

APPROVED



NO REDACTIONS NEEDED

**THE COURT OF APPEAL
CIVIL**

Record No.: 2022/256

High Court Record Number: 2017/1570S

Neutral Citation Number [2023] IECA 318

**Costello J.
Faherty J.
Butler J.**

BETWEEN/

ALLIED IRISH BANKS PLC

AND

EVERYDAY FINANCE DESIGNATED ACTIVITY COMPANY

**PLAINTIFF/
APPELLANT**

- AND -

MICHAEL BOYD AND JOHN BOYD

**DEFENDANTS/
RESPONDENTS**

JUDGMENT of Ms. Justice Butler delivered on the 21st day of December 2023

Introduction

1. This is an appeal taken by the appellant from a decision of the High Court (Heslin J.) [2022] IEHC 574 setting aside an order made by Murphy J. on 5 May 2021 renewing a summary summons which had been issued by the appellant on 9 August 2017.

2. The decision of Heslin J. examines the arguments made by the parties in some detail before concluding that the plaintiff had not established special circumstances which justified an extension of time to renew the summons under O.8, r.4 of the Rules of the Superior Courts. The main ground on which the appellant appeals this decision is the contention that the trial judge erred in considering and rejecting each of the matters relied on by it separately rather than considering whether cumulatively they amounted to special circumstances. The appellant also contends that the trial judge erred in not concluding that it would be in the interests of justice to permit the renewal of the summons.

3. There was no significant disagreement between the parties as to the applicable law – namely O.8 of the Rules as substituted by S.I. 482 of 2018 and as interpreted by Haughton J. in *Murphy v. HSE* [2021] IECA 3. The dispute between them lay in the application of the legal principles to the particular facts of the case. As those facts are complex, I will set them out in some detail at the outset before looking at the relevant legal principles and the decision of Heslin J. I will then consider whether, in light of all of the facts and circumstances, the conclusion reached by Heslin J. that the renewal of the summons should be set aside should be upheld.

4. It might be noted that by order of Costello J. made in the Court of Appeal on 22 February 2023 Everyday Finance DAC were joined to the proceedings as a second plaintiff and, for the purposes of this appeal, a second appellant. This arose in circumstances where the loan, the subject of the underlying proceedings, was sold by AIB to Everyday Finance DAC on 4 October 2022. Nothing in particular turns on this save that the reader should be aware that references to “the appellant” in this judgment in the context of events, all of which took place before October 2022, are necessarily references to AIB alone.

Background Facts

5. The underlying proceedings arise out of the failure of one Agnes Boyd (also “Mrs. Boyd”, “the defendant” or “the deceased”) to make repayments on two loans made to her by the appellant in 2006 and 2007. The circumstances of these loans were unusual in that Mrs. Boyd was 77 years of age and a widow at the time the loans were drawn down by her and the amount was large – over €1.7m. between two separate loans. It appears that the purpose of the loans was twofold. Some €200,000 was to be applied towards the renovation of Mrs. Boyd’s existing dwelling house and the balance was to be applied towards the purchase of a new dwelling house. The original intention was that the proceeds of sale of the existing dwelling house would then be applied to substantially reduce the amount outstanding on the loan for the new dwelling house. The timing of the loans was inauspicious and following a crash in the property market in 2008 Mrs. Boyd was left with significant residual debt to the appellant. Formal demands for repayment were made by the appellant in July 2015 and January 2016 but the outstanding balance on the loans was not repaid.

6. This led the appellant to issue proceedings by way of summary summons on 9 August 2017 seeking judgment in the sum of €1,025,303.35. The appellant engaged a summons server who attempted to serve the proceedings on Mrs. Boyd, who was by then 88 years of age, at her home. In all, five unsuccessful attempts at service were made between 24 October 2017 and 14 November 2017. On two occasions there was no reply when the summons server knocked at the door. On two occasions the door was answered by a man who indicated that Mrs. Boyd was incapacitated and could not come to the door. On one other occasion the summons server met a different man in the driveway who told him that Mrs. Boyd could not come to the door which was not opened when he knocked. As a result of this the appellant instructed its solicitors to prepare an application for substituted service. The solicitors were also instructed to issue possession proceedings regarding the property

which had been provided as security for the loans in the appropriate Circuit Court. These proceedings were drafted but were not issued until much later. Likewise motion papers for the substituted service application were drafted but before they were filed the appellant received a letter of complaint from Mrs. Boyd dated 22 November 2017. This letter was stated to have been prepared by her with assistance. According to an averment made by the appellant's solicitor, the appellant decided not to progress the proceedings nor to issue the Circuit Court proceedings until the complaint had been resolved.

7. Before I look at the handling of the complaint, I should note that the appellant relies on the preceding facts as establishing, firstly, the deliberate evasion of service by Mrs. Boyd and persons who were presumed to be her sons and, secondly, from the terms of the complaint, that Mrs. Boyd was aware that the appellant had issued High Court proceedings against her. In fact, the appellant sees the complaint as having been made as a direct response to the litigation.

8. The detail of the complaint made by Mrs. Boyd is not relevant to the issues I have to decide save insofar as the appellant contends that it does not disclose any legal or equitable defence to the proceedings. Mrs. Boyd complained that the appellant had failed in its duty towards her, as an elderly and vulnerable customer, by providing her with facilities and products which were inappropriate in light of her age, income and lack of business experience. She said that the appellant failed to advise her of the risks inherent in the proposal or to caution her as to the need to make provision for her future health and care needs. All of this, it was contended, led to a gross deterioration in her financial circumstances.

9. The letter concluded by inviting the appellant to meet with Mrs. Boyd's representatives or members of her family "*without seeking to lay down pre-conditions*". The letter was copied to the Central Bank and to the Financial Services & Pensions

Ombudsman (“FSPO”). Separately, on 8 February 2018 Mrs. Boyd made a formal complaint in similar terms to the FSPO. Very shortly after this Mrs. Boyd died on 3 April 2018.

10. The death of a party to litigation necessarily presents procedural issues which have to be addressed before the proceedings can continue. At its most basic, a deceased person cannot participate in court proceedings and, if the litigation is to continue, the proceedings must be reconstituted in order to proceed against the deceased person’s estate. However, this cannot be done until a grant of probate has been extracted by the deceased person’s personal representatives. If those entitled to extract a grant of probate do not do so, then under s.27(4) of the Succession Act 1965 the High Court may permit someone who is not normally entitled to probate to extract what is termed an *ad litem* grant to the estate of the deceased person to enable proceedings to be issued or served in cases where a statutory limitation period is due to expire.

11. Further, under s.9(2)(b) of the Civil Liability Act 1961 proceedings in respect of a cause of action which has survived against the estate of a deceased person cannot be maintained unless either the proceedings had been issued and were pending at the time of death or, if proceedings were not issued at the time of death, they are commenced within the relevant time for that type of action under the Statute of Limitations or within two years from the date of death, whichever is the earlier. The effect of this is that in most routine contract and tort cases, if proceedings have not been issued before a potential defendant dies, the limitation period that would otherwise apply under s.11 of the Statute of Limitations is reduced to two years from the date of death.

12. Regardless of the difficulties encountered in effecting service, in practical terms when Mrs. Boyd died the appellant had to reconstitute the proceedings against her estate. At this juncture it appears that the appellant also instructed its solicitors to consider whether

fresh proceedings should be issued against the estate. It was not immediately possible for the appellant to do either of these things as, on checking with the Probate Office in June 2018 and again in July 2019, it transpired that a grant of probate had not yet been extracted to Mrs. Boyd's estate. The appellant instructed its solicitor to prepare an application seeking an *ad litem* grant under s.27(4) of the Succession Act but before this could be done, on 2 October 2019, a grant issued from the local Probate Registry to the respondents to this appeal, two of Mr. Boyd's sons who are the executors of her estate.

13. I am not minded to be especially critical of the appellant for not moving more promptly between June 2018 and October 2019. The summary proceedings were issued comfortably within the time limit under s.11 of the Statute of Limitations and, as they were pending at the time of Mrs. Boyd's death, they did not become subject to the shorter two year time limit under s.9 of the Civil Liability Act 1961. Whilst the possibility of applying for an *ad litem* grant under s.27(4) of the Succession Act 1965 in order to serve the existing proceedings was open to the appellant, the general practice of the High Court is to afford the executors named in a will or those entitled to extract letters of administration, who may also be grieving family members, the opportunity to apply for a grant before permitting a third party to do so - unless of course there is an imminent risk of a limitation period expiring.

14. In parallel to this, the complaint made by Mrs. Boyd continued to be progressed. In addition to an exchange of without prejudice correspondence between June and August 2018, on 22 June 2018 the appellant issued a formal reply to the complaint. This reply denied the various allegations made by Mrs. Boyd and also the applicability of the Consumer Protection Code 2006 to the loans in question. The letter concluded by indicating that the appellant would be happy to meet with representatives of the deceased's estate but added, for the avoidance of doubt, that "*proceedings shall not be stayed until such time as a full and final settlement agreement is reached*". Heslin J. placed significant reliance on this

statement, concluding that it was inconsistent with the appellant's position on the renewal application that the proceedings had been put "on hold" pending the resolution of the complaint.

15. Although the letter of 22 June 2018 advised the respondents of their right to proceed to the FSPO, that step had in fact already been taken by their mother prior to her death. Mediation, facilitated by the FSPO, took place between the parties in August 2019 but did not result in a resolution of the issues between them. The complaint itself remained live before the FSPO until 2 September 2020 when it was dismissed largely on jurisdictional grounds for being out of time. Time limits under the Financial Services and Pensions Ombudsman Act 2017 are calculated from the date of the conduct complained of which, on the basis of Mrs. Boyd's complaint, was the provision to her of loan facilities in 2006 and 2007.

16. Before the appellant had taken steps to substitute the respondents' names in the title to the proceedings, the Supreme Court delivered its seminal judgment in *Bank of Ireland Mortgage Bank v. O'Malley* [2020] 2 ILRM 423. That judgment held that the level of detail commonly included by financial institutions in seeking summary judgment was insufficient in light of the requirement in O.4, r.4 to include in the endorsement of claim a statement which "*specifically and with all necessary particulars*" set out "*the relief claimed and the grounds thereof*". Further, documents in which those particulars are set out (such as bank statements) may only be relied on if they are expressly incorporated by reference into the text of the endorsement of claim. As a result of *O'Malley*, the appellant along with other financial institutions had to review existing proceedings to see if they met the criteria as set out in that judgment. In this case, that review was carried out and the appellant concluded that the level of particularity included in the summary summons fell short of what was required.

17. At this point as the summary summons had not been served, the solicitor for the appellant avers that the appellant decided that in lieu of making an application to renew the summons and to substitute the respondents as the personal representatives of the deceased, it would be more efficient to issue fresh proceedings – making the claim with the requisite level of particularity - against the personal representatives. No date is given as to when this decision was made save that, by inference, it must have been after the date of the *O'Malley* judgment (29 November 2019) and before the date on which the fresh proceedings were actually issued (3 April 2020).

18. The solicitor then avers to the restrictions introduced on public health grounds to deal with the Covid-19 pandemic commencing on 12 March 2020. Those restrictions are described in some detail and include the fact that the solicitor's firm organised for its staff to work from home and that there was, initially, uncertainty as to how the Central Office would continue to facilitate the institution of proceedings, a process which typically requires an in-person attendance to stamp and file documents. It is accepted that the solicitor's firm was facilitated by the Central Office and fresh proceedings were issued ("the 2020 proceedings") during the height of the restrictions on 3 April 2020. The difficulty from the appellant's perspective (and it is unclear if this was appreciated at the time) is that the 2020 proceedings were issued against Mrs. Boyd's estate after her death and were subject to the two-year time limit under s.9 of the Civil Liability Act 1961. As Mrs. Boyd died on 3 April 2018, that limit expired on 2 April 2020 and, thus, the 2020 proceedings were issued one day out of time.

19. The solicitor who swore the affidavit does not indicate what, if anything, happened with the 2020 proceedings nor whether they were ever served on the respondents, although the court was led to understand in argument that they may not have been. It appears that the particular solicitor within the firm who had been handling the file went on sick leave in

January 2021 and by the end of that month had advised the firm that he would be unable to return to work for health reasons. The firm then conducted a full review of that solicitor's files, including these proceedings, which showed that the 2020 proceedings were issued out of time. Whilst I fully appreciate the need to protect this individual's privacy, it is unclear whether the affidavit is suggesting that due to his health condition the solicitor in question had been impeded in fully attending to his files prior to his departure. As this is not stated and no evidence is provided in this regard, I am not prepared to conclude that this is what occurred. This is obviously problematic for the appellant as it means there is an unexplained period from April 2020 to April 2021 (when the application was moved before Murphy J.), during which no step was taken by the appellant to deal with these proceedings. Equally no step was taken during this period to deal with the new 2020 proceedings nor to resolve the underlying issues between the parties through any other mechanism.

History of this Application

20. The application to renew the summons was moved *ex parte* on behalf of the applicant before Murphy J. on 26 April 2021 and was grounded on the affidavit of a solicitor who is the principal of the firm handling the matter on behalf of the appellant and an affidavit of the summons server. That application was coupled with applications to substitute the respondents as defendants in the title to the proceedings and to amend the summary summons so as to allow for more particularised pleadings in line with the *O'Malley* jurisprudence. The respondents subsequently applied for and were granted access to the transcript of the Digital Audio Recording ("DAR") which was available to this Court for the purposes of the appeal.

21. The application was moved fully and fairly by counsel on behalf of the appellant on much the same basis as this appeal i.e., that the court should have regard to a number of

factors which, the appellant submitted, amounted cumulatively to special circumstances. It is clear from the exchanges between counsel and Murphy J. that she had concerns about the application, primarily because the individual facts relied on as cumulatively constituting special circumstances all emanated from the appellant's own conduct or, as Murphy J. put it "*...are all down to the plaintiff not doing what the plaintiff should have*". However, counsel argued that an application of this nature will only ever arise where a plaintiff has failed to act, so the real question is whether the choices made by the plaintiff were appropriate and reasonable in the circumstances in which they were made.

22. Murphy J. accepted that *prima facie* there were special circumstances which justified the renewal of the summons, but it is clear from the transcript that she did so only in circumstances where she knew that the respondents would have the right to apply to have the order for renewal set aside. The special circumstances as recited in Murphy J.'s order are as follows:

"The Plaintiff placed a hold on proceedings while engaging with Financial Services and Pensions Ombudsman on foot of complaint made by the Defendant and where the parties entered an unsuccessful mediation process and where the Plaintiff did not pursue litigation during the current COVID-19 restrictions and where the Plaintiff was required to amend the Summary Summons on foot of the Supreme Court decision in Bank of Ireland v. O'Malley [2019] IESC 84...."

The amended summons was served on the respondents in person on 26 May 2021.

23. On 28 June 2021 the respondents applied for and were granted access to the transcript of the DAR of the earlier application. Then on 30 June 2021 they issued a motion under O.8, r.2 of the Rules seeking to have the renewal order set aside. I have had some difficulty identifying which of the three affidavits sworn by the respondents' solicitor

grounds this application. The first, dated 24 May 2021, appears to ground the application for access to the DAR.

24. The second, dated 22 June 2021, does not clearly identify the application to which it relates although there is some suggestion in the affidavit that it was sworn on an urgent basis as the appellant was insisting any motion to set aside be filed and served by 30 June 2021. It is unclear if there was a court direction to this effect or if this date was chosen by the appellant to ensure that any application to set aside the renewal of the summons could be heard and determined within the three months which Murphy J. had allowed for the service of the renewed summons. In three of the earlier paragraphs of this affidavit (paras. 5, 6 and 8) it seems to be suggested that the respondents intended to bring an application to set aside the renewal of the summons and to make an application on notice to do so. About half of the affidavit sets out the procedural history to date and the balance identifies in some detail the case that will be made on the intended application, anticipating that the affidavit will be supplemented in due course. It then concludes by asking the court to set aside the renewal of the summary summons. As far as I can see there was no supplemental affidavit sworn.

25. There is a third affidavit sworn on 19 December 2022, which post-dates the judgment from which this appeal is taken. Again, the affidavit does not identify the application to which it relates nor whether it is intended as a reply to any other affidavit or affidavits. It seems intended to deal with the joinder of Everyday Finance DAC to the proceedings and perhaps even to ground an application to join Everyday although no such motion is included in the pleadings before the court. All of this is a bit of a jumble, and it would obviously be preferable to have an affidavit which clearly grounds the application which is the subject of the appeal. Nonetheless, it seems reasonably clear that the case made

on behalf of the respondents is to be found in the affidavit of 22 June 2021 notwithstanding the manner in which that affidavit is framed.

Judgment of Heslin J.

26. The application to set aside was heard on 15 July 2022. Heslin J. delivered the judgment from which this appeal is taken on 14 October 2022. Having set out the relevant legal principles and the chronology of the relevant legal events, Heslin J. made a number of findings enroute to concluding that the renewal order should be set aside. Some of these are relatively uncontentious and are findings with which I agree. These include his view that had an application for substituted service been made in the winter of 2017 after multiple failed service attempts, it was highly likely that this would have been granted; the refusal to make a finding on the evidence that the respondents had conspired with their late mother to avoid service; a rejection of the proposition that there was no defence to the claim made in the summary summons in light of the issues raised by Mrs. Boyd in her complaint and that the appellant's decision not to progress the proceedings whilst the complaint was dealt with was an unilateral decision which had not been communicated to Mrs. Boyd.

27. Other findings are however more problematic. Central to Heslin J.'s analysis is the nature of the decision taken by the appellant not to progress the proceedings, whether that decision can properly be described as the appellant placing a "hold" on the proceedings and whether it persisted past the date on which the appellant sent the respondents a formal response to the complaint in which it is stated that the proceedings would not be stayed (i.e. 22 June 2018). Heslin J. regarded the appellant's decision not to progress the proceedings on receipt of the complaint as unreasonable. More significantly, he regarded any such decision as being inconsistent with the fact that the appellant continued to instruct its solicitors regarding various aspects of the claim, such as the steps necessary to reconstitute

the proceedings after Mrs. Boyd's death or, alternatively, whether fresh proceedings should be issued against her estate.

28. Further, he regarded the contention that the proceedings were "on hold" as untenable after 22 June 2018 when the appellant advised the respondents that they would not be stayed. In light of the appellant's stated intention not to stay the proceedings, he took the view that neither the exchange of without prejudice correspondence nor the conduct of mediation could be regarded as special circumstances.

29. He then found that by issuing a fresh set of proceedings in April 2020, the appellant had effectively decided to abandon the 2017 proceedings. This conclusion is phrased in the following terms: "*to decide not to progress proceedings is, self-evidently, a decision to abandon them*" (para. 72 of the judgment). Therefore, Heslin J. regarded the difficulties in issuing the 2020 proceedings which arose due to the public health restrictions imposed as a result of the Covid-19 pandemic and also the hold placed by the appellant on all litigation in 2020 as irrelevant to whether there were special circumstances justifying the renewal of the 2017 summons. Similarly, he regarded the ill health of the appellant's solicitor as irrelevant as it affected only the 2020 proceedings and not the 2017 proceedings. In essence, Heslin J. regarded the central reason for the appellant bringing the renewal application as being the fact that the 2020 proceedings were statute barred. In his view, this did not amount to special circumstances.

30. Because Heslin J. did not accept that the appellant had established special circumstances, his consideration of the interests of justice is necessarily limited (para. 114 of the judgment). He took account of a range of factors which included not just the potential prejudice to the respondents by reason of the death of Mrs. Boyd but also the fact that the respondents were on notice of the proceedings even though service had not been effected in 2017, the length of the period between the expiry of the summons and the application to

renew and the potential prejudice to the appellant in circumstances where, if the summons were not renewed, the claim would likely be statute barred. At an earlier point in the judgment, he had rejected the appellant's argument that the respondents should be regarded as standing to receive an undeserved windfall, a point he felt he could not accept unless he were satisfied that there was no merit whatsoever in the potential defence to the proceedings as evidenced in the letter of complaint.

The Position of the Parties on Appeal

31. The grounds of appeal are stated by the appellant in very bald terms, i.e., the trial judge erred in law and in fact in finding that there were no special circumstances and in finding that it was not in the interests of justice to renew the summons. It would generally be preferable if the precise basis upon which it is alleged that a trial judge had erred could be identified in the Notice of Appeal. Although the Court of Appeal has jurisdiction to consider an appeal from the exercise of discretion by a High Court judge, the exercise of discretion in this case is dependent on the court being satisfied that there are special circumstances which justify an extension, and it appears that the appeal is really directed at the conclusion that no such special circumstances existed. The basis on which it is contended that this conclusion is incorrect in law and in fact should have been clearly identified. In any event, the argument made by the appellant is relatively net. The central contention is that the High Court erred in considering and rejecting each matter relied upon by the appellant separately rather than considering whether cumulatively they amounted to special circumstances. In overarching terms, the appellant argued that the question was not whether each of those steps were reasonable but whether they were a reasonable response to unforeseen circumstances. This is, I presume, particularly relevant to the Covid-19 restrictions and the Supreme Court decision in *O'Malley* and perhaps to a lesser extent to

the death of Mrs. Boyd, although given her advanced age this could not have been entirely unforeseen.

32. The appellant maintained many of the same arguments as had been made in the High Court including the contention that there was no defence to the proceedings and that, if the appellant were not able to pursue its claim, the respondents would benefit from an undeserved windfall. More significantly the appellant argued that between August 2017 and August 2019 there were reasons which justified the non-progression of the proceedings, and which would likely have ensured the rejection of any application by the respondents to strike out the proceedings for delay up to that point (as indeed Murphy J. had observed would be the case). These included the fact that efforts had been made to serve the proceedings; that the original defendant was aware of them; that the appellant had deliberately not progressed the proceedings when a complaint was made in the hope of resolving issues which included without prejudice correspondence and formal mediation facilitated by the FSPO. Consequently, it was contended that the court's focus should be on whether there were special circumstances which explained the delay between August 2019 and April 2021, and hence justified the renewal of the summons. It was contended that the course of action adopted by the appellant in light of the procedural issues arising from the death of Mrs. Boyd and the decision of the Supreme Court in *O'Malley* was reasonable and that this coupled with the effects of the Covid-19 restrictions and the appellant's decision to place all litigation on hold for the same reason cumulatively satisfied the requirements of special circumstances.

33. The respondents on the other hand argued that the proceedings could not be regarded as being on hold when the appellant was actively instructing its solicitor to take preparatory steps intrinsic to the litigation whilst the FSPO complaint and mediation was still alive. It was contended that the need to comply with the decision in *O'Malley*, something which affected many cases, was not a special circumstance. In other similar

cases, the summons was simply amended or the creditor agreed to allow the proceedings to go to plenary hearing thereby obviating the pleading difficulties. The respondents also stood over Heslin J.'s conclusion that the 2017 proceedings had been abandoned on the issuing of the 2020 proceedings.

34. One of the factors relied on by the appellant was the absence of a replying affidavit putting the factual averments made in its solicitor's grounding affidavit in issue. As a result, it was contended, these had to be accepted at face value. This is only partially correct. The solicitor's affidavit was sworn to ground the appellant's original application for renewal. The application before Heslin J. was the respondent's application to set aside the renewal order. Obviously the two are inter-linked but they are also separate applications. Although, as I have identified, there is some confusion regarding the respondents' solicitor's affidavit, I have assumed that the application proceeded on the basis that the motion seeking to set aside the renewal order was grounded on the affidavit of 22 June 2021 to which the appellant did not file a reply. Therefore, neither side has engaged with the affidavit evidence of the other.

35. The more fundamental issue for the appellant is that the affidavit which grounded the application before Murphy J. is vague in many material respects. In particular, dates are not provided for the taking of key decisions regarding the proceedings. Reasons are not given as to why steps which the solicitors were instructed to take were not taken before other events intervened, often months later. I acknowledge that the appellant's deponent faced some difficulties in preparing his affidavit as he personally was not the solicitor who handled the file and the solicitor who handled the file was not available to swear an affidavit. Thus, the deponent does not have first-hand knowledge of any of the matters to which he avers save, perhaps, the review of the first solicitor's files after his departure from the firm but even this is unclear. He also purports to attest to matters relevant to his firm's instructions

which are not really matters of which any solicitor in that firm could have had first-hand knowledge. Rather they are matters which, if they are to be relied on as facts, one would have expected them to be averred to in an affidavit sworn by an official of the appellant. Therefore, notwithstanding the deponent's undoubted *bona fides*, serious issues arose as to the extent to which the absence of an explanation, either as to a specific decision or as to a period of time, impacted on whether the residual explanation could nonetheless be regarded as constituting special circumstances.

Relevant Legal Principles

36. There was little or no disagreement between the parties as to the relevant legal principles. The application to renew a summons is one made under O.8, r.1, the relevant parts of which are set out below. The application to set aside an Order of Renewal is made under O.8, r.2.

“1(1) No original summons shall be in force for more than 12 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 12 months to the Master for leave to renew the summons.

...

(3) After the expiration of twelve months, and notwithstanding that an order may have been made under sub-rule (2), application to extend time for leave to renew the summons shall be made to the Court.

(4) The Court on an application under sub-rule (3) may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive where satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order.”

...

2. *In any case where a summons has been renewed on an ex parte application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order.*”

37. The authoritative decision on the interpretation and application of the current text of O.8 (which was substituted in 2019) is that of Haughton J. in *Murphy v. HSE* [2021] IECA 3. Having considered a range of High Court decisions on the new text of the order and dealt with an issue which does not arise in this case (as to whether the “*other good reason*” test continued to apply to the application to renew once special circumstances had been shown to justify an extension of time within which to make it), Haughton J. focussed on the interpretation of the phrase “*special circumstances*”. He stated:

“69. *Order 8 r. 1(4) does not assist in identifying what may amount to “special circumstances which justify an extension”. However, some general observations may be made.*

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

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

72. *It also follows from the use of the word “special”. While this does not raise the bar to “extraordinary”, it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present.”*

38. Haughton J. went on to approve an analogy drawn by Hyland J. in *Brereton v. The Governors of the National Maternity Hospital* [2020] IEHC 172 with the test applied to the

granting for security for costs under O.29 of the Rules, which he emphasised showed that “*the essence of the Order...is to advance the interests of justice and not to hinder them*”.

Haughton J. went on to say:

“the court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused.”

He did not regard this as a second tier or limb to the test but as being encompassed within the requirement that the special circumstances justify the extension. Thus, whilst there might be special circumstances which would *prima facie* justify a renewal, when weighed in the balance against countervailing circumstances such as prejudice to the defendant, this could lead a court to decide not to renew. In this regard he noted that the jurisdiction to grant leave to renew is discretionary, provided the trial judge is satisfied that special circumstances exist. The existence or not of special circumstances is not itself a discretionary issue.

39. The particular facts of *Murphy v. HSE*, a medical negligence case, are not directly relevant to this case and much of Haughton J.’s subsequent analysis concerned the need for an expert report before professional negligence proceedings are issued and the position of lawyers acting for a plaintiff if there is a delay in obtaining such a report given the potential expiration of a statutory time limit. However, he also made a few more general points. Firstly, the inadvertence or inattention of a legal advisor in failing to take a necessary step will not normally constitute special circumstances. Secondly, the trial judge is entitled to take account of the fact that a plaintiff may potentially lose the ability to pursue a cause of action pursuant to the Statute of Limitations if an application is refused. As I noted in *Klodkiewicz v. Palluch* [2021] IEHC 67 the expiration of a statutory time limit cannot be

determinative of such an application but is a factor which can be weighed in the balance when considering the respective prejudice to each side.

40. The decision in *Murphy* was considered and approved in *Nolan v. Board of Management of St. Marys Diocesan School* [2022] IECA 10, the facts of which have some resonance for this case. The claim was one of bullying in an employment context over an extended period of time. The plaintiff instructed her solicitor who drafted -but did not issue- proceedings. At the same time, she was involved in a number of procedures at her place of employment which included a bullying complaint by her and threatened disciplinary proceedings against her. These seem to have resulted in an agreement in principle to facilitate the plaintiff's application for early retirement, an application which was ultimately refused on medical grounds by the relevant department. The summons expired whilst the retirement application was pending and an application to renew it was made just over three months after its expiry. This application was allowed by the High Court as was the defendant's subsequent application to set aside the renewal. The issue on appeal centred on the fact that the plaintiff's solicitor appeared to have made a deliberate decision not to serve the summons whilst the retirement process was ongoing to avoid causing additional stress to the plaintiff and in the hope of limiting the scope of the litigation. In looking in broad terms at O.8 Noonan J. observed (at para. 16 of the judgment):-

“16. A summons once issued remains valid for a period of one year before it expires unless it has been served. This is in effect an extension of the statutory limitation period as is, of course, any subsequent renewal. As many judgments have commented, a tension therefore arises between the clear policy behind limitation periods to protect parties from stale claims and bring finality to litigation on the one hand, and the court's jurisdiction to, in effect, extend that limitation period by renewing a summons that has expired on the other.”

41. In considering the extent to which the question of prejudice should be considered in tandem with that of whether special circumstances exist, Noonan J. clarified that this was not what *Murphy v. HSE* required (at paras. 25 and 26 of his judgment):

“Haughton J. recognised that special circumstances alone are not enough and placed emphasis on the requirement for those circumstances to justify extension. His reference to there not being a second tier or limb to the test refers to the fact that special circumstances and the justification for renewal are not two separate and distinct matters, but fall to be considered together in the analysis of whether it is in the interest of justice to renew the summons. Prejudice is a component of that analysis. However, before that analysis can be arrived at, it must be established that there are special circumstances. This follows from the court's approval of the Chambers approach and accords with common sense. The plaintiff's contention that the court is required to consider prejudice from the outset is to put the cart before the horse and would lead to a result diametrically opposed to the clear intent of the new rule.”

42. In considering whether special circumstances had been established, Noonan J. commented critically on the lack of clarity in the solicitor's grounding affidavit especially regarding the timing of his decision to postpone service of the summons. He regarded this as unsatisfactory in a case where the onus lay on the plaintiff to establish the existence of special circumstances justifying renewal as *“the Court is left to speculate about the matter”*. In dismissing each of the factors relied on in that case, Noonan J. rejected the contention that the plaintiff's involvement in other procedures, which she found to be stressful, allowed her to stall pursuit of her litigation.

43. The respondents point to the relatively short period between the expiry of the summons and the unsuccessful renewal application (just over three months) in *Nolan* and to similar, or even shorter periods, in other cases such as *Brereton* (10 weeks) which contrast

unfavourably with the 3 year period in this case. Obviously, those cases cannot be treated as fixing an outer limit beyond which renewal will not be permitted as each case must be considered in light of its own particular facts. Nonetheless there is some co-relation between the ease with which a plaintiff is likely to be able to establish special circumstances and the lapse of time between the expiration of the summons and bringing an application to renew it. The courts must be live to the fact that any gap between the issuing of a summons and its service may amount *de facto* to an extension of the relevant time limit under the Statute of Limitations and that this is especially so where the summons has expired and requires renewal.

Analysis of Issues on Appeal

44. In this case the interval between the expiration of the summons in August 2018 and the application to renew it in April 2021 is just under three years. Attempts were made to serve the summons in the months after its issue and I agree with the trial judge that an application for substituted service made after those unsuccessful attempts would almost certainly have been successful. However, that intended application was not brought because of Mrs. Boyd's complaint, initially to the appellant itself in November 2017 and then formally to the FSPO in February 2018.

45. The procedures before the FSPO and the power of the FSPO to issue legally binding determinations and to award compensation under the 2017 Act are part of a statutory process which runs parallel to, but which does not supplant the jurisdiction of the courts in relation to disputes between financial service providers and their customers, even where those disputes relate to the same transactions which are the subject of complaints to the FSPO. Consequently, the making of a complaint does not require litigation arising out of those transactions to be paused, still less does it operate to suspend the running of time for the

purposes of the Statute of Limitations. It may well make commercial sense for the financial service provider to see if the issues between the parties can be resolved through FSPO facilitated mediation and, consequently, not to actively pursue litigation whilst that is done. This begs the question as to whether, if a decision to pause litigation is made unilaterally by a party in the appellant's position, they can then rely on that decision as constituting part of a matrix which can be characterised as amounting to special circumstances.

46. This question is not really addressed in the High Court judgment because Heslin J. instead focussed on whether the litigation could properly be said to have been "*on hold*" until the conclusion of the unsuccessful mediation (i.e., from November 2017 to August 2019). He concluded that it could not, partly because the appellant continued to instruct its solicitor in relation to the litigation during this period and partly because of the appellant's letter in response to the complaint in which it is stated that the proceedings will not be stayed (August 2018). In my view, this analysis is both overly strict and, perhaps because of that, misses the real issue.

47. There is no precise legal definition of what it means to place proceedings on hold, save the assumption that no formal step will be taken during the period that the proceedings are on hold. Where two or more parties are actively engaged in litigation and they agree that the proceedings will be placed on hold or one advises the other that this is being done, this may well have a bearing on the relationship between those parties. In particular, it may be relevant to the extent to which a court might regard it as inequitable for a party to make a complaint of delay against their opponent when, to their knowledge, the proceedings were deliberately not being pursued so that alternative pathways to resolution could be actively explored.

48. However, it is hard to see that the effect of placing proceedings on hold – even with the other party's consent or to the other party's express knowledge – could be greater than

the operation of a stay imposed by a court. If proceedings were stayed by court order, a party to those proceedings may still seek the advice of their lawyers on issues arising in the litigation or for the purpose of exploring their options and may instruct their lawyers to draft pleadings or other applications. The stay would only be breached by the taking of a concrete step such as the issuing of an application or the filing of a pleading. Work done in the background short of taking such a formal step would not breach any stay on the proceedings and, by analogy, similar background work cannot be regarded as being inconsistent with a voluntary hold on proceedings.

49. Therefore, I think the trial judge was incorrect in his view that the proceedings could not be regarded as being on hold if the appellant continued to instruct its lawyers in connection with them. It was not unreasonable for the appellant to seek and obtain legal advice on the range of issues that arose consequent on the making of the complaint which could and did have a bearing on the continuance of the proceedings even if it had decided not to pursue the litigation for the time being. This is particularly so in relation to issues arising from the death of Mrs. Boyd including the reconstitution of the proceedings and the potential need to extract an *ad litem* grant of probate. In short, proceedings do not cease to be on hold (insofar as that is a term of art) because a party seeks advice or takes preparatory steps - although formally making any of the applications for which this preparatory work has been done would necessarily mean that the proceedings were no longer on hold.

50. There is an additional reason why this is all somewhat hypothetical in this case. Notwithstanding the appellant's assertion that the proceedings were "on hold", because the proceedings had not been served and the intended defendant was not advised that service was being postponed because of her complaint, the defendant and later the respondents were unaware that this approach had been taken by the appellant until after the application for renewal was made. Thus, the "hold" on the proceedings did not have any bearing on the

relationship between the parties. In my view the statement in correspondence that the proceedings would not be stayed carries less weight than Heslin J. attributed to it because the respondents, on receiving the letter, were unaware that this statement was inconsistent with the position previously adopted by the appellant or marked any change in that position.

51. Further, I think the trial judge's characterisation of the appellant as abandoning the 2017 proceedings once the 2020 proceedings were issued is incorrect. Clearly, the plaintiff could not pursue the same sum on foot of the same contractual liability in two different sets of proceedings. However, the issuing of two sets of proceedings does not require that either set be treated as automatically invalidated by the existence of the other. In this case it is fairly clear that had the 2020 proceedings been issued within time, the likelihood is that the appellant would never have sought to renew the summons in the 2017 proceedings. However, in circumstances where the 2020 proceedings were both out of time and never actually served, I do not think that the appellant can, as a matter of law, be treated as having abandoned the earlier proceedings.

52. Again, no more than proceedings being "on hold", there is no precise legal definition as to what the "abandonment" of proceedings means. In normal course proceedings which are not actively pursued can either be formally discontinued by the party issuing them or, alternatively, can be the subject of an application to strike out by the party against whom they are issued. If neither of those steps are taken the proceedings continue to exist although, in the absence of service and after the lapse of a period of time, their existence will cease to serve any practical function as they are unlikely to be capable of being pursued. When people speak colloquially of the abandonment of proceedings, they usually mean their non-progression without either of these formal steps been taken. That is not however a definite and legally recognised step. The question of whether proceedings which

have not been discontinued can be pursued after either a delay or after the taking of other steps, is something which must be resolved on a case-by-case basis.

53. Therefore, I think that three of the factors on which the trial judge placed significant reliance are really of peripheral relevance to the question of whether special circumstances which justify the renewal of the summons had been established.

54. This is not to say that the assertion on behalf of the appellant that it had placed the proceedings on hold should necessarily be accepted by the court as being capable of constituting special circumstances, much less of justifying the renewal of the summons. There is an issue as to how much reliance should be placed on that assertion when it is made in an affidavit sworn by a solicitor who was not the solicitor engaged in advising the appellant on these matters at the material time and who does not appear to have any direct knowledge of them.

55. It is not really clear what formal weight it is intended should be attributed to the appellant's decision not to actively pursue the litigation through the use of the phrase "on hold". The appellant did not, in fact, progress the proceedings between November 2017 and August 2019 but, at the same time, it clearly did not regard itself as precluded from doing so. For example, it seems likely that the appellant would have made an application for an *ad litem* grant of probate had the respondents not extracted a grant of probate in October 2019. The hold placed on the proceedings, such as it was, was porous and capable of being rescinded by the appellant at its sole instigation and at a time of its choosing. In those circumstances, if the unhelpful concept of the proceedings being "on hold" is removed from the equation, does the fact that the appellant did not in fact progress the proceedings whilst the complaint was outstanding constitute special circumstances?

56. On balance, by itself I think probably not, but when considered in conjunction with the difficulties arising from the death of Mrs. Boyd it might just about reach this threshold.

My reasons for this conclusion are as follows. Although the appellant would undoubtedly have been granted an order for substituted service in November 2017, it was not actually obliged to serve the summons until August 2018 – i.e., twelve months from its date of issue. In circumstances where a complaint had been made it was reasonable to postpone service to see if the complaint could be resolved. It is open to question whether in normal course it would have remained reasonable to postpone service once the initial twelve-month period came close to its expiration. However, before this occurred Mrs. Boyd died in April 2018.

57. The summons could probably have been renewed without the proceedings being reconstituted but it could not have been served as a result of which any application for renewal would necessarily have required the appellant to be in a position to make a contemporaneous or virtually contemporaneous application to reconstitute the proceedings. The prudent course would no doubt have been to apply to the Master for an extension of the summons before 8 August 2018 and then to apply for an *ad litem* grant before the expiry of the three-month period for which the summons would have been renewed under O.8, r.2 and then to effect service on the holder of the *ad litem* grant. Indeed, it seems likely that the first probate search in June 2018 was conducted with a view to such an application and no explanation is offered as to why such application was never brought. I have already commented on the general reluctance of the High Court to make *ad litem* grants of probate where there has not been any unreasonable delay on the part of those entitled to extract a grant in taking necessary steps to do so. The situation is, of course, different where the person seeking the *ad litem* grant is facing a time limit the imminent expiry of which would operate to deprive them of their cause of action. That would not have been the case for this appellant as regards these proceedings which had been issued and thus were pending at the death of the deceased. It is only the later 2020 proceedings which were caught by the two-year time limit applicable to proceedings against the estate of a deceased person. Thus,

whilst in normal course I do not think it would be open to a plaintiff to decide unilaterally not to serve a summons for over a year after it had expired, on the facts of this case, non-service was not entirely due to the decision to place the litigation on hold, but also because service was legally impossible or procedurally difficult for at least some of that time. When the practical difficulties arising from the death of the deceased are coupled with the potential for resolution in the context of a formal mediation between the same parties albeit under a different statutory process, then in my view special circumstances have, just about, been established.

58. However, that is not the end of the matter. Even if I were to treat this combination of factors as constituting special circumstances it would still be necessary to consider whether those circumstances justified an extension for the renewal of the summons in light of the countervailing prejudice asserted by the defendants. In this case I do not even get to this point because there is an additional period of delay after the grant of probate had been extracted by the respondents in October 2019, thus providing a straightforward procedure for the reconstitution and service of the proceedings once they had been renewed. In reality, little or no explanation is offered to justify the appellant's inaction during this period. Counsel for the appellant argued that the critical period was between 2 October 2019 when the grant of probate was extracted and 2 April 2020 when the Statute of Limitations in respect of the 2020 proceedings expired. I have some difficulty in understanding why the critical period should be so defined. As I see it, even if I were to regard the October to April period as sufficiently explained by a reason or reasons capable of constituting special circumstances, the appellant faces an equal, if not a greater difficulty, in explaining its inaction between April 2020 and April 2021, a period for which no real explanation is offered.

59. I accept that the decision of the Supreme Court in *O'Malley* which was handed down in November 2019 had a significant effect on the way in which cases of this nature are now required to be pleaded. However, it is not really suggested that compliance with *O'Malley* caused a significant delay in these proceedings. As the respondents rightly point out, the appellant could have applied to renew this summons (which would have required the reconstitution of the proceedings) and left the amendment required by *O'Malley* to a later date or even agreed to allow the claim to go forward for plenary hearing without amending the summons. Instead, a decision seems to have been taken by the appellant that rather than seeking the renewal of this summons, together with its amendment and the reconstitution of the proceedings, it would be more straightforward to issue fresh proceedings. Even if this decision was a reasonable one, it was a strategic choice made by a party to litigation and it is difficult to see how it could amount to a special circumstance.

60. Similarly, the appellant does not really rely on the Covid-19 pandemic to justify further delay in these proceedings, but instead relies on the restrictions imposed due to the pandemic to explain the difficulties which arose in issuing and serving the 2020 proceedings as a result of which they were issued out of time. I share Heslin J.'s difficulty in understanding how a factor which undoubtedly impacted on the 2020 proceedings can be regarded as a special circumstance in relation to the 2017 summons.

61. I am not certain what weight the appellant expects the court to attribute to its solicitor's averment that the appellant placed all litigation on hold during 2020 because of the Covid-19 pandemic. If such an averment was intended to be taken seriously, I would expect it to have been made in an affidavit sworn by an officer of the appellant explaining not only the extent to which this hold applied to existing proceedings but also to proceedings facing time limits of varying types. I would also expect it to clearly set out when the decision was taken and by whom, from when it was applied and when it ceased to apply. None of

this information is included. With all due respect to the solicitor in question, I do not think much weight can be afforded to a reference in a single paragraph of the solicitor's affidavit to a hold having been placed by the appellant on the progressing of any litigation during the period when restrictions were in place due to Covid-19.

62. A further difficulty facing the appellant in seeking to persuade the court that it had placed the proceedings on hold either because of the existence of a complaint before the FSPO or because of self-imposed restrictions due to the Covid-19 pandemic is that its conduct in issuing proceedings in April 2020 is inconsistent with both of those claims. The FSPO did not issue its determination of the complaint until 2 September 2020. Covid-19 restrictions were imposed in March 2020. Notwithstanding the generic assertion by the solicitor that the appellant placed all litigation on hold during 2020 as a result of those restrictions, it proceeded to issue the 2020 proceedings in April 2020. As there is a dearth of evidence from the appellant to explain these inconsistencies it is not possible for me to accept that they operated so as to prevent the appellant, even on its own terms, from taking the steps necessary to ensure that the summons in the 2017 proceedings was renewed many months, if not years, earlier than it actually did.

63. The affidavit is similarly vague in respect of another matter relied on by the appellant as constituting part of the special circumstances asserted by it. This is the retirement on health grounds of the solicitor who had been handling the file in January 2021. I have previously noted that even allowing a degree of circumspection to protect the individual's privacy, it is unclear whether that solicitor was unable to attend fully to his files prior to his retirement and at what point after his retirement it became apparent to the appellant that the 2020 proceedings were likely statute barred. There is an onus on a plaintiff who seeks to renew a summons to provide a comprehensive and coherent account to the court not just as to why the summons was not served within time but as to what has occurred

during the subsequent period which explains any delay in bringing the application to court. Gaps in the account presented by a plaintiff will be problematic as it may not be open to a court to draw inferences in the absence of evidence consistent with the existence of special circumstances where no explanation at all is offered for extended periods of delay.

64. The basic argument made by the appellant on this appeal was that matters relied on by a plaintiff in seeking the renewal of a summons under O.8 should be looked at cumulatively in order to see whether they establish special circumstances and should not be dismissed individually without their cumulative weight been assessed. As a matter of principle, I think this argument is correct. As noted by Haughton J. in *Murphy v. HSE* the rules do not categorially define what constitutes special circumstances. Further, although this linguistic point was not really pushed by counsel for the appellant (perhaps because the word “circumstances” is rarely used in the singular) I do accept that it is a naturally plural concept and as such may encompass a number of different factors. Thus, I accept that the existence of special circumstances is not dependent on a single overriding factor being established and may arise because of the combination or confluence of various circumstances which individually might not be regarded as special. In short, the fact that multiple factors operate cumulatively may of itself provide the “specialness” necessary under O.8, r.4.

65. Where there has been an extended period of delay in serving a summons, it may well be that some circumstances pertain only to part of the period of that delay and other circumstances pertain to a different part. There is no difficulty in a court accepting different explanations regarding different periods of time. This is, of course, subject to the observations I have already made to the difficulty in reaching the threshold being commensurately greater the longer the period that a plaintiff is seeking to excuse. However, looking at various factors cumulatively really only adds weight when those factors were

operative so as to affect the plaintiff's pursuit of the proceedings at the same time. In other words, it is one thing to say that a particular factor justified a plaintiff's inaction for a particular period and that a different factor justified inaction for a different period, but those factors do not interact cumulatively with each other unless the period during which they operated to justify the plaintiff's inaction overlaps at least to some extent.

66. This may be evident in the way in which I have treated interaction between the plaintiff's decision not to actively pursue the litigation whilst negotiations and mediation were conducted within the context of the FSPO process and the procedural difficulties arising from the death of Mrs. Boyd both of which had a cumulative impact on the progression of the proceedings between April 2018 and August 2019. However, I do not think that these factors can be said to have had a continued effect on the progression of the proceedings either individually or cumulatively after 2 October 2019 when a grant of probate was extracted by the respondents and the mediation had concluded. Albeit that I do not think these factors are sufficient to constitute special circumstances at all, the reliance placed by the appellant on the need to amend the proceedings following the *O'Malley* decision and the difficulties in issuing the 2020 proceedings due to the Covid-19 restrictions do not interact with the earlier factors. Therefore, whilst they should all be considered, these latter factors are not necessarily to be considered cumulatively, in the sense of adding weight to the earlier factors. More significantly, the earlier factors which had ceased to be operative by October 2019 cannot be regarded as adding weight to factors which arose only after the earlier factors had ceased to be operative.

67. In circumstances where the appellant has not persuaded me that the cumulative effect of the factors relied on is such as to amount to special circumstances, it follows that I am not satisfied that the trial judge erred in not treating them as such. One final observation on that matter is that this appeal is technically from the decision of the High Court setting

aside the order granting renewal. In moving its appeal, the appellant did not confine itself to the circumstances which are recited on the face of the order made by Murphy J., the terms of which are set out above. For the most part the judgment in the High Court and the arguments on this appeal have focussed more generally on whether the appellant has established that there are special circumstances capable of justifying such renewal. It may be that a plaintiff who has obtained a renewal order - which must state on its face the special circumstances the judge has found to justify making it - is thereafter confined to those circumstances when meeting any application to set the order aside. As this point was not argued in this case and would not in any event have been determinative of the appeal, I have not considered it further.

68. For the reasons set out in the preceding paragraphs I am not satisfied that the appellant had established that there were special circumstances pertaining to the non-service of these proceedings between August 2019 and April 2021 and, in particular, between April 2020, at which point the appellant had not managed to issue proceedings within two years from the date of the death of Mrs. Boyd, and April 2021 when an application was made to renew the summons which was extant at the time she died. This is a significant period, particularly when regard is had to the fact that the summons was already expired for in excess of a year at the point where the mediation concluded. There was an onus on the appellant, as the plaintiff, to pursue its litigation with reasonable expedition and it manifestly did not do so.

69. Finally, in line with the judgment in *Nolan v. Board of Management of St. Marys Diocesan School*, as the plaintiff has not established that there are special circumstances, it is unnecessary for me to go on and consider whether those circumstances justify a renewal of the summons in light of any countervailing arguments that might be advanced by the respondents. I note that Heslin J. briefly considered those arguments in para. 114 of his

judgment and, were it necessary to consider this issue, I would agree with his conclusions. The starting point for this analysis must be the fact that the delay involved in this case of nearly three years - is extensive. The appellant will undoubtedly suffer prejudice if it is unable to pursue this litigation which concerns a debt owed to it of over €1m. The respondents would be prejudiced in their defence of the litigation because, assuming that the defence would be in line with the complaint made by their mother to the FSPO, the key witness to the matters complained of, Mrs. Boyd, is now deceased and unavailable to assist in the defence of the proceedings. Of course, had the proceedings been served within time the respondents might well find themselves having to defend the proceedings without the benefit of their late mother's evidence but as they were not served within time they are entitled to point to her absence as a potential prejudice to them. Were this to be a live issue, I would also reject this ground of appeal.

70. In all of the circumstances the appellant's appeal should be dismissed.

71. In circumstances where the appellant has not succeeded in its appeal, my provisional view is that the respondents should be entitled to an order for the costs of the appeal. If the appellant wishes to contend for an alternative order, it has liberty to file a written submission not exceeding 1,000 words within 14 days of the date of this judgment and the respondents will have a similar period to respond likewise. In default of such submissions being filed, the proposed order will be made in the terms suggested above.

72. As this judgment is being delivered electronically, Costello and Faherty JJ. have indicated their agreement with it and the orders I have proposed.