her “housekeeping” in terms of documentation and compliance with court procedures but urged that this not be relied upon to preclude access to the court because of technicalities and procedural wrangling.

57. I was left in no doubt by the Plaintiff’s submissions as to her wish to pursue these proceedings. She presented as having a very strong sense of grievance against the two newspapers because of the way she was referenced in the publications in question and as being anxious to secure a court remedy in respect of the wrongdoing she perceives against her.

DISCUSSION AND DECISION

Whether Repeat Application an Abuse of Process or Impermissible as Res Judicata

58. Addressing firstly the contention that bringing a fresh application rather than appealing a refusal of an application to renew is impermissible, it is clear from the decision of McKechnie J. in *F.G. v. Child and Family Agency* [2018] IESC 28 that an order made *ex parte* could not of itself result in a determination of any issue between the parties and accordingly, the doctrine of *res judicata* is not truly in play and does not act as a bar to subsequent relief. However, this does not mean that an application should not be struck out as an abuse of process where on the facts established in evidence a subsequent application made before a different judge of the High Court may be characterised as abusive. As McKechnie J. states at (para. 68):

“...the resolution of whether the renewed application amounts to an abuse of process is fundamentally for the discretion of the judge hearing the subsequent application, although it must be said at the outset that repeat applications should not be entertained lightly. The well-settled general rule is that it is not permissible to engage in a form of forum shopping in the hope of securing a more hospitable reception the next time around. The most noticeable exception to this is a habeas corpus application under Article 40.4 of the Constitution, which exception is justified on historical grounds and whose remit cannot easily be extended beyond that enclosure by analogy. However, the courts in England at least have shown themselves prepared to entertain renewed or

fresh leave applications in limited situations, primarily where there has been a material change of circumstances, where new evidence has come to light which could not reasonably have been obtained at the time of the original application, or where the law has significantly changed in the intervening period: see, for example, R (Opoku) v. Principal of Southwark College [2003] 1 All ER 272, [2003] 1 W.L.R. 234 ('Opoku'), discussed below. Of course the requirement of uberrima fides which applies on all ex parte applications has an even more significant impact in this context as a repeat applicant must show the utmost good faith by disclosing all relevant information which he or she has, or with due diligence should have; this obviously includes the fact of the original, failed application. To Ms. G's credit, she did just that. As a rule, the existence of the previous application and the grounds upon which the application is renewed ought to be clearly and frankly disclosed not only orally, but also by way of affidavit."

59. Clearly, whether an abuse of process arises depends on the facts of a given case. It seems to me, for example, that where a judge refuses an application on the basis of deficiency of proofs, then the appropriate course is for the application to be renewed if and when the matter of proofs has been attended, presuming that it is accepted that there was a deficiency in the proofs and the repeat or subsequent application is represented on the basis that the deficiency has been addressed. In such cases, the second judge should be advised of the fact that an application was previously refused and it should be clearly explained in what way the basis for presenting the application again differs from the previous failed application.

60. On the other hand, where it is not accepted that the proofs were inadequate and the Judge is considered to have erred, the appropriate course is to challenge the decision to refuse using available appeal channels. It seems to me that (save in exceptional circumstances such as the Article 40.4 jurisdiction where special considerations apply) it would not be a proper use of the Court process to present the same application before a different judge, even while disclosing the fact of the previous failed application and the basis for it. This is why it is so essential that there be clarity around the distinct bases for the separate applications where a first application has been refused and the application is renewed.

61. In this case, the Plaintiff has not provided a copy of the Affidavit which was relied upon before Allen J. in either case. A real difficulty for me before obtaining the DAR was that there was incomplete information available to me on affidavit as to what was before both Allen J.

and Cross J. It appears from the use of the words “*to be filed*” in the order by Allen J. as drawn that the application before him in both cases was moved on an unfiled affidavit. It further appears, however, from what is noted on the *ex parte* docket, that the Plaintiff relied on her solicitor’s “*procrastination*” in serving the summons. There was no mention of any health issues on the *ex parte* docket. From the handwritten affidavit grounding her application before Cross J., the Plaintiff appears to have squarely relied on medical issues. I am satisfied that this was an added factor in her application given that the *ex parte* docket before Allen J. referred only to her solicitor’s procrastination and this is borne out by the DAR transcript from August, 2019.

62. It seems to me to be likely that the Plaintiff referred to the letter of the 28th of January, 2020 from a doctor with the Earls Court Medical Centre, which she exhibits in response to the set aside application, when moving the application before Cross J. given the date of the letter, even if it was not properly in evidence. Given his willingness to accept a “life threatening condition” in his engagement with the Plaintiff as recorded on the DAR, some medical evidence is likely to have been proffered although it must be observed that the letter from Earls Court Medical Centre does not use words such as “life threatening condition.” The likelihood of reliance on this medical documentation is also supported by the contents of the affidavit sworn in July, 2020 (and therefore post-dating the renewal application) to support the service of a copy summons following the loss of the original summons because medical issues are referenced in that affidavit. In this later affidavit medical issues are cited to explain why she did not make the application before Allen J. properly supporting a conclusion that medical issues were advanced to ground the renewal application before Cross J. in a manner distinct from the application before Allen J.

63. Having considered the papers and the DAR, I accept that the Plaintiff’s first applications were refused because reference to a solicitor’s “*procrastination*” in whatever way this was presented to the Court was considered an inadequate basis for granting an extension of time for leave to make an application renewing the summons. Where reliance was not placed on the Plaintiff’s state of health in the same way before Allen J., then it seems to me that the second application was likely made on an expanded factual basis with reference to additional circumstances, most particularly the Plaintiff’s ill health. I see no impediment to an *ex parte* application of this nature being re-presented on a second occasion before a different judge grounded on better evidence which seeks to address the deficiencies identified by the first

judge, provided there is full disclosure to the second judge in relation to what had previously occurred. Where the second judge is informed of the previous unsuccessful application and the applicant specifically identifies what is different about the renewed application and why facts have now been put before the Court which would allow the second judge to make a different decision, it seems to me that the repeat application is not an abuse of process.

64. As reliance was placed on medical matters before Cross J. which had not previously been put before Allen J., there was a difference in substance between the two applications. This difference could be relied upon as justification for renewing the application rather than proceeding by way of appeal where reference to medical issues was not included in the application before Allen J. It is not enough for there to be a difference in substance, however as it is imperative that there should be full disclosure to the second judge.

65. It is now clear from all the evidence in this case however that Cross J. was not properly appraised of the previous applications and the decision to refuse them. Proceeding to make a second *ex parte* application without disclosing the previous refusal of the application is an abuse of the process of the Court and is to be condemned as an unacceptable practice. Although the Plaintiff submits orally that she referred to the earlier refusal by Allen J. when moving her application before Cross J., this is not confirmed in evidence in any of the affidavits I have seen and is conclusively controverted by the DAR. The Plaintiff categorically did not tell Cross J. that she had previously made an application to renew the summonses to Allen J. and her applications had therefore been refused.

66. It is an abuse of process to renew an application without full disclosure to the judge hearing the second application. Such disclosure should be clearly made on affidavit so that there is no ambiguity arising. As Cross J. was not made aware that a previous application had been refused and why when a second application was moved before him, a basis exists for proceeding to set-aside the renewal orders made on the grounds that they were procured through an application made in abuse of the court process.

67. Given that the Plaintiff is a lay litigant who presented before me in a state of some distress saying that she told Cross J. about the previous application, albeit it transpires for a review of the DAR that she only told him about it when he raised it with her having already made an order on a previous date, I have decided not to set aside the orders made on the basis

that the applications constitute an abuse of process. I note in this regard that when the matter was back before Cross J. in July, 2020 for permission to serve copy summons, he was willing to make further orders in ease of the Plaintiff notwithstanding that on this occasion he had been made aware of the previous orders of Allen J. on the earlier renewal applications. The DAR transcript certainly suggests that he was willing to accept that the Plaintiff had not intentionally misled him and, while not persuaded her omission was entirely innocent, I propose to afford her the same indulgence.

68. Accordingly, I now propose to proceed to consider whether, presuming disclosure of the previous unsuccessful application was made to Cross J. and presuming that new evidence in the form of the medical evidence relied upon in response to the set aside application was placed before him even if not properly in evidence, special circumstances were demonstrated to ground an extension of time for leave to renew the summons in these cases. I adopt this approach on the facts and circumstances of this application because it seems to me that there is a risk of injustice to the Plaintiff were her proceedings dismissed only because of her inability to properly represent herself as a lay litigant in circumstances where she would have been entitled to an order renewing her summons on the real facts and circumstances of her case if they had been properly set out in evidence grounding her application.

Whether Special Circumstances Demonstrated

69. Under O.8, r.1(4), the Court may order a renewal of the original summons for three months from the date of the renewal order inclusive where satisfied that there are “*special circumstances*” which justify an extension of time and renewal of the summons under Order 8, rules 3 and 4 of the Rules of the Superior Courts, 1986 (as amended), such “*special circumstances*” to be stated in the order. In deciding on whether to make an order setting aside the renewal permitted on foot of the order made *ex parte*, I cannot be satisfied that the Court considered the requirement to demonstrate “*special circumstances*” for an extension of time for leave to seek renewal under the recently commenced new rule when making that order. The absence of a recitation on the face of the order of the “*special circumstances*” relied upon in making the renewal, in breach of the express requirements of O.8, r.1(4), compels me to the conclusion that the new rule was not properly applied when the renewal order was made. This conclusion is reinforced by a review of the DAR transcript from which it is clear the rule was not addressed and the requirement to identify “*special circumstances*” was not referred to by

either the Plaintiff or the judge. There is no evidence the renewal orders were made in each case with due regard to the requirements of the new O.8, r.1(4), specifically to identify a “special circumstance” which could justify the order and to record it on the face of the order.

70. In addition, I am assisted in considering the proper application of O. 8, r. 1(4) by the fact that there is more information available to me than was available to the Cross J. when making the renewal orders because of the fuller affidavit evidence before me. While Cross J. would have been aware that the proceedings were defamation proceedings which require special attention to expediency, he would not have been aware of any specific elements of prejudice such as those identified on behalf of the *Irish Daily Star* on affidavit grounding this application including change of ownership, change of editor and absence of notice of existence of proceedings until over four years after the alleged defamatory publication. Crucially, it seems that Cross J. was not properly appraised of the basis for the previous applications and the Plaintiff has, even as yet, not produced the papers grounding the application before Allen J. No reference at all was made to the previous application refused by Allen J. in the handwritten affidavit which appears to have grounded the application before Cross J. It is clear from what he himself said about the existence of “*contradictory orders*” when the matter came back before him in July, 2020 that Cross J. considered the earlier refusal a very material consideration capable of affecting his decision on the renewal application he had acceded to without full information being put before him.

71. Further, even if Cross J. had regard to the requirements of the new O. 8 r. 1(4) despite the failure to identify the “*special circumstances*” relied upon in the orders as drawn, the law has benefitted from more recent consideration (most particularly the considered written judgment of the Court of Appeal in *Murphy v. HSE* [2021] IECA 3) and this is of assistance in deciding whether a renewal order ought properly to have been made in this case. In *Nolan v. Board of Management of St. Mary’s Diocesan School* [2022] IECA 10, the Court of Appeal (Noonan J.) found that litigation stress could rarely amount to a special circumstance within the meaning of Order 8. The Court in *Nolan* did not accept that a diagnosis of depression because of the incidents complained of changed matters. Indeed, the Court observed that plaintiffs in personal injury actions of whatever nature who do not suffer some element of depression or psychological upset are “*very much in the minority*”.

72. Separately, the fact that a failure to renew a summons will result in proceedings being rendered statute barred was found not to constitute a good reason to renew a summons under the old Order 8 regime (*Monahan v. Byrne* [2016] IECA 10), it must follow, that a statutory limitation period cannot satisfy a requirement to demonstrate “*special circumstances*”.

73. It is clear from the decision of Haughton J. (at para. 74 citing Hyland J. in *Brereton v. the Governors of the National Maternity Hospital, HSE & Ors.* [2020] IEHC 172 with approval) on behalf of the Court of Appeal in *Murphy* that in deciding whether “*special circumstances*” are shown which justify an extension of time for leave to bring the application, I should consider whether it is in the interests of justice to renew the summons. 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. Haughton J. noted (at para. 76):

“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.”

74. Haughton J. further observed in *Murphy v. HSE* [2021] IECA 3 (at para. 78) that where a judge is satisfied that “*special circumstances*” exist, the jurisdiction to grant leave to renew is discretionary and it follows that in reviewing a decision to renew a summons an appellate court should afford the trial judge a margin of appreciation and should not interfere with the decision of the trial judge unless the trial judge has erred in principle or there is a clear error of fact or breach of the rules of natural justice. Of course, here I am not exercising an appellate jurisdiction but a separate, distinct jurisdiction to set aside in respect of an order granted *ex parte* based on less information and without argument from the other side.

75. From the caselaw summarised in the decision in *Murphy* and the principles set out in the judgment in that case, it is established that something “*special*” is required to justify

renewal of a summons outside the initial twelve-month period following issue. The “*special circumstances*” should both explain why the summons was not served in time and should be capable of justifying renewal notwithstanding delays and a failure to prosecute the claim properly. To see if this threshold has been reached in these cases, therefore, it is necessary for me to consider the evidence in this case. The evidence now extends beyond what could have been and was before Cross J. and includes the evidence contained in the affidavits sworn by the Defendants’ solicitors, the Plaintiff’s replying affidavit in the *Irish Examiner* case and the material disclosed on the court files as set out above.

76. In approaching the task of applying the “*special circumstances*” test in a principled fashion I am mindful that this is not a case like *Murphy v. HSE* where the non-service of the summons is explained by the need to obtain an expert opinion in a medical negligence case, which it is accepted can constitute a “*special circumstances*” because of the tension between the obligation on legal advisors to obtain expert professional opinion before serving professional negligence proceedings on the one hand, and on the other the barring of claims under the Statute of Limitations, 1957 (as amended) and the general requirement for claims to be processed promptly. The observations in *Nolan v. Board of Management of St. Mary’s Diocesan School* [2022] IECA 10 in relation to litigation stress not constituting a special circumstance resonate with me. Of note, however, in *Nolan*, no medical evidence was put before the Court. Rather the plaintiff’s solicitor in that case averred to his worry about subjecting his client to stress. The Court pointed out that there had never been any suggestion that the plaintiff was unable to give instructions and the Court referred to the fact that she appeared to be able to transact other legal business of significance to her during the period concerned. The evidence here goes somewhat further, even if itself unsatisfactory.

77. The basis identified by the Plaintiff as constituting “*special circumstances*” appears to be a breakdown in communication or “*procrastination*” on the part of her former solicitor and her own medical circumstances. The evidence produced by the Plaintiff regarding claimed “*procrastination*” is vague. She does not provide details as regards her instruction to her former solicitor that proceedings be served or the circumstances in which it occurred that they were not served (recalling that the solicitors were never involved in the *Irish Examiner* case and that she issued the summons in that case herself) and when she became aware that they had not been served. She exhibits no correspondence with her former solicitor in this regard.

78. A similar vagueness or lack of demonstrated substance affects her evidence as to her medical difficulties. She does not detail the nature of the medical condition which prevented her advancing the litigation by serving the proceedings. The medical letter she exhibits lists several “*current medical problems*” and “*current medication*”, none of which self-evidently establish that the Plaintiff was unfit to pursue her proceedings. The letter does not identify a condition which prevented her progressing her claims and is not expressed in clear terms. Furthermore, the letter fails to identify the outer parameters of the period during which a medical impediment to progressing proceedings could be said to have existed.

79. Insofar as the Plaintiff refers to medical appointments in a typewritten document exhibited in her replying affidavit, she only refers to appointments spanning the period between the 1st of January, 2017 and the 31st of April, 2018. Accepting for the sake of argument that a list of medical appointments could be capable of supporting the Plaintiff’s application, particularly if combined with a sufficiently detailed letter or report from her treating doctors confirming that she was too unwell to progress her proceedings during the period in question, it is noteworthy that the Plaintiff makes no reference in her list to any appointments for the period from April, 2018 until August, 2019 when her first application was made before Allen J. or from then until June, 2020 when the second application was moved. Accordingly, there is no evidence of appointments throughout this period of a nature which might support a conclusion that the Plaintiff was unable to prosecute her defamation proceedings throughout the entirety of the period, beyond the general terms of what is said in the letter from Earls Court Medical Centre in January, 2020 and what the Plaintiff herself shortly states on affidavit. Simply put, the medical evidence does not go anywhere near far enough to establish that the Plaintiff could not have prosecuted her proceedings because of her state of health.

80. Even though I consider that the medical evidence grounding the application is neither cogent nor strong, I have also considered the fact that the Plaintiff’s claims will likely be treated as statute barred if the application to set aside on behalf of each Defendant is acceded to, in line with the dicta of the Court of Appeal in *Murphy*, in assessing where the balance of justice/hardship lies. I do so having regard to other factors in this case which include the fact that the Plaintiff is a lay litigant who has had some inadequately detailed parting of the ways from her former solicitor. This appears to have occurred, however, after the said solicitor had engaged in correspondence on the Plaintiff’s behalf and had an opportunity to consider the response received from the *Irish Daily Star*. The response received by letter dated the 13th of

January, 2017 referred to the fact that the article complained of had already been addressed by a further article published on the 18th of February, 2016 written following correspondence from the Plaintiff in respect of the earlier article published on the 29th of January, 2016 (the subject of the pre-litigation correspondence) and a discussion between the reporter and the Plaintiff. It is stated that the article published relies on quotes from the Plaintiff and clearly states that she did not wish to have her mother prosecuted. The letter confirmed that the report carried a photograph the Plaintiff had requested be used.

81. While the balance of justice test falls to be exercised where a threshold of special circumstances is identified, what constitutes “*special circumstances*” cannot be fully divorced from balance of justice considerations as this is not a precise test or scientific standard. The correspondence between the Plaintiff’s former solicitor and the *Irish Daily Star* presents a background to these proceedings which goes to the merits of the claim she makes against the *Irish Daily Star* with which she has not engaged on affidavit or in oral argument. The correspondence forms part of the factual background to these proceedings and the failure to progress them in a timely fashion.

82. The terms of the correspondence demonstrates that the Plaintiff actively engaged in relation to the publication immediately it was published and corresponded on her own behalf with the newspaper. While there is no direct evidence that this correspondence contributed to the parting of ways with her previous solicitor, the failure to refer to this engagement in the solicitor’s pre-litigation correspondence seeking an apology and redress proposals is indeed strange and is not consistent with him being fully instructed. If the Plaintiff’s solicitor had been aware that the *Irish Daily Star* had published an article in consultation with the Plaintiff in response to her concerns when he called for an apology in respect of the article published on the 29th of January, 2016 in formal pre-litigation correspondence, one would expect him to refer to this fact given that her position had purportedly been set out in the later article published in February, 2016.

83. The fact of this engagement by the Plaintiff and the terms of the subsequent publication in February, 2016 which it is claimed occurred in consultation with the Plaintiff (a claim that has not been disputed by her), warrants some consideration in a balance of justice test. Not only was she seemingly able to engage on her own behalf immediately following the

publication but she secured publication of an article which correctly set out her position at that time.

84. The decision to issue writs in these cases in January, 2017, so close to the one year anniversary of the publications, without serving them immediately (certainly in the case in which solicitors were acting) is consistent with the issue of writ on a protective basis having regard to concerns under the Statute of Limitations, 1957 (as amended). Unlike medical negligence cases considered in most of the case-law to date, there is no established legitimate basis for a general practice of issuing a writ but not serving it in defamation cases. On the contrary, the need for prompt action in defamation cases is recognised by the courts and the Legislature alike.

85. Whereas the burden to establish “*special circumstances*” which justify renewal of the summons varies depending on the full circumstances of the case, I am mindful in this case, as I consider I must be, that the Legislature has prescribed special time limits in defamation law which recognise the need for expediency in such cases by requiring that proceedings be initiated within twelve months of the accrual of the cause of action with a power to extend this time limited to circumstances in which an application for an extension of time is brought/determined within two years. These provisions are unique to the area of defamation law. They reflect a legislative acknowledgment of the requirement for speed in these types of cases. When the application was moved before Cross J. in 2020, more than four years had passed since the alleged defamatory publication.

86. Indeed, while the Court has power to extend time for the issue of proceedings under the 2009 Act, this is a tightly constrained power which can only be exercised before the expiry of two years from the accrual of the cause of action where the court is satisfied that the interests of justice require the giving of the direction and that the prejudice that the plaintiff would suffer if the direction were not given would significantly outweigh the prejudice that the defendant would suffer if the direction were given. In extending time, the court is obliged to have regard to the reason for the failure to bring the action within one year. Where the application for an extension of time within which to issue proceedings is not brought within two years of the accrual of the cause of action, it is now established that the Court has no jurisdiction to extend time. This strict time limit does not apply in other areas of litigation and should not be undermined by an unduly lax approach to the requirement to demonstrate “*special*

circumstances” to ground renewal of a summons which has not been served well outside the time permitted for the issue of defamation proceedings.

87. It seems to me that the statutory intent in prescribing such careful and constrained time limits in defamation actions is an important factor to be considered in deciding whether “*special circumstances*” have been shown to which justify the grant of an extension with the effect of renewing a summons thereby permitting an action to be maintained well outside this two-year period extended period provided for under the 2009 Act in circumstances where the summons issued but was not served. I consider the onus on the Plaintiff to identify “*special circumstances*” in a defamation action is high bearing in mind that they must be capable of justifying an extension when the legislative policy is to require particular expedition. Recalling the decision of Hyland J. in *Brereton* (cited with approval by the Court of Appeal in *Murphy*), the length of the delay in this case is a very material consideration. Demonstrating “*special circumstances*” which would justify a renewal of a summons when this would result in a significant departure from time limits prescribed in primary legislation for defamation cases becomes more burdensome the longer the delay.

88. Having carefully considered the evidence and the submissions made I am not satisfied that sufficiently “*special circumstances*” have been demonstrated by the Plaintiff such that renewing the summons is justified having regard to balance of justice considerations in either case. In view of the fuller information before me on hearing these set-aside applications, I am satisfied that the circumstances demonstrated by the Plaintiff are not such as would warrant a renewal of the summonses in either of these cases on foot of applications made more than four years post the alleged defamation.

CONCLUSION

89. For the reasons aforesaid, I will allow the applications to set-aside the renewal of the summonses in both the proceedings against the *Irish Examiner* and the *Irish Daily Star*. I will hear the parties in respect of the form of the order and any consequential matters. This matter will be listed before me for this purpose on a date to be notified by the Registrar after the passage of 7 days from the electronic delivery of the judgment.