THE HIGH COURT

[2022] IEHC 574

[2017 1570S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

-AND-

MICHAEL BOYD AND JOHN BOYD

DEFENDANTS

JUDGMENT of Mr. Justice Heslin delivered on the 14th day of October, 2022

Introduction

1. The plaintiff is a bank, whereas the defendants are the legal personal representatives of the estate of Agnes Theresa Boyd who died on 3 April 2018 (where relevant, "Ms Boyd" or "the deceased"). Some 8 months prior to her passing, the plaintiff issued a summary summons against Ms Boyd on 9th August 2017. It was never served. On 26th April 2021 the High Court (Murphy J) made an order renewing the summons, following an *ex parte* application by the plaintiff. In the present application, the defendants seek to set aside that order of 26th April 2021 ("the order"). The plaintiff's motion was issued on 30the June 2021, 2 months after the renewal. The central issue for the purposes of the present application is whether, in light of the evidence before the court, there were *special circumstances justifying* the renewal.

The Order renewing the summons

2. The Order made on 26 April 2021 (Murphy J) stated *inter-alia* the following.

> *"And the Court being satisfied having regard to order 8 rule 1(4) of the rules of the Superior Courts that the following special circumstances justify the making of an order extending the time for leave to renew the said summary summons herein.*
>
> *In circumstances where* ***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.
>
> *IT IS ORDERED pursuant to order 8 rule 1(3) of the rules of the Superior Courts that the time for applying for a renewal of the said summary summons be extended to the date hereof.*

AND IT IS ORDERED pursuant to order 8 rule 1(4) of the rules of the Superior Courts that the said summary summons be renewed for a period of 3 months from the date hereof…" (emphasis added)"

In addition to the foregoing, Murphy J made an order substituting the defendants in lieu of the original defendant (Agnes Teresa Boyd (otherwise Carmel Boyd)) and gave liberty to file an amended Summary Summons. The defendants seek to set aside the renewal.

Order 8 – Renewal of Summons

3. O.8, r.1 of the Rules of the Superior Courts, 1986 ("RSC"), as substituted by the Rules of the Superior Courts (Renewal of Summons) 2018 (S.I. No. 482 of 2018) came into operation on 11th January 2019. Sub-rule (1) of O.8, r.1 provides that "*No original summons shall be in force for more than twelve months*"; and a "*plaintiff may apply, prior to the expiry of twelve months, to the Master for leave to renew…".*

4. Sub-rule (2) goes on to provide that the Master may order the summons to be renewed for three months if satisfied that reasonable efforts have been made to serve or for other good reason. No such application to the Master was made.

5. Sub-rule (3) provides that, after the expiration of 12 months and notwithstanding an order made under sub-rule (2), the relevant application must be made to the court. Such an application was made in the present case in April 2021 on foot of which the order was made.

6. Of particular relevance to the present case is sub-rule (4) of Ord.8, r.1, which states that: *"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****."* (emphasis added).

7. There are 4 "*special circumstances*" referred to in the order of 26th April 2021. I highlighted each of these 4 in bold when quoting from same but, for ease of reference, these comprise the following:-

(1) *"the plaintiff placed a hold on proceedings while engaging with Financial Services and Pensions Ombudsman on foot of complaints made by the Defendant";*

(2) *"the parties entered an unsuccessful mediation process";*

(3) *"the Plaintiff did not pursue litigation during the current COVID-19 restrictions";* and

(4) *"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".

Order 8 rule 2 – motion to set aside renewal

8. This is not an appeal against the order made on 26th April 2021. Nor is it an application for judicial review. Rather, it is an application made pursuant to O. 8, r. 2 which provides, as follows:-

"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."

9. The Defendants were not heard at the *ex parte* stage. Thus, this application constitutes a full *de novo* consideration of whether the summons ought to be renewed.

Evidence

10. For the purposes of the hearing which took place on 15th July 2022, I was provided with (i) a book of pleadings; (ii) a joint book of authorities; and (iii) written submissions by both sides. The evidence comprised the following:-

- affidavit of Mr Liam Mahony, sworn 15 March 2021 (Summons Server for the plaintiff);
- affidavit of Mr Robert Brown, solicitor for the plaintiff, sworn on 14th April 2021, together with exhibits "RB1" – "RB2" thereto (which grounded the plaintiff's *ex parte* application to renew);
- affidavit of Mr Seamus Brennan, solicitor for the defendants, sworn 24 May 2021, together with exhibits, *per* "Table of contents" (concerning a motion seeking the "DAR");
- affidavit of Mr Seamus Brennan, sworn 22 June 2021 (grounding the defendants motion to set aside the renewal).

Submissions

11. I have carefully considered all of the foregoing. I have also carefully considered the written legal submissions which were provided to the court by Mr Kennedy SC for the defendants/moving party and by Mr Barron SC for the plaintiff/respondent. Both counsel supplemented these by means of detailed oral submissions. The respective positions of their clients could not have been put with greater clarity or skill and I am very grateful for the assistance which both counsel gave to the court. I will refer to various submissions during the course of this judgment.

Relevant legal principles

12. There was no dispute between the parties as to the applicable legal principles. Clear guidance in this area has been given by the Court of Appeal in a relatively recent judgment by Mr Justice Haughton, handed down on 15th January 2021 in *Murphy v. Health Service Executive* 2021 [IECA] 3. In *Murphy*, Haughton J carried out a thorough analysis as to the proper interpretation of Ord. 8 and the single test with which this Court is concerned on an Ord. 8, r. 4 application. In short, the Court must be *"satisfied that there are special circumstances which justify an extension"*. Given the significance, for present purposes, of the guidance provided by the Court of Appeal under the heading "*Special Circumstances*", it is appropriate to set this out, *verbatim,* before turning to look at the facts which emerge from an examination of the evidence before this court:

> ***"Special Circumstances"***
>
> *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.

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

> *"In West Donegal Land League v Udaras Na Gaeltachta [2006] IESC 29 Denham J., as she then was, noted that in considering the concept of special circumstances it should be remembered that the essence of the order for security for costs is to advance the interests of justice and not hinder them, and that it is for a court on such an application to consider and balance the interests of the plaintiff company and those of the defendant in a fair and proportionate manner."*

74. I agree with Hyland J. that this applies by analogy to a court deciding whether "special circumstances …justify an extension". The court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused.

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

> *"[8] …Firstly, the court should consider is there good reason to renew the summons. Secondly, if the court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Thirdly, in considering the question of whether it is in the interest of justice as between the parties to renew the summons because of the identified good reason, the court will consider the balance of hardship for each of the parties if the order for renewal is or is not made."*

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

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

77. At the level of principle a question also arises as to whether inadvertence on the part of a plaintiff or their solicitors can ever amount to or be relied upon as a special circumstance. As far as a plaintiff is concerned this is very fact dependant and it is probably not helpful to speculate in a vacuum. As far as legal advisors are concerned in my view inadvertence or inattention, for example in effecting service of the summons, will rarely constitute "special circumstances". Legal advisors must be taken to be aware of the 12 month time limit for service of the original summons, and the consequences of allowing it to lapse. Peart J., in the context of "good reason", in Moynihan v Dairygold Co-operative Society Limited [2006] IEHC 318, said –

> *"38 …This is an opportunity to give a timely warning to practitioners that proper attention must be given to the question of service of proceedings after issue, especially where there is a likelihood that after expiration of one year from the date of issue, the Statute will have expired."*

If inadvertence of this nature would not reach the threshold of "good reason" it is even more unlikely to amount to "special circumstance".

78. Finally, provided the trial judge is satisfied that "special circumstances" exist, the jurisdiction to grant leave to renew is discretionary. It follows from that that this court, in reviewing a decision to renew a summons, should afford the trial judge a margin of appreciation and should not interfere with the decision unless the trial judge has erred in principle or there is a clear error of fact or breach of the rules of natural justice."

Chronology of relevant events

13. Armed with the foregoing principles, I now turn to the facts. Having carefully analysed the evidence before the court, the following is revealed which, for ease of reference, I propose to set out in chronological order.

9 August 2017

14. The plaintiff issued proceedings against Ms Boyd by way of a special summons which was issued on 9 August 2017. As pleaded, the claim sought judgment in the sum of €967,129.14 for monies

advanced pursuant to various loan facilities. Reference is made in the summons to loan facilities accepted, variously, on 29th December 2006; 20th September 2006; and 17th July 2007. It is pleaded that the loan facilities were for the purpose of assisting with the purchase and renovation of a dwelling house at Castle Gardens, Kilkenny ("the property"). Pleas are made inter-alia with regard to formal demands made on 26 May 2015 and on 4 January 2016 and it is pleaded that, despite demands, the defendant (Ms Boyle then being the sole defendant) failed, neglected and refused to pay the sums due and owing. It is not in dispute that, as of 2017, Ms Boyd was 88 years of age.

October/November 2017 – attempts at personal service

15. Mr Liam Mahony is a summons server retained by the plaintiff and he swore an affidavit on the 15 March 2021, wherein he sets out details of 5 separate attempts to effect personal service on the defendant at the aforesaid property. As averred by Mr Mahony, these 5 attempts at personal service were as follows:-

(1) on 24 October 2017 at 5:45 p.m. (when a gentleman, who would not identify himself, informed Mr Mahony that the defendant "*was incapacitated and could not come to the door"*);

(2) on 1 November 2017 at 11:30 a.m. (when Mr Mahony knocked on the door but there was no reply although he "*observed a few cars parked in the driveway*");

(3) on 4 November 2017 at 2 p.m. (when he met a different gentleman in the driveway getting into a car, who informed him that the defendant "*could not come to the door";* and when Mr Mahony knocked on the door, there was no reply);

(4) on 10 November 2017 at 10:45 AM (when Mr Mahony knocked on the door, but there was no reply); and

(5) on 14 November 2017 at 11:15 AM (when the door was answered by the same gentleman who answered it on the first occasion, and who was on the phone at the time, would not identify himself to Mr Mahony and closed the door).

Plaintiff's instructions to prepare substituted service application (after 14 Nov 2017)

16. Arising from the aforesaid difficulty in serving the defendant, personally, the plaintiff instructed Messrs. McKeever Rowan solicitors to make an application for substituted service. This is averred at para. 8 of the affidavit sworn on 14 April 2021 by Mr Robert Browne, the plaintiff's solicitor. It is not indicated *when* the plaintiff gave instructions to its solicitors to apply for substituted service, but it seems clear that this occurred at some time *after* 14 November 2017 (being the last of the 5 unsuccessful attempts at personal service). That being so, one might reasonably expect an application for substituted service to have been brought relatively quickly thereafter–if not in the days or weeks, then certainly in the months that followed. In the manner presently discussed, no application for substituted service was ever brought.

17. Before proceeding further, it seems uncontroversial to suggest that, had an application been brought at that point seeking an order for substituted service, it is highly likely to have been granted, given what Mr Mahony has averred.

18. On the topic of personal service, it was submitted by counsel for the plaintiff that the defendants "*would appear to have been involved*" in thwarting the efforts of Mr Mahony to effect personal service on their mother (who was then the sole defendant in the proceedings). In making this submission, counsel for the plaintiff acknowledged that the foregoing could not be known with "*absolute certainty".* That seems to me to be the central point. The evidence certainly does not allow for any finding of fact that these defendants, or either of them, deliberately frustrated efforts at personal service or, for that matter, conspired with their late mother in that regard. The plaintiff may have grounds for suspicions in that regard but this court does not have evidence before it which would allow for such a finding.

"Undeserving" "Windfall"

19. The aforementioned submission made by counsel for the plaintiff was in the context of suggesting that, if the present motion is successful, the defendants would be the "*undeserving*" recipients of what was described as a "*substantial windfall*". Regardless of the skill with which these submissions were made on behalf of the plaintiff, they do not seem to me to be grounded in facts which have been established. For example, it seems to me at least conceivable that a lady aged 88 might have been *"incapacitated"* and "*unable to come to the door"* on the occasion(s) to which Mr Mahony referred. Furthermore, Ms Boyd was the only defendant at that stage and self-evidently neither of the defendants could be regarded as seeking to avoid proceedings against them (there were none). Nor has it been established as a matter of fact that both of the defendants are the unidentified gentlemen to whom Mr. Mahony refers. On a related point, it seems to me that for this court to take the view that the defendants stand to receive a "*substantial windfall*", requires the court to accept entirely that there is no merit whatsoever in any defence to the plaintiff's claim. On this issue, counsel for the plaintiff submits that this is "*a simple case of a debt*", which is "*not a liability case in reality*", and one where "*a substantial sum was advanced and not repaid*" and "*there seems to be no defence*".

20. It does not seem to me to be the proper function of this court, in the context of hearing the present motion, to make determinations as to the *merits* of the underlying proceedings. Furthermore, given the contents of correspondence which the plaintiff relied upon at the *ex parte* stage (namely, a 22nd November 2017 letter of complaint which was sent to the CEO of the plaintiff bank by Ms Boyd) matters do not appear to be at all as simple or straightforward as counsel for the plaintiff contends. By that I mean, given the number and nature of the issues raised in the correspondence, this court cannot take the view that there is no possibility of Ms Boyd having had a *bona fide* defence. To say the foregoing is not to state that the court is satisfied that there is a strong defence; or one likely to succeed; or that the issues raised in Ms Boyd's letter even reach the level of a *bona fide* defence. It is simply to say that, for the purpose of approaching the present motion, this court cannot adopt the stance that there was, and is, no *possibility* of there being a *bona fide* defence to the plaintiff's claim. To accept the submissions made with skill by the plaintiff's counsel would be, it seems to me, for this court impermissibly to rule out the possibility that there is a stateable or bona fide defence, thereby making decisions on the merits (or not) of the underlying claim. I will presently look in some detail at Ms Boyd's complaint and the defence(s) and claims canvassed therein.

21. For the foregoing reasons, this court cannot proceed in its analysis on the basis that the plaintiff has established that the defendants are "*undeserving*" and/or if their motion is successful, they will receive a "*windfall".* If, to take a theoretical example, a defendant in Ms Boyd's position had openly acknowledged liability to the bank for a specific sum, it might well be possible for the court to proceed on the basis that liability was not in issue and that was no defence to the claim. That is not at all the position. Nor have the defendants ever acknowledged liability on behalf of the estate.

Affidavits by the parties

22. Counsel for the plaintiff was also critical of the fact that the defendants did not swear affidavits, personally. It was submitted that, therefore, the state of the evidence is that there is no defence to the plaintiff's claim. I take a different view, for several reasons. Firstly, the plaintiff has sworn no affidavit, either. The relevant affidavits were sworn by solicitors representing the respective parties. Secondly, numerous issues are raised in Ms Boyd's 22nd November 2017 letter of complaint which are said to comprise a defence, as well as setting out of claims against the bank and, as I observed earlier, the Plaintiff has relied on this letter (this letter comprised exhibit "RB1" to Mr. Browne's affidavit of 14th April 2021 which grounded the *ex parte* application to renew). Thirdly, and as the authorities make clear, the relevant onus in the present application rests squarely on the plaintiff.

Mid-November 2017

23. Returning to the chronology of relevant events, the following can be said with confidence with regard to the position as of mid-November 2017: (i) the plaintiff had made appropriate and repeated efforts at personal service; (ii) these efforts proved unsuccessful; (iii) very understandably, the plaintiff decided that an application for substituted service should be brought; (iv) applications for substituted service are neither complex nor uncommon; (v) had such an application been brought at that point (or at any point) it seems uncontroversial to say that it is highly-likely, to the point of virtual certainty, that the Court would have granted substituted service (e.g. by ordinary prepaid post/by leaving a true copy of the summons at Ms Boyd's address); (vi) no such application was brought.

"In or about this time" – "possession proceedings"

24. At para. 9 of Mr Browne's affidavit, it is averred, inter alia, that "***In about this time*** *the plaintiff also instructed this office to issue possession proceedings against the defendant in Kilkenny Circuit court in circumstances where the loans, the subject matter of these proceedings, were secured by a first legal charge in favour of the plaintiff"* (emphasis added). Again, it is not made clear precisely *when* these instructions were given, but it would appear to have been in the wake of the unsuccessful attempts to serve Ms Boyd, personally (the last of those being on 14th November 2017). Mr Browne goes on to aver that, although such proceedings were drafted, they were never issued from Kilkenny Circuit Court office. During the hearing which took place on 15 July 2022, this court was informed that those possession proceedings did not issue until some 4 years later, on 28 June 2021 and it appears to be common case that those Circuit Court proceedings are 'statute-barred'.

Instructions to counsel re substituted service application (after 14 Nov 2017)

25. At para 10 of his affidavit, Mr Browne avers that his office gave instructions to counsel to draft papers in respect of a substituted service application. Once more, it is not made clear precisely *when* these instructions were given to counsel. However, it seems safe to assume that this was on or after 14 November 2017. Mr Browne goes on to aver that prior to those papers being filed *"the plaintiff instructed this firm not to file the papers or move the application as a complaint had been received by the plaintiff from the defendant which is dated 22 November 2017".*

22nd November 2017 – Ms Boyd's letter of complaint

26. A copy of the said letter dated 22 November 2017 ("the complaint" or "letter of complaint) comprises exhibit "RB1" to Mr Browne's affidavit. In it, Ms Boyd made numerous complaints with regard to the manner in which the plaintiff treated her, including, as a "consumer". The complainant was in the form of a very detailed letter which ran to 7 pages and Ms Boyd made clear that it had been prepared *"with necessary assistance from others*". As well as being addressed to the CEO of the Plaintiff bank, the complaint was also copied to (i) the plaintiff's solicitors; (ii) the Central Bank of Ireland; and (iii) the Financial Services Ombudsman. To gain some appreciation of the issues raised, the following are *verbatim* extracts from the complaint:

"I wish to complain about the manner in which Allied Irish Banks plc bank have dealt with me as a borrower (as a consumer) from the bank.

In 2006 I was aged 77 years and who had no business experience and had for the best part of 50 years been a housewife who did not work outside the home, not having ever had any business training or experience.

I was then living and had for 49 years lived at 7 Patrick St, Kilkenny, which, since it was purchased in 1957, was always the family home, and which I became sole owner of in 2002, following the death of my late husband Patrick.

…

In an[d] *about the provision of facilities to me and taking this mortgage the bank failed completely to observe the terms of the Consumer Protection Code*.

In consequence of the bank's non-observance of the Code I have been exposed to and have suffered loss and damage in that I have found myself moving from a position of, at age 77, owning my own residence, unencumbered by any charge and debt free, and being the owner of some investment properties providing me with income, to being now, aged 88 years, where I have had to dispose of my family owned investment properties, to meet the bank's demands, and now under pressure from the bank which has instituted High Court proceedings, against me seeking to obtain judgement against me and seeking, I believe, to force the sale of my home at Fuinseog, Castle Gardens, Kilkenny.

The bank in its dealings with me failed utterly and in every respect to apply the provisions of the consumer credit code or to properly assess my suitability as a candidate for credit and facilities.

Having regard to my age and general circumstances as known at all times to the bank provision of facilities to me as an elderly widow lacking business experience and with limited income should have been preceded by a full investigation of my circumstances and careful consideration of my financial

position and of the risks of the proposed purchase and sale transactions and of my repayment capacity and an assessment of the downside risks of the proposed transactions for me.

The Bank never should have provided me with facilities having regard to my age and circumstances and should, if they exercised any care, as bankers dealing with an elderly "consumer" customer and had due regard to the bank's duties under the Consumer Protection Code, have discouraged me from the proposed sale and purchase transaction given the degree of risk to my financial well-being, inherent in the proposed transactions and the manner of their financing and in all the circumstances.

The bank, if it applied any judgement to the matter cannot, as experienced lenders, have failed to realise that any scheme which involved the purchase, at auction, of a new family home before having sold my existing home was necessarily a highly risky one and highly inadvisable having regard to (i) the potential risks inherent in buying before selling and (ii) the fact of my being predictably dependent on the sale to fund the purchase and (iii) having regard to my age, means, business and experience, comparatively modest income and (v) general circumstances.

I say that the bank in every respect failed to fulfil its duties under the consumer protection code and failed:

- *to carry out any or any proper or sufficient investigation of my circumstances;*
- *to make any proper fact find and/or risk assessment before providing facilities;*
- *to ascertain the extent to which I have the benefit of independent financial advice;*
- *to appreciate that I clearly should have independent financial advice and had obtained it;*
- *to assess my capacity to repay;*
- *to appreciate my entire lack of business capacity;*
- *to appreciate my age and circumstances;*
- *to appreciate that at my age one should not enter into speculative and risky transactions;*
- *to appreciate the likely insufficiency of my income to fund debt repayments or interest;*
- *to address and highlight the potential risks of default inherent in seeking to fund a property purchase by a later property sale rather first selling the property to be sold, and then, only, applying the fully realised proceeds of sale to funding of the desired property purchase;*
- *to carry out normal due diligence;*
- *to obtain any valuations of investment properties owned by me;*
- *to obtain all other necessary valuations;*
- *to obtain any clarification as to the extent to which my investment properties were or might have been charged to another lender, namely EBS building society, and my repayment liabilities to that other lender;*
- *to take into account, as was clearly appropriate and necessary, my other repayment commitments to EBS building society;*

- *to investigate, in circumstances in which a comprehensive and thorough investigation was clearly called for, by interview and seeking all necessary confirmation and vouching my financial, family and general circumstances;*
- *to highlight to me the risks of the proposed transactions, obvious as they must have been to any experienced banker or lender or lending officers of the bank, dealing with a person of my age and in my circumstances, even as the bank, with inadequate investigation, may have believed them to be;*
- *to obtain any confirmation of my financial affairs and standing from my accountant or tax adviser;*
- *to properly document my interactions with the bank;*
- *to give appropriate advice to me as a vulnerable elderly person;*
- *to warn and caution me of the risks of proposed actions by new where such risks were or should have been obvious to the Bank or its officers and where such warning and caution was clearly required;*
- *to realise and appreciate and warned me of the risks inherent in my being unable to obtain mortgage protection or not having any or any sufficient life assurance cover;*
- *to realise and appreciate and take on board and warn me of the obvious need to factor in the need to make adequate provision for (i) likely unforeseeable charges for healthcare and potential nursing home care (should same ever become necessary) and (ii) the potential negative impact of deterioration in my health and consequent healthcare or nursing home expenditure;*
- *to assess and realise and appreciate and take on board and properly respond and warn me of the potential danger and risks should the sale of my residence not achieve hoped for levels and the financial risk and exposure that would arise from this;*
- *generate communicate me in a manner and as the substance of what should be communicated, compliant with the code and appropriate for my circumstances;*

…

- *There was in reality no real or meaningful interaction between me and the bank and its officers such as was clearly required and appropriate under the Consumer Protection Code and having regard to my age and circumstances;*

…

The bank supplied me with bank facilities and products which were not appropriate for me and were obviously not appropriate and which the bank should not have provided to me;

…

I INVITE REQUEST AND REQUIRE the bank at this juncture and its response to properly disclose all relevant material and in replying to this complaint to attach an appendix of all relevant

documentation in a structured manner e.g. in booklet form, properly paginated and with a proper table of contents and not omitting any relevant material.

…

I INVITE REQUEST AND REQUIRE the bank at this juncture with its response to furnish copies of all relevant files and records of the bank, excepting those only enjoying legal privilege";

…

I SUBMIT AND CONTEND that the banks manner of dealing with me has culpably and by reason of all to and error on the part of the bank I have suffered

- *a gross deterioration in my financial circumstances;*
- *serious financial loss and damage;*
- *much worry and anxiety to the extent damaging to my health or certainly adding to me* (sic) *health problems;*
- *reduction in income;*
- *reduction from being a person owning her home largely debt free to being a person whose residence stands mortgaged (but reserving my right to challenge such mortgage) to the bank and facing (but again reserving all grounds of defence of such proceedings) High Court debt proceedings and worse from the bank (none of which would arise had the bank properly performed its duties as banker and not breached the Consumer Protection Code;* (emphasis added)

I DO NOT ACCEPT the validity of the proceedings threatened by the bank or of the purported securities or mortgage relied upon by the bank and I RESERVE all grounds of defence *to and challenge to the bank's position and I will fully defend all proceedings by the bank";* (emphasis added)

…

I SUBMIT that the state of relations between the bank and me is such that ***the bank lacks any proper justification for suing me****…";* (emphasis added)

27. It seems clear from the contents of 27 November 2017 letter, that Ms Boyd understood, at that time, that the plaintiff intended to bring legal proceedings against her. However, regardless of whether these were what she described in her complaint as "*debt proceedings*" or what she referred to as aimed at the "*sale of*" the property, it is common case that she did <u>not</u> receive a copy of same. I make this point because this is not a situation where, for example, a copy of the summons was provided to Ms Boyd by email, or by ordinary post, or by any other means which, whilst not complying with strict service-rules, would nonetheless mean that she did in fact have a copy of the summons.

28. The particular facts in the present case can be contrasted with those in *DRM Contract Administration Limited v. Proton Technologies AG* [2021] IEHC 554. That case, which counsel for the plaintiff helpfully drew to the court's attention, concerned a plenary summons which was issued

on 15 October 2018 in which the principal relief sought was damages for defamation. The plenary summons bore the relevant "Lugano Convention" endorsement for service outside of the jurisdiction. The defendant company was domiciled in Switzerland and, that being so, a specific procedure set out under Order 11E of the RSC ought to have been complied with. Instead, the plaintiff sent the plenary summons to the defendant by email and by tracked post. It was common case that the plenary summons was actually received by the defendant, but the issue before the court in *DRM* was whether the form of service was irregular and, if so, the legal consequences of same. It was against that factual backdrop that Simon's J observed (at para. 102 of his judgment) that:

> *"Notwithstanding that the service was irregular, it is a fact that the defendant has been on notice of the defamation proceedings since 18 October 2018 at the latest. This is highly significant. The case law indicates that one of the factors which can be taken into account on a renewal application is that a defendant was on notice of the proceedings, notwithstanding that same had not been formally served".*

The facts are materially different in the present case, in that Ms Boyd never received a copy of the summons in question, nor did the defendants. Thus, there is no question of the deceased or the defendants having made no objection to the form of service chosen, whilst simultaneously being in receipt of a copy of the summons.

Unjustified windfall

29. The court in *DRM* went on to employ the term *"unjustified windfall"* but this, too, needs to be seen in the context of the very particular facts of the case in question. In *DRM,* the defendant took no issue with the *form* of service when the email and tracked post were received. On the contrary, the defendant initially attempted to enter an appearance to the proceedings but, thereafter, made a tactical decision not to contest the proceedings. It did not communicate this decision to the plaintiff and did not engage further in correspondence. There was silence from the defendant for a period of 18 months. It was against that factual backdrop that Simons J used the term "*unjustified windfall"* in the following passage (at para. 103) in *DRM:*

> "*It would be contrary to the interests of justice to deny the plaintiff and opportunity to regularise service now. If the summons is not renewed, then the plaintiff's claim for defamation would be statute barred. This would confer an* ***unjustified windfall*** *on the defendant. In effect, the defendant would be rewarded for having failed to make any objection at the time to the form of service, and for having chosen to ignore the proceedings thereafter. Such an would be an affront to the interests of justice."*

30. Had the plaintiff posted a copy of the summary summons to Ms Boyd and had she, upon receipt of same, made no objection to service but, instead, kept silent, the facts would be somewhat similar to those in *DRM.* That is not at all the position. In the present case, neither the deceased nor the defendants ever received a copy of the summons by any means. This is plainly not a situation where there was, as a matter of fact, delivery of the summons and the dispute hinges on the narrow, albeit important, issue of service-formalities. The present case is not one where any defendant ignored anything.

31. The stark contrast in facts is illustrated by the seven-page letter sent by Ms Boyd on 22 November 2017. That letter was sent well *within* the time for service by the plaintiff of the summons, which it had issued on 9 August 2017. A simple application for substituted service at any time between 14th November 2017 (the last of the efforts at personal service) and 8th August 2018 (when the summons expired) would have ensured effective service *within* time. None was brought. It is equally clear that Ms Boyd put the plaintiff on notice that she did "*NOT ACCEPT the validity of the proceedings threatened by the bank or of the purported securities or mortgage relied upon by the bank"* and that she *"RESERVE*[D] *all grounds of defence"* in respect of such proceedings as the plaintiff might seek to prosecute. Indeed, the contents of her letter of complaint can fairly be considered to comprise the setting-out of a range of issues contended by her to constitute a full defence to any claim by the plaintiff by someone who maintained the stance that *"the bank lacks any proper justification for suing me…".* Indeed, Ms Boyd not only objected to the very entitlement of the Bank to make any claim against her, she referred to claims by her against the bank, both of a 'financial loss' and 'personal injuries' nature. At the risk of stating the obvious, the letter did not agree to accept service of proceedings or nominate solicitors for the purposes of accepting service of proceedings. On any reasonable analysis, this letter could have provided no comfort to the recipient bank, in respect of *any* issue (be that service of proceedings or any claim pleaded in such proceedings). In short, the letter made clear that *everything* was in dispute.

Defence(s) / claim(s) canvassed in the letter of complaint

32. As can be seen from the complaint, a range of matters are said to comprise a defence to the plaintiffs claim and claims are flagged by Ms Boyd. On any objective analysis, the letter raised, inter alia the following issues:-

- the alleged duty on the part of the bank with respect to an *elderly* customer, including, in particular:
- the alleged duty of a bank to such a customer, who asserts that they *vulnerable* and that the bank was on notice of their particular *circumstances*;
- the alleged duty on the part of the bank to ensure that such a customer had available to her, and availed of, *independent financial advice*;
- the alleged duty on the part of the bank to ensure that a *full investigation* of such a customer's circumstances, and a consideration of such a customer's *financial position* and *risk* to same, was undertaken;
- the alleged provision by the bank of *products* which are contended to have been *inappropriate* for the customer;
- alleged failures on the part of the bank to comply with what is described as the "*Consumer Protection Code*" and "*Consumer Credit Code*"; and
- the customer's claim for alleged *financial loss* and damage to her *health.*

33. The foregoing and other issues contended by Ms Boyd to constitute a full defence to any claim by the bank. Whilst I make the point elsewhere in this judgment, it is the nature and range of these issues which causes me to reject the submission made on behalf of the plaintiff's counsel, to the

effect that the summary proceedings constitute a claim where liability is not in issue and there can be no question of any defence. It also seems to me that, given the nature of certain of the issues raised in the complaint, the death of Ms Boyd means that, were the matter to have proceeded to plenary hearing (as opposed to being dealt with in a summary fashion) the defendants, and the trial judge, would very obviously be deprived of evidence from a relevant witness.

Unusual or out of the ordinary

34. The plaintiff's counsel submits that Ms Boyd's *complaint* amounts to a *special circumstance*, contending that it was something unusual or out of the ordinary. In this I cannot agree. For a major bank (which is in the business of lending to customers) to receive a complaint from a customer with respect to loan facilities (self-evidently made in the course of that very business) could not, in my view, be considered in any way unusual, or outside of the ordinary. Furthermore, where that bank is regulated by the Central Bank of Ireland, it hardly seems unusual or out of the ordinary that a complaint might be copied by the bank's customer to that body. It cannot be in doubt that the plaintiff is a regulated financial service provider. Nor is it in doubt that Financial Services Ombudsman (i.e. the "Financial Services and Pensions Ombudsman" or "FSPO") exists, *inter alia,* to provide a complaints-resolution services for customers of regulated financial service providers. Thus, I cannot accept that a complaint made by such a customer to the very body which exists to deal with such complaints is in any way unusual or out of the ordinary.

Obligation to prosecute proceedings with reasonable diligence

35. It is not in dispute that a plaintiff who makes the decision to issue proceedings is under an obligation to prosecute them with reasonable expedition. In my view, the making by Ms Dowd of a complaint, dated 22nd November 2017, was not something which was particularly unusual or out of the ordinary and it does not seem to me that the receipt by a plaintiff bank of such a complaint from its defendant/customer relieved the plaintiff of the obligation to prosecute its claim, in the present circumstances.

Instructions not to progress the proceedings until the complaint was dealt with

36. Mr Browne avers at para. 11 of his affidavit "*The plaintiff instructed this firm not to progress the within proceedings or to issue the Circuit Court proceedings* ***until such time as the complaint was dealt with****"* (emphasis added). It seems that on receipt of the complaint, the bank made the unilateral decision not to prosecute the within claim. I deliberately say *unilateral* because, nowhere in the complaint does Ms Boyd ask that the plaintiff bank cease to prosecute its claim against her until such time as her complaint is dealt with. Furthermore, not only did the bank make a *unilateral* decision not to prosecute its claim, the decision to which Mr Browne refers was, in effect, to put its own proceedings on hold *indefinitely*. I say this because it cannot be suggested that "*until such time as the complaint was dealt with*" represents a 'known quantity' in terms of any deadline, as regards the bank's decision *not* to prosecute its claim. It can also be said that the unilateral decision made by the plaintiff bank not to prosecute its claim for an unquantified period (i.e. until such future point as the complaint had been dealt with) does not appear to have been a decision communicated to Ms Boyd at that time (or ever). There has certainly been neither an averment that Ms Boyd was informed, nor any correspondence informing her of this decision. To the extent that this is what the

plaintiff bank decided in the aftermath of receiving the 22nd November 2017 complaint, it does not seem to me to be a reasonable decision on the part of a plaintiff who had chosen to institute legal proceedings. It is a decision which was wholly inconsistent with the duty on all plaintiffs to prosecute litigation with reasonable expedition.

Without "*preconditions*"

37. Returning to the letter of complaint, itself, the final page of same concluded, *inter alia,* as follows:

> *"**My preference is that the bank will meet** members of my family, and/or my representatives, **without seeking to lay down preconditions** (i) for a full, frank and free discussion of my case, and (ii) to allow the bank to respond (both in terms of providing documents and responding orally) fully to my complaint, and (iii) to enable the bank hand over all relevant information and documents".* (emphasis added)

38. For a bank to *"lay down a preconditions"* in respect of a proposed meeting with a customer's representative(s) is for the bank to insist that no meeting will occur unless the customer takes, or refrains from taking, a step or steps. Examples, for present purposes would include for the plaintiff bank (i) to insist that Ms Boyd accept service of legal proceedings, personally; or (ii) to require Ms Boyd to nominate a firm of solicitors to accept service on her behalf; or (iii) to insist that Ms Boyd make a certain payment, as a *sine qua non* for the bank's willingness to meet. By contrast, *her* request that no preconditions are laid down *by* the bank plainly did not 'tie the hands' of the bank in respect of such steps it might decide to take (in parallel with the bank's willingness, or not, to attend the meeting sought).

39. It is uncontroversial to say that nowhere does the letter of complaint state or suggest that Ms Boyd's willingness to have her representatives meet with the bank was *subject to,* for example: (i) the bank agreeing not to *serve* any proceedings issued; or (ii) the bank agreeing not to *issue* any further proceedings; or (iii) the bank agreeing to *stay* all proceedings until such time as Ms Boyd's complaint had been dealt with.

40. The foregoing would have been for Ms Boyd to have laid down preconditions, as opposed to her request that the bank lay down none. Read objectively, I cannot interpret this letter as an insistence, or even a request, that the plaintiff take no further step to progress its legal until the complaint was dealt with and or for so long as there was engagement between the bank, borrower, Central Bank and/or Financial Services Ombudsman.

41. The state of the evidence is certainly that, having received the letter of complaint, the plaintiff instructed its solicitors to refrain from progressing the within proceedings. That was plainly a decision open to them to make, and one which may well have taken into account a range of considerations (be they commercial, legal, reputational, temporal, and/or what might be called humanitarian) but it was nonetheless a unilateral decision on the plaintiff's part and, as well as being 'open ended' and not communicated to Ms Boyd, was not reasonable in my view, having regard to the obligation on a plaintiff as regards prosecuting a claim it chose to institute. No further attempt at personal service was made as of 22nd November 2017 despite the reality that nobody else had 'tied the hands' of the bank. No application for substituted service was progressed. Nor did the plaintiff issue possession

proceedings in relation to the Kilkenny property, despite, it appears, the facilities having been secured by way of mortgage on the relevant property. To continue with the chronology, I now turn to events of February 2018.

8 February 2018

42. The plaintiff's solicitor believes that the FSPO decided to open an investigation on foot of a complaint form received from Ms Boyd, dated 8 February 2018. That is averred by Mr Browne at para. 16 of his 14 April 2021 affidavit. Support for this can certainly be seen from a letter from the FSPO, dated 2nd September 2020, which was sent to the first named defendant (a copy of which comprises exhibit "RB3" to Mr Browne's affidavit) which letter states *inter-alia* the following:

> "*Background to the complaint:*
>
> *The complaint of the late Mrs Boyd's as per* ***her complaint form, received by this Office on February 8, 2018****, is…"* (emphasis added)

The FSPO letter went on to refer to details of the complaint and quoted from both the "*complaint form*" and the 22 November 2017 letter of complaint. In circumstances where the summons was issued on 9th August 2017, the bank still had ample time, as of February 2018, to make an application for substituted service.

'In or about February 2018' – plaintiff 'willing to meet'

43. In or about February 2018, the plaintiff informed its solicitors that it would be willing to meet with Ms Boyd and her advisers to discuss the complaint on a "*without prejudice*" basis. That is averred by Mr Browne at para. 11 of his 14 April 2021 affidavit. However, it is nowhere suggested that Ms Boyd, or anyone representing her, ever insisted (i.e. on 22nd November 2017 or at any time thereafter) that *their* willingness to meet the bank was on condition that the bank refrained from taking any/all steps with respect to proceedings until the complaint was dealt with.

"Without prejudice" engagement

44. In submissions, counsel for the plaintiff laid considerable emphasis on the bank's willingness to meet on a "without prejudice" basis, also stressing that the courts are supportive of "without prejudice" discussions, in the context of the underlying public policy objective of promoting settlements. Counsel went on to submit that, whilst it may not appear unusual *"at first blush""*, engagement on a "without prejudice" basis in the context of an elderly person making a complaint to the FSPO and the bank dealing with that complaint, was out of the ordinary and unusual and constituted special circumstances. I cannot agree.

45. No issue could be taken with the proposition that "without prejudice" discussions (and, by the same token, mediation and alternative dispute resolution) play a vital role in promoting settlements. Very obviously, the courts are supportive of same. However, a decision to meet on a "without prejudice" basis, or to engage in "without prejudice" communication, does not relieve the party who decides to engage in that manner of their obligations to progress litigation with reasonable expedition (with the RSC and statute of limitations deadlines being of relevance in that regard). If it were otherwise, it would (i) entirely undermine the will of the Oireachtas as regards limitation periods in respect of the commencement of proceedings and (ii) and set at naught the time limits in Ord. 8.

Thus, when the plaintiff, in February 2018, made a decision to engage on a without prejudice basis, the plaintiff did so "eyes open". In other words, it did so knowing when the summons had been issued (9th August 2017) and when it would expire (8th August 2018).

22 November 2017 – 3rd April 2018

46. There was no further attempt at personal service between the 22nd November 2017 complaint and the death of Ms Boyd who passed away on 3 April 2018. Nor was any step taken to apply for substituted service during this period. Furthermore, it is a statement of the obvious to say that a period of over four months elapsed between letter of complaint and the demise of Ms Boyd, during which period the plaintiff did not send any response to the complaint. The reason for this is not explained. There is no evidence of any impediment. The point is that 4-and-a-half months elapsed without either (i) any step made to progress the proceedings or (ii) any response to the complaint.

3rd April 2018

47. At para. 12 of his affidavit Mr Browne avers that the plaintiff and its solicitors prepared a written response to the complaint. It is not made clear *when* this response was prepared. It can only have been at some point *after* the 22 November 2017 complaint but precisely when is unknown. Mr Browne went on to aver that, *before* this response issued, Ms Boyd died on 3rd April 2018.

June 2018 – probate search

48. A probate search was conducted in June 2018 which showed that no grant of probate had been extracted at that time in respect of the deceased's estate.

In or about June 2018 – *"continue"* the proceedings

49. At para. 13, Mr Browne avers that "*In or about June 2018 the plaintiff instructed this firm to explore* ***what steps needed to be taken to continue the within proceedings*** *or in the alternative whether to issue a fresh set of proceedings against the defendant's estate"* (emphasis added). Several things can fairly be said in relation to the foregoing averment. Firstly, it will be recalled that, in the wake of receiving the complaint, the plaintiff decided not to progress the within proceedings or to issue Circuit Court possession proceedings "*until such time as the complaint was dealt with*" (see para. 11 of Mr Browne's affidavit). Given the averments at para. 13, the bank's attitude had clearly *changed* by June 2018. What Mr Browne avers at para. 13 can only be consistent with the plaintiff regarding itself, as of June 2018, as *free* to prosecute the within proceedings or, for that matter, to issue 'fresh' proceedings against the defendants (being the personal representatives of the deceased's estate), irrespective of whether or not the complaint had been dealt with. In short, for the plaintiff to have given instructions to explore the steps needed to *continue* the present proceedings is utterly inconsistent with the plaintiff regarding itself as not at liberty to continue those proceedings.

50. Secondly, as of June 2018, the summons had *not* expired. Thus, 'time' was still on the plaintiff's 'side' insofar as taking steps to continue the proceedings i.e. the plaintiff *knew* when the summons would expire (i.e. as of 8th August 2018). Thus, insofar as the plaintiff regarded itself, from late November 2017 onwards, as obliged *not* to progress litigation against Ms Boyd until her complaint had been dealt with, that was no longer the case, from June 2018 onwards. Despite the exploration

in June 2018 of "*what steps needed to be taken to continue the within proceedings",* no such steps were, in fact, taken. Why this is so, is not at all clear and has not been explained on behalf of the plaintiff. There is certainly no evidence before this court of any impediment which prevented the plaintiff from progressing its claim had it so wished, in the period before the summons expired or, for that matter, thereafter.

51. It is also clear that, as of June 2013, the plaintiff was giving active consideration to abandoning the present proceedings in favour of instituting other proceedings instead. To instruct solicitors to explore "*in the alternative whether to issue a fresh set of proceedings against the defendant's estate"* can mean nothing else. In short, the plaintiff's position, as of June 2018, was to regard the complaint as posing no impediment to either the plaintiff (i) continuing to prosecute these proceedings; or (ii) issuing fresh proceedings against the deceased's estate. The foregoing is entirely supported by what the bank said to the defendants at that time, and it is appropriate to turn to the plaintiff's 22nd June 2018 letter to see the clarity with which the plaintiff put its position.

Plaintiff's 22 June 2018 – "*final response"* to complaint

52. By letter dated 22 June 2018, the plaintiff sent a response to the complaint, which was addressed to the first named defendant (i.e. a son of the deceased who was not, at that point, a defendant in these proceedings). The foregoing is averred to by Mr Browne at paras. 13 and 14 of his affidavit and a copy of the 22 June 2018 letter comprises exhibit "RB2". Having set out details in relation to the facilities, the letter went on to state *inter-alia* the following:-

> *"In the provision of the above referenced facilities, the bank also dealt with you, Mr Michael Boyd, as authorised by Mrs Boyd. In making a decision to advance the facilities in respect of the purchase of the Property, the bank carried out a full assessment of Mrs Boyd's circumstances and have regard to her previous dealings with the bank, her income, and her network. The bank also adhered to the provisions of the relevant lending policies and guidelines applicable at the time.*
>
> *The lending at the time of the initial advancement of the facilities as outlined above was not subject to the Consumer Protection Code of 2006.* ***This Code was first implemented on 1 July 2007. Therefore, the complaint concerning the alleged breach of the Consumer Protection Code (August 2006) cannot be upheld.***
>
> *…*
>
> *In the letter of complaint, a request was made for copies of the documentation the bank holds on record in relation to Mrs Boyd. This has already been supplied to Mrs Boyd following a recent subject access request.*
>
> *We note that Mrs Boyd also requested a meeting with the bank.* ***The bank and its representatives would now welcome an opportunity to meet*** *with you and or other representatives of your mother's estate to discuss proposals for clearance of the outstanding balances on the above account* ***on a without prejudice basis****.*

However, for the avoidance of doubt, *the bank will not consider the cancellation or annulment of the relevant facilities. In addition to this,* ***proceedings shall not be stayed until such time as a full and final settlement agreement is reached.***

This is our final response to the letter of complaint*. If you are dissatisfied with our response, you may refer the complaint to the Financial Services and Pensions Ombudsman* ***(FSPO) who will seek to resolve it through mediation or through investigation and adjudication.*** *Information about the FSPO services is available from their website (www.fspo.ie). Complaints to the FSPO can be made online through the FSPO website. Enquiries can also be made by email to info@fspo.ie or by telephone to 01 567 7000. Please note,* ***if you are making a complaint to the FSPO you must provide a copy of this correspondence*** *with your Complaint Form".* (emphasis added)

"Proceedings shall not be stayed"

53. The first thing to say about the plaintiff's response is that it fortifies me in the view that neither a complaint by a customer to the bank, nor a complaint by a customer to the FSPO was so unusual or out of the ordinary as to amount to special circumstances. The plaintiff's very response to the complaint letter specifically directed the first defendant to the FSPO and provided contact details for the latter. In the manner examined earlier, the deceased's 22 November 2017 letter of complaint laid down no preconditions with regard to the meeting proposed by Ms Boyd in the context of the complaint made. Rather, it asked that the *bank* lay down no preconditions. Thus, it seems to me that the bank's decision to take no further step with respect to the present proceedings, from 22 November 2017 onwards, was very much its own decision, made unilaterally, for its own reasons. It certainly did not reflect any demand or request made by or on behalf of the deceased.

22nd June 2018 onwards

54. Even if I am entirely wrong in that view i.e. even if the 22 November 2017 complaint *can* fairly be interpreted as an insistence on the part of the borrower that no meeting will take place unless (i) the bank makes no further attempt at personal service of the summons; and (ii) makes no application for substituted service, and (iii) issues no further legal proceedings (or, in the alternative, if I am wrong to regard the plaintiff bank's unilateral November 2017 decision not to prosecute these proceedings as an unreasonable one, having regard to the obligation on plaintiffs to progress claims they have chosen to issue) very different considerations apply, from 22 June 2018 onwards. That is because of the following:

(i) the plaintiff bank provided its "*final response*" to the complaint on 22nd June 2018;

(ii) the essence of that final response was for the bank to say "*the complaint concerning the alleged breach of the Consumer Protection Code (August 2006) cannot be upheld*";

(iii) whilst the plaintiff was willing to meet on a "*without prejudice basis*", it made explicit that "***proceedings shall not be stayed*** *until such time as a full and final settlement agreement is reached"* (and it is common case that no such settlement has ever been reached); and

(iv) the plaintiff made equally clear on 22nd June 2018 that the foregoing was its attitude even if the recipient was "*dissatisfied"* with the response and took matters to the FSPO.

55. It is clear from the contents of the bank's letter that it was well aware that its final response might not be acceptable to the defendant(s) and that the FSPO might seek to resolve the complaint (including, as the plaintiff's letter explicitly stated, "*through mediation*"). Yet, as of 22nd June 2018 the plaintiff's stance was that, regardless of any such complaint to the FSPO, and irrespective of any action taken by the FSPO concerning the matter, *"proceedings shall not be stayed"*. Indeed, this stance was 'copper-fastened' by the plaintiff's insistence that its final response to the complaint be provided by Mr Boyd to the FSPO. Before leaving the contents of this final response by the bank, two further comments seem appropriate as follows.

56. Firstly, and very obviously, the contention (reflected in the order made on 26 April 2021) that "*the plaintiff placed a hold on proceedings while engaging with Financial Services and Pensions Ombudsman on foot of complaints made by the defendant"* is impossible to square with (i) the instructions given to its solicitors to explore what steps were needed to continue these proceedings/ abandon them in favour of issuing fresh proceedings against the deceased's estate; and (ii) what the plaintiff told the defendants in its final response to the complaint dated 22nd June 2018. In short, the evidence with respect June 2018, including contemporaneous evidence, undermines the contention advanced by the plaintiff in the April 2021 *ex parte* application.

57. Secondly, a key element of the bank's *"final response"* was that the relevant lending was not covered by the Consumer Protection Code because, according to the bank, the "*Code was first implemented on 1 July 2007".* With regard to the foregoing, the summary summons, in its initial form, referred to the acceptance by the deceased of facilities on various dates, the third of which is said to have been accepted on 17th July 2007 (i.e. over a fortnight *after* the Code was "*first implemented*" according to the bank's letter). Without purporting to decide any issue, the foregoing fortifies me in the view that it would be wholly inappropriate for this court to adopt the view that there is <u>no</u> possibility of a *bona fide* defence and to deal with the present motion on the basis that there is <u>no</u> question of liability being in issue. Rather, it seems to me that, regardless of how weak one might consider the potential defence(s) to be, there are, nonetheless, a range of matters, including this one, which prevent this court from agreeing with the submissions made on the plaintiff's behalf to the effect there is simply no defence to the claim and, were the present motion to be successful, undeserving defendants would receive a substantial windfall as a consequence of not having to face proceedings to which there could be no defence (all 3 sets of relevant proceedings being statute-barred in the event of this motion succeeding). I now continue to look at events in chronological order.

What occurred following the 22nd June 2018 "*final response"*

58. Despite the plaintiff making clear, on 22nd June 2018, that legal proceedings would *not* be stayed, it did not, in the days, weeks, or months thereafter, bring any application to renew the summons. It will be recalled that the summons did not expire until 8th August 2018. Thus, the plaintiff who had made 'crystal-clear' that these proceedings "*shall not be stayed"* had somewhat over 7 weeks to take such steps as it wished, in order to prosecute its claim, before the time for service of the summons would expire. It took no such step.

June – August 2018 without prejudice correspondence

59. As to what occurred following the 22nd June 2018 letter, Mr Browne avers at para. 19 of his affidavit that *"In addition to the FSPO investigation there was **some without prejudice correspondence** between this firm and a firm of solicitors acting for the estate of the defendant **between June 2018 and August 2018**"* (emphasis added). With regard to the FSPO investigation, it will, of course, be recalled that the bank made explicit that the 22nd June 2018 letter constituted its *"final response"* to the complaint. That response was for the bank to say that the complaint "*cannot be upheld".* Thus, from 22nd June onwards (in particular, between then and the expiry of the summons on 8th August 2018) the FSPO complaint was utterly irrelevant according to what the plaintiff's told the defendants.

60. Similar comments apply in relation to the reference to "*some without prejudice correspondence"* which was exchanged between June and August 2018. It was accepted during the hearing that there had been without prejudice communication and there is no question of it having been other than *bona fide.* Nor, as I have explained earlier, does this court suggest that without prejudice communication does not have a vital role to play in promoting settlements. That is not the point, however. The point is that the bank, itself, made explicit on 22 June 2018 that, whilst it was willing to engage on a without prejudice basis, *"proceedings shall not be stayed".* Thus, there is simply no question of the (i) the complaint (ii) the FSPO investigation of the complaint; or (iii) without prejudice communication concerning the foregoing, amounting to special circumstances, particularly from 22nd June 2018 onwards. To keep the relevant 'timeline' in mind, it will be recalled that the *ex parte* application to renew the summons was not made until 26th April 2021, almost 3 years later.

8 August 2018

61. There is no evidence of any step taken by the plaintiff to prosecute the within proceedings between the 22nd June 2018 (its final response) and 8th August 2018 (the expiry of the summons). Nor is there any evidence of any impediment which prevented the plaintiff from taking such a step. The only activity seems to have been "*some without prejudice correspondence".*

July 2019 – probate search

62. Mr Browne avers, *inter alia,* that in July 2019 (over a year after the plaintiff bank's final response) a further probate search was made and that "*records showed that no grant of probate or letters of administration had been taken out*" (para. 20 of his Affidavit). This was a similar result to the one obtained in June 2018, as he also explained. He went on to aver, at para. 21, that, in the absence of a grant of probate having been extracted at the time, the plaintiff instructed his firm to make the necessary application to have an administrator *ad litem* appointed. He does not aver precisely when these instructions were given, but he goes on to avers that, before such an application was made, the plaintiff learned that a grant of probate was extracted by the defendants on 2 October 2019. It is not made clear precisely when the Plaintiff learned of the extract of the aforesaid grant, but a copy of the grant of probate comprises exhibit "RB4" (see para. 21 of Mr. Browne's affidavit).

Exploration of steps to progress the proceedings – prior to Mediation (August 2019)

63. In the manner I will presently come to, it seems that mediation, facilitated by the FSPO, took place in August 2019. At para. 20 Mr Browne avers *inter-alia* that "*Before the mediation took place the plaintiff instructed this firm to explore what steps would need to be taken to progress the summary summons matter*". Precisely when the plaintiff gave these instructions is not made clear but, given that the mediation took place in August 2019, it seems safe to assume that it was in the days or weeks prior to that. Several comments can be made in relation to the foregoing.

64. Firstly, these instructions were given by the plaintiff well over a year *after* the plaintiff had made clear (by letter of 22nd June 2018) that its attitude to proceedings was, as counsel for the Defendants accurately put it, 'full steam ahead'.

65. Secondly, it will also be recalled that Mr Browne made very similar averments at para. 13 but with respect to a period 14 months *earlier* (i.e. at para. 13 he averred "*In or about June 2018, the plaintiff instructed this firm to explore what steps needed to be taken to continue the within proceedings or in the alternative, whether to issue a fresh set of proceedings against the defendant's estate."*). No steps were taken in June 2018 to prosecute the within proceedings or, for that matter, to issue a fresh set of proceedings against the defendants. What were, in substance, the very same instructions appear to have been given 14 months later (i.e. circa August 2019) to explore what steps would need to be taken to progress the within proceedings. It hardly seems necessary to say that *exploring* what steps might need to be taken to progress existing legal proceedings / issue fresh proceedings does not constitute special circumstances, regardless of whether matters were explored in June 2018 or in August 2019 and the evidence is that this was done at both points, 14 months apart.

August 2019 - Mediation

66. Mr Browne avers (at para. 17 of his affidavit) that he has been advised by Mr Jack O' Leary Keating, an employee of the plaintiff, that *"…a confidential mediation was facilitated by the FSPO in or about August 2019"* and he also confirms that this mediation was unsuccessful. The first observation to make is that this mediation took place a year *after* the expiry of the time allowed for service of the summons. It is entirely fair to say that there is no evidence before the court of any formal step, or any attempt to take a formal step, with regard to the prosecution of the plaintiff's claim during the year which elapsed between August 2018 and August 2019. Given the fact that the plaintiff made clear, in its 22nd June 2018 letter that *proceedings would not be stayed*, this is surprising to say the least. There are certainly no special circumstances which arose during that year.

67. In the manner previously examined, the bank made 'crystal-clear' on 22nd June 2018 that any mediation which might take place under the auspices of the FSPO was irrelevant to its stance insofar as pressing ahead with legal proceedings was concerned. Thus, mediation did not amount to special circumstances. For the sake of completeness, no averment is made to the effect that the plaintiff's stance, as made clear in its 22 June 2018 letter, *ever* changed thereafter (be that unilaterally, or by agreement with the defendants). Rather, the state of the evidence before this Court is that, as and from 22 June 2018, the bank's position was that proceedings would <u>not</u> be stayed, regardless of the

complaint (to which it had delivered a final response) and irrespective of either without prejudice engagement or any involvement of the FSPO (be that mediation, investigation or adjudication). Rather, proceedings would only be stayed if there was a full and final settlement (and there has been none).

68. The foregoing analysis is, of course, of fundamental relevance to what the plaintiff contended to be *special circumstances* in its April 2021 *ex parte* application to renew the summons. It will be recalled that I set these out earlier in this judgment. The first two of the four canvassed by the plaintiff (and recited in the relevant Order) comprise: (1) *the plaintiff placed a hold on proceedings while engaging with Financial Services and Pensions Ombudsman on foot of complaints made by the Defendant;* and (2) *the parties entered an unsuccessful mediation process.* It seems to me that a careful analysis of the evidence undermines entirely the proposition that either of the foregoing constitute special circumstances. In short, this is because the plaintiff made crystal-clear in its 22nd of June 2018 letter that "*proceedings shall not be stayed",* irrespective of either of these two matters.

8th August 2019

69. Under Ord. 8, R.1 sub rules (1) and (2), it was open to the plaintiff to apply to the Master for leave to renew the summons at any point up to 8th August 2019 (i.e. within 12 months of its expiry). No such application was brought. Had it been brought, the Master would have had to be satisfied that "*reasonable efforts have been made to serve such defendant, or for other good reason*". The Master is not required to state the reason for renewal in an order renewing a summons.

29th November 2019

70. On 29 November 2019, the Supreme Court delivered its judgment in *Bank of Ireland v. O'Malley* [2019] IESC 84; [2020] 2 ILRM 423. As Mr Browne put it at para. 23 of his affidavit "*That judgment clarified the level of particularity which must be contained in a summary summons".* It does not seem to me that the handing-down by the Supreme Court of the aforesaid decision amounts, of itself, to special circumstances. As counsel for the Defendants rightly submitted, clarifications of the law regularly emerge from the Superior Courts and in my view this judgment most certainly did not allow the plaintiff to 'down tools'. I cannot accept that its receipt by the plaintiff relieved it of the obligation to prosecute a claim it had chosen to institute. Moving away from those statements, which flow from a first-principles approach, it is important to see what role the decision in Bank of Ireland did, or did not, play with respect to the present proceedings, having regard to the evidence before this Court.

Review of these proceedings in light of *Bank of Ireland v. O'Malley*

71. Mr Browne averred, at para. 24, that *"A review of the particulars contained in the within summary summons was conducted and it was determined that the level of particulars contained therein may fall short of what was required".* Mr Browne does not indicate when this *"review"* took place. Similar averments are made at para. 26, wherein Mr. Browne states that "*A full review of the two facility accounts was undertaken by the plaintiff and this firm in order to set out the particulars of debt fully in accordance with the Rules of the Superior Courts and the Supreme Court's judgement in Bank of Ireland v. O'Malley*". Again, precisely when this "*full review*" took place is not clarified,

but it can only have been in the wake of the Supreme Court's decision of 29th November 2019, and not before.

Plaintiff's decision to abandon these proceedings

72. At para. 25 Mr Browne averred that "*The plaintiff ultimately decided that in circumstances where the within summons had not been served that, in lieu of making an application to renew the summons, amend the summons and substitute the personal representatives of the Defendant's estate as defendants in the proceedings, it would be more efficient to issue a fresh set of proceedings against the personal representatives."* It is not specified when the plaintiff "*ultimately decided"* the foregoing, in that Mr Browne does not refer to a precise date. However, it seems clear that it was a decision made following the Supreme Court's judgment in *Bank of Ireland v. O'Malley*, which was delivered on 29 November 2019. Nothing seems to me to turn on the precise date of the decision but a consideration of the evidence suggests that it was a decision taken by the end of 2019. Of far more significance than the precise date is that para. 25 constitutes an explicit averment to the effect that the plaintiff made a conscious decision not to progress the within proceedings. There is no suggestion that this decision was made at the defendants' request and, thus, it was a unilateral decision taken by the plaintiff, for its own reasons. To decide not to progress proceedings is, self-evidently, a decision to abandon them. It will also be recalled that this option, although finally decided-upon in the wake of the Supreme Court's 29th November 2019 decision in *Bank of Ireland v. O'Malley*, is one which the plaintiff was giving active consideration to 17 months earlier. I say this in light of Mr. Browne's averments at para. 13: "*In or about June 2018 the plaintiff instructed this firm to* ***explore what steps needed*** *to be taken to* ***continue the within proceedings or*** *in the alternative whether to* ***issue a fresh set of proceedings*** *against the defendant's estate"* (emphasis added).

73. In the manner examined in this judgment, I am satisfied that the plaintiff has not established the existence of any special circumstances, *prior* to the point at which the plaintiff decided to abandon these proceedings (which, it seems safe to assume, was in the days or weeks following the 29th November 2019 decision in *Bank of Ireland v. O'Malley*). Even if the plaintiff had established in the present application, that, as of the end of November 2019, special circumstances existed justifying a renewal of the summons at that point (and this has not been established), it seems to me that the existence of same would have been 'overtaken' by, and rendered irrelevant by the decision which was undoubtedly made by the plaintiff by the end of 2019 not to progress the present proceedings at all.

74. That being so, it also seems to me that what did, or did not, occur *after* the plaintiff decided to abandon the present proceedings cannot, in truth, constitute "special circumstances" (i.e. special circumstances justifying a renewal of proceedings which the plaintiff decided not to progress). To put it another way, it could hardly be suggested, in my view, that a plaintiff's decision to abandon proceedings and the consequences of that decision for the plaintiff, amount to special circumstances justifying a renewal of those deliberately-abandoned proceedings.

"More efficient"

75. The plaintiff has made very clear, not only the *fact* that the within proceedings were abandoned, but to the *reason* for abandoning them, namely, because the plaintiff considered that it would be "*more efficient"* to take a different course of action. It cannot be in doubt that it was open to the plaintiff to make this decision but is seems uncontroversial to say that the consequences of that unilateral decision were, and are, for the plaintiff to deal with. In truth, the foregoing seems to me to be sufficient to decide the present motion in the defendants' favour. I will, however continue with the analysis, lest any matter be overlooked.

Special circumstance - *Bank of Ireland v. O'Malley*

76. As I indicated earlier in this judgment, another of the four "*special circumstances*" canvassed by the Plaintiff in the *ex parte* application made in April 2021 was that: "*the Plaintiff was required to amend the Summary Summons on foot of the Supreme Court decision in Bank of Ireland v. O'Malley".* Several comments seem to me to be appropriate. Firstly, there is a very obvious and material difference between (i) deciding to amend an existing set of proceedings by reason of the judgment in *Bank of Ireland v. O'Malley* and (ii) deciding not to amend existing proceedings and that it would be *more efficient* to issue entirely new i.e. 'fresh' proceedings and abandon the existing proceedings. These are mutually-exclusive options and the evidence demonstrates that he plaintiff did the latter, not the former. The proposition that "*the Plaintiff was* ***required to amend the Summary Summons*** *on foot of the Supreme Court decision in Bank of Ireland v. O'Malley"* (emphasis added) does not reflect the evidence before this Court. The plaintiff was not required to amend the within summary summons proceedings. It decided to take and entirely different course which was <u>not</u> to amend the summary summons at all, but to issue entirely different proceedings instead.

77. The Supreme Court's decision in *Bank Ireland v. O'Malley* cannot, on any analysis, account for the Plaintiff's failure to prosecute the within proceedings *prior* to the Supreme Court handing down its judgment. As to the relevant 'timeline', it will be recalled that the summons expired as of 8th August 2018, whereas the Supreme Court handed down its decision on 29th November 2019. The period between those dates represents just shy of a year and 4 months. It will also be recalled that, as of 22nd June 2018, the plaintiff made clear that legal proceedings would <u>not</u> be stayed. The plaintiff has not established the existence of any special circumstances with respect to these periods, be that (i) the period of over a year and five months (22nd June 2018 – 29th November 2019) or (ii) the period of just less than a year and four months (8th August 2018 – 29th November 2019). Both periods far exceed the 12-months allowed for the service of an originating summons. In short, the Supreme Court's decision in *Bank of Ireland v. O'Malley* cannot constitute a special circumstance with respect to the period prior to its delivery. Furthermore, *Bank of Ireland v. O'Malley* was, according to the plaintiff's evidence, irrelevant to these summary proceedings which the plaintiff decided to abandon as of the end of 2019.

78. In short, having taken no step to prosecute the claim from November 2017 onwards, the bank decided, as of the end of 2019, to abandon the within proceedings altogether, rather than to seek to amend them. In other words, the decision was taken <u>not</u> to seek to amend the within proceedings in light of *Bank of Ireland v. O'Malley*, but to abandon these proceedings and to issue 'fresh'

proceedings instead. It will also be recalled that the option of abandoning these proceedings and issuing separate proceedings was something the plaintiff was considering in June 2018 (i.e. 17 *months* before the Supreme Court's decision in *Bank of Ireland v. O'Malley*). Thus, reliance on *Bank of Ireland v. O'Malley* simply cannot constitute special circumstances, given the particular facts in this case. For these reasons, I agree with counsel for the defendants who described the plaintiff's purported reliance on *Bank of Ireland v. O'Malley* as a 'red herring' in the context of the contended-for special circumstances.

3 ½ months from 29th November 2019 to 12th March 2020

79. Entirely without prejudice to the foregoing, if one were to ignore, for present purposes, the fact and consequences of the plaintiff's decision to abandon these proceedings, and to look at the period commencing on 29th November 2019 (when the Supreme Court's decision was handed down) and ending on 12th March 2020 (when the Taoiseach announced the coming into force of restrictions concerning COVID-19), it amounts to a period of 3 ½ months. The fact *that* no application of any kind was brought during that period is not in doubt (be that (i) to amend the summary summons, *per Bank of Ireland v. O'Malley;* (ii) to renew the summary summons; and (iii) no 'fresh' proceedings were issued within that *3 ½ month* period either). The reason *why* no such proceedings were issued during that period is not explained and the plaintiff has certainly not established the existence of special circumstances which arose during that period. I make this point not least because of the significance of a period of *3 months.*

80. In the context of the progress of litigation where proceedings have been served, an appearance entered, and both parties being engaged in pleading the claim and defence, respectively, 3 months may not seem to be a particularly long period. Indeed, dealing with a single issue (such as discovery) might well take that, and more time. However, the foregoing analysis is with respect to litigation which is 'up and running'. A 3-month period, whilst possibly a short one, in the context of the prosecution of such a case, is otherwise in other contexts. As noted earlier, where reasonable efforts have been made to serve or for other good reason, the Master may order a renewal of a summons "*for three months"* (per Ord.8, R.1. (2)) and no more. Similarly, where the Court is satisfied that there are special circumstances which justify an extension, it may order a renewal "*for three months*" from the date of such renewal and has no authority to grant a renewal for a longer period. To my mind, the relationship between (i) the time-limits in Ord. 8 and (ii) the length of time of the period(s) during which a plaintiff did not prosecute their claim, without having established the existence of special circumstance in respect of those periods, is relevant to the exercise this court is asked to conduct in an application of the present sort. In other words, it seems to me that even a period of 3 ½ months delay can, in the present context be seen as quite a long period. It certainly elapsed and there were no special circumstances which relate to that period and it was a period *prior* to the arrival of Covid-19 (the 'pandemic' being something counsel for the plaintiff laid considerable emphasis on in his submissions).

Covid-19

81. At para. 27, it is averred that on 12th March 2020, the Government announced that severe restrictions would be introduced as a consequence of the COVID-19 virus. The 4th (and last) of the "*special circumstances*", according to the Plaintiff was that: *the Plaintiff did not pursue litigation*

during the current COVID-19 restrictions. For the reasons previously set out, it seems to me that nothing after the end of 2019 is truly of relevance in the present case. Why? Because the plaintiff made a conscious decision (which this court is entitled to take was a decision made as of the end of 2019, given that it was stated to be following a review in the wake of the Supreme Court's 29th November 2019 judgment in *Bank of Ireland v. O'Malley*) , for stated reasons (i.e. greater efficiency) that it was abandoning these summary summons proceedings and, instead, was going to issue 'fresh' proceedings. Thus, anything which is said to amount to a special circumstances, subsequent to the end of December 2019, cannot be of relevance to the *within* summary proceedings. Rather, they can only be of relevance to an entirely *different* set of proceedings (i.e. the fresh proceedings which the plaintiff had decided to issue, instead of progressing the within proceedings).

The period *prior* to Covid-19

82. Entirely without prejudice to the foregoing, it is entirely fair to say that COVID-19 restrictions cannot under any circumstances amount to special circumstances in respect of any period of time *prior* to the announcement on 12th March 2020 that restrictions would be coming into force in response to the pandemic. As to those prior periods, it will be recalled that the summons expired almost a year and 8 months *before* the announcement of Covid-19 restrictions (i.e. as of 8th August 2018). It will also be recalled that, as of 22nd June 2018, (i.e. one year and 9 months *earlier*) the plaintiff made clear that "*proceedings shall not be stayed*".

Fresh proceedings drafted and ready for issuing (after 12th March 2020)

83. Remaining with the chronology of relevant events, Mr Browne avers, at para. 30, that *"The fresh set of proceedings were drafted and were ready for issuing."* He does not say precisely when this was. He goes on, however, to make it clear that this was after the 12th March 2020 announcement of the coming into force of COVID-19 restrictions. The central point is that the plaintiff decided (by the end of 2019) that it was no longer interested in progressing the *within* proceedings at all (having given consideration to that from June 2018). The present proceedings were abandoned in favour of the greater *efficiency*, as the plaintiff saw it, in issuing entirely new proceedings. Para. 30 is entirely consistent with the foregoing. In short, para. 30 reflects the 'follow thorough' by the plaintiff of the decision to abandon the present proceedings. Thus, the timing of when those different proceedings were drafted, were ready for issuing, were in fact issued, or any difficulties encountered along the way is not, in reality, of any relevance whatsoever to the *within* proceedings (which the plaintiff abandoned as of the end of 2019).

Difficulties with respect to *different* proceedings

84. Keeping the above in mind, I note that para. 30 continues as follows: *"However, there was huge uncertainty at that time as to whether the courts and Courts service was operating, and how they were operating due to the Government imposed restrictions. Also, the Central Office of the High Court required in-person appointments to be made for most purposes, including the issuing of proceedings. There was too no clear way to discharge the stamp duty payable on the Summons of €400. There was no access to the offices of the firm for the purposes of obtaining a cheque with which to pay same. Ultimately, the solicitor produced an undertaking to the Central Office which was very kindly and helpfully accommodated. The proceedings entitled the High Court Allied Irish Banks,*

PLC Plaintiff and Michael Boyd and John Boyd Defendants and bearing Record Number 2020/107 S were issued on 3rd April 2020". It is fair to say that difficulties encountered due to Covid 19 restrictions, as averred to in para. 30 of Mr Browne's affidavit, apply exclusively to entirely *different* proceedings, not to the within proceedings (which were abandoned circa the end of 2019).

3 weeks

85. Without prejudice to the foregoing, the averments made at para. 30 refer to a period commencing on or after 12 March 2020 (the Taoiseach's announcement of Covid-19 restrictions having been at that point, and no specific date being given for when the proceedings "*were drafted ready for issuing*") and ending on 3rd April 2020 (when the 'fresh' summons was, in fact, issued). That is a period of, at most, 3 weeks.

86. The restrictions imposed in response to Covid-19 and their effect were, in principle, special circumstances. However, two important points must be made. The first and fundamentally important point is that Covid-19 restrictions and their effects were utterly irrelevant to the within proceedings, given that the plaintiff abandoned them by circa the end of December 2019 (i.e. 1 year and 3 months before). Thus, Covid-19 can only have been relevant to entirely *different* proceedings which the plaintiff in fact issued on 3rd April 2020 (being the 'fresh' proceedings which had been the plaintiff's focus since its decision in the wake of the *"review"* following the 29th November 2019 judgment in *Bank of Ireland v. O'Malley,* and which the plaintiff considered issuing as early as June 2018).

87. A second point, far less important given the first, is that the plaintiff conceivably could, at most, establish the existence of special circumstances due to Covid-19, with respect to *issuing* these fresh/different proceedings, for the *3-week* period ending 3rd April 2020. This is not to say that the foregoing has been established. Also, and to place that 3-week period (which is relevant to *different* proceedings) in the 'timeline' (concerning the *within* proceedings), the summary summons in the present proceedings was issued on 9th August 2017 and expired on 8th August 2018.

No steps taken to serve *different* proceedings

88. At para. 31 it is averred that *"Due to the continued Covid 19 restrictions **and** a hold placed by the plaintiff on progressing any litigation, **no steps were taken to serve the 2020 proceedings***" (emphasis added). In the foregoing averment, reference is made both to COVID-19 restrictions *"and"* to "*a hold placed by the plaintiff on progressing any litigation*". In other words, the plaintiff appears to proffer two reasons for the fact that no steps were taken to serve the 2020 proceedings (which, it hardly needs re-stating, are *not* the proceedings which are the subject of the application before this Court). Covid-19 restrictions could not have been of any relevance prior to the point at which they were announced, being mid-March 2020. With respect to the issue of a "hold" on litigation, it will be recalled that as far back as 22 June 2018, the plaintiff bank made clear that legal proceedings would not be stayed and, based on the evidence, no alteration of that stance was ever notified to the defendants at any point. The contents of the plaintiff's 22nd June 2018 letter are wholly at odds with the proposition that there was any hold on legal proceedings for any period from 22nd June 2018 onwards.

89. It also seems appropriate to point out that at no stage did the defendants, or either of them, request that the plaintiff 'stay its hand', be that (i) during the period commencing with the Plaintiff's

22nd June 2018 "*final response*" and ending with the Taoiseach's 12th March 2020 announcement regarding COVID-19 restrictions; or (ii) at any time after the 12th March 2020 announcement and the coming into force of the restrictions themselves.

90. In short, the evidence is to the effect that having made clear in June 2018 that proceedings issued on 9th August 2017 would not be placed on hold or stayed, and having taken no step thereafter to prosecute the within (i.e. 2017) proceedings, the plaintiff made the definite choice, at the end of 2019, to abandon the 2017 proceedings in favour of issuing 'fresh' proceedings and, having done so on 3rd April 2020 (Covid-19 having been of relevance for only the 3 previous weeks), the Plaintiff made a unilateral decision not to progress the 'fresh' (i.e. 2020) proceedings.

Arrangements by the Courts Service in response to Covid-19

91. In submissions, counsel for the plaintiff suggested that, whilst it may well be the case that arrangements were put in place by the courts service in order to facilitate the business of the courts continuing, "*there is a danger in looking back at 'Covid times' without recognising the way things were*". The thrust of that submission was that, in the context of the then difficulties and uncertainty, Covid 19 restrictions explain all delays by the plaintiff from mid-March 2020. Without for a moment, suggesting that there was not great uncertainty and inconvenience, it does not seem to me that evidence has been put before the court as to the *specific* difficulties encountered, as a direct result of Covid 19 restrictions, and the specific *dates* on which there were encountered, sufficient for this court to come to the view that, from 10 March 2020 onwards (i.e. up to the 26th April 2021 renewal application) Covid-19 accounts for all. It is also most important to repeat, once more, that the submission made by the plaintiff's counsel, with respect to March 2020 onwards, cannot avail the plaintiff, for the simple reason that it relates to *different* proceedings which were issued long after the plaintiff had decided to abandon the *present* proceedings. In the manner previously explained, such inconvenience as was encountered by the plaintiff or its solicitors, as a consequence of Covid 19 restrictions, cannot conceivably be special circumstances justifying the renewal of proceedings which were deliberately abandoned (by circa the end of 2019).

Illness of a solicitor

92. Between paras. 32–34, Mr Browne makes averments to the effect that the solicitor who was handling the plaintiff's file went on sick leave on the 17 January 2021 and advised the firm on 30th January 2021 that he would not be able to return to work, due to severe personal health difficulties. Leaving aside the reality that for a legal professional to become ill, unavailable or to leave a firm (whether due to ill health, or retirement, or because they decided to change firms, or jobs) is hardly particularly unusual, the foregoing averments relate, of course, to different proceedings (i.e. the 2020) proceedings and, thus, do not seem to me to be relevant to the question of special circumstance in the present case.

After 30th January 2021

93. It is averred that a full review of open files was immediately conducted. Precisely when the said review was undertaken is not specified, but the impression is that it was immediately *after* 30th January 2021. It is also averred *inter-alia* that "*While the plaintiff continued to place a hold on progressing proceedings, the review of the within proceedings was conducted".* Again, that

averment is simply impossible to reconcile with and is fatally undermined by (i) the plaintiff's explicit confirmation to Ms Boyd, on 22nd June 2018, that "*proceedings shall not be stayed"*; (ii) the plaintiff's instructions to its solicitors, in June 2018, to explore the steps needed to *continue* these or to issue *fresh* proceedings; and (iii) the fact that, at of the end of 2019, the plaintiff, in fact, abandoned the within proceedings, in favour of issuing fresh proceedings.

Civil liability act 1961

94. Reference is made on behalf of the plaintiff to the provisions of S.9(2)(b) of the Civil Liability Act 1961 ("the 1961 Act") and s. 18(h) of the Interpretation Act 2005, which provide that any proceedings brought against the personal representatives of the deceased must be issued within 2 years of the date of death. In the present case, proceedings should have been issued no later than 2nd April 2020. Thus, the 'fresh' proceedings which were issued on 3rd April 2020, were issued 'out of time'. It is not made clear precisely when the plaintiff or its solicitors realised this, but the central point is that these were difficulties with *differen*t proceeding. Counsel for the plaintiff submitted that "*This isn't a case of the plaintiff 'sitting on its hands' or inadvertence by a solicitor",* or words to that effect.

"Sitting on its hands"

95. What steps the plaintiff did and did not take in respect of these proceedings has been examined in this judgment. Without intending any disrespect, it seems to me that, having decided (after *Bank of Ireland v O'Malley* was handed down) not to progress the within proceedings further, it is not at all inaccurate to say that the plaintiff *did* 'sit on its hands' thereafter, with respect to *these* proceedings. That is a statement of the obvious, given that the plaintiff decided to, and did, abandon them (in favour of issuing fresh proceedings).

Inadvertence

96. As to the submission that there was no inadvertence on the part of any legal professional, it will be recalled that, at para. 77 of the Court of Appeal's decision in *Murphy*, Haughton J stated *inter-alia* that: "*As far as legal advisors are concerned, in my view inadvertence or inattention, for example in effecting service of the summons, will rarely constitute special circumstances. Legal advisors must be taken to be aware of the twelve-month time limit for service of the original summons, and the consequences of allowing it to lapse."* It seems uncontroversial to suggest that the foregoing comments apply with equal force to awareness of, and compliance with, Statute of Limitations periods, insofar as issuing proceedings within time is concerned.

97. Furthermore, it does not seem to me that sufficient detail has been put before this court to enable it to take the view that (i) what was *possible* to do on 3 April 2020, had been *impossible* to do every day prior to that date, measured from the date of the deceased's passing (or, for that matter, from June 2018 when the plaintiff was considering fresh proceedings as an alternative to the present summons); and (ii) that such impossibility flowed exclusively from Covid- 19 restrictions. I want to stress that this *may* be so, but the point I am making is that the court, in the present application, has been given insufficient evidence to hold that this *is* so.

98. The reason to refer to *dicta* from *Murphy* is to highlight that, even if it was the case that inadvertence played a part in the 2020 proceedings being issued a day late, this does not seem to me to amount to a special circumstance justifying the renewal of the 2017 proceedings. It is also an analysis which seems to me to be somewhat beside the point. I say this in circumstances where, from a first-principles perspective, I cannot accept that difficulties which may have been encountered in respect of entirely *different* (i.e. the 2020) proceedings constitute special circumstances justifying the renewal of *these* (i.e. 2017) proceedings, which the plaintiff decided (by *circa* the end of 2019), to *abandon* entirely, in favour of issuing those different / 'fresh' proceedings. In particular, I cannot accept that the failure to issue those 'fresh' proceedings within time, constitutes special circumstances justifying renewal of the writ in the abandoned claim. This is, of course, for two reasons. Firstly, those difficulties circa March/early April 2020 have no cogent relationship to the period commencing in June 2018 (when the plaintiff made clear that proceedings would not be stayed). Secondly, events of March/early April 2020 do not undo the reality that a year and 3 months earlier, the plaintiff decided, unilaterally, for its own reasons, not to progress the within proceedings. Mr Browne avers at para. 36, that, because the within proceedings were instituted prior to the passing of the deceased, the provisions of s.9 (2) (a) of the 1961 Act mean that the action may still be maintained. This reference to the 1961 Act does not, however, engage with the reality that the within proceedings were abandoned by the end of 2019, (i.e. a year and four months *prior* to the 26th April 2021 application to renew a summons in respect of proceedings deliberately abandoned).

Statute of limitations

99. At para. 37, Mr Browne makes averments to the effect that, because Circuit Court proceedings were not instituted prior to the passing of the defendant, and where no proceedings were issued against the personal representatives within 2 years of her death, he believes that any proceedings seeking possession would be statute-barred by virtue of the provisions of s. 9(2)(b) of the 1961 act. Whilst it is not made clear when the plaintiff or its solicitors formed that view, it is impossible to see how Statute of Limitations difficulties encountered in respect of *different* proceedings could amount to special circumstances justifying the renewal of the summons in *these* proceedings. At this juncture, it seems useful to note that the Court of Appeal (Haughton J) also made the following clear (at para. 110) in the 15th January 2021 decision in *Murphy v. H.S.E.* [2021] IECA 3:

> "… the extent to which the Master, or a court as the case may be, may have regard to the statute of limitations in considering where the balance of justice lies, has not changed under the amended O. 8. Having reviewed the case law, in *Whelan v. HSE* Kelly P at paragraph 39 concluded that:
>
> > 'The mere fact that the plaintiff's claim would be statute-barred is not of itself 'other good reason' for renewing a summons.'
>
> Similarly, in this court in *Monaghan v. Byrne* [2016] IECA 10 Hogan J held:
>
> > '31. It follows, therefore, that the fact that an action might otherwise be statute-barred is not *in itself* a 'good reason' such as might justify the court renewing the summons for the purposes of Ord. 8, r. 1. If it did, then this might have the effect whereby, in the

words of Laffoy J in *O'Reilly,* 'the time strictures imposed by the Statute of Limitations 1957 could be easily set at nought'."

The central reason the *ex parte* application was brought

100. It is perfectly clear that the present application is one which would *never* have been brought, had an entirely *different* set of proceedings be issued 'within time' for the purposes of the Statute of Limitations. Counsel for the plaintiff, very appropriately, acknowledged as much. This underlines that the central reason for the ex parte application stems from issues in entirely different proceedings. The reality is that, in the *present* case, there are truly no special circumstances justifying renewal. In truth none would even have been asserted, had the statute of limitations period been met with respect to the issuing of an entirely *different* set of proceedings. According to the plaintiff's own case, the issuing of those entirely different proceedings represented the route actively chosen by the plaintiff to maintain such claim as it wished to prosecute against the defendants.

May 2020–April 2021

101. At para. 38 of Mr Browne's affidavit, the delay between May 2020 and April 2021 is explained in the following terms:-

> *"h. May 2020 – to date – Plaintiff has a hold placed on progressing proceedings and the solicitor dealing with the file ultimately resigned his position within the firm due to health reasons."*

Four brief comments can be made: (1) On 22 June 2018, the plaintiff made clear that there was no hold on proceedings; (2) by May 2020, a *different* set of proceedings had already been issued (they were issued on 3rd April 2020); (3) this was the "*fresh set of proceedings against the personal representatives"* which the plaintiff decided (in the wake of the *Bank of Ireland v. O'Malley* decision) that it would be *"more efficient to issue"* (see para. 25 of Mr Browne's affidavit); and (5) what did or did not happen in respect of these entirely *different* proceedings (which, on the plaintiff's case, were issued a day after the expiry of the statute of limitations period) does not constitute special circumstances in the *present* proceedings, still less special circumstances *justifying* renewal of these 2017 proceedings which the plaintiff deliberately abandoned by the end of 2019.

Extreme delay

102. As counsel for the plaintiff rightly points out, there is no statutory time-limit in respect of how long, after the expiry of a summons, an application to renew may be brought. That does not mean that delay is not relevant, and the plaintiff's counsel very correctly acknowledged that it is. Delay and its extent are among the factors which falls to be looked at when the court considers whether it is in the interests of justice to renew a summons (i.e. whether there are special circumstances which *justify* the renewal).

103. The *ex parte* application to renew the summons in this case was brought 2 years and 8 months after the summons expired. I have no hesitation in describing this as being at the very *extreme* end of delay. In terms of measuring the relevant period of time, it seems to me that it is appropriate to compare, on the one hand, the period of 3 months (which constitutes the maximum period for which,

per Ord. 8, R.1 (2), the Master; and *per* Ord. 8, R.1 (4), this Court, can renew a summons) and, on the other, the period of 2 years and 8 months i.e. 32 months (between the expiry of the summons and the ex parte renewal application). The latter is over 10 x times the former. This delay is also over 2 ½ times the period (of 12 months) which is allowed for the service of a summons. On that analysis, it is an extreme delay.

104. Even though a decision in each case must flow from the specific facts and circumstances in same, it is also useful to note the relevant periods of delay in certain of the authorities furnished to the Court. In *Murphy v. H.S.E.* [2021] IECA 3, the relevant personal injuries summons issued on 31st August 2018 and, thus, the period for service expired on 30th August 2019, whereas the renewal application was brought 5 months later, on 3rd February 2020 (as opposed to the 32 months in the present case).

105. In *Nolan v. Trustees of Bridge United AFC* [2021] IEHC 335, the personal injuries summons issued on 21st May 2018 and time for service expired on 20th May 2019. On 27th August 2019 the plaintiff's solicitor became aware that the summons had not been served on either of the relevant defendants and an order renewing the summons was made on 14th October 2019 (i.e. less than 5 months after it expired). The Court later set aside that renewal.

106. In *Young v. St Vincent's Healthcare Group* [2021] IEHC 386, the personal injuries summons issued on 26th October 2017 and time for service expired on 25th October 2018, whereas an *ex parte* application to renew was made and granted on 27th July 2019 i.e. 9 months later. The court subsequently set aside this renewal.

107. In *Nolan v. Board of Management of St. Mary's Diocesan School* [2022] IECA 10, the plaintiff, who was a teacher, brought personal injuries proceedings alleging bullying and harassment in the context of her employment as an art teacher. The summons in question was issued on 23 July 2018. A 2nd personal injuries summons issued on 16 August 2018 but ultimately did not proceed. In the same month, 'Terms of Agreement' was signed between the plaintiff and defendant. The details were not before the court but the plaintiff's counsel said it related to a form of arrangement which appears to have been reached whereby a disciplinary process threatened by the school would be discontinued and the school would support the plaintiff's application to be permitted to retire on ill-health grounds. Thereafter, it appears that efforts were directed to the plaintiff's retirement claim which included the plaintiff undergoing various medical assessments. Her retirement application was refused on 3 December 2018 and the refusal was upheld on appeal as of 30 January 2019. On 7 November 2019, the plaintiff lodged an *ex parte* docket with respect to an application to renew the summons. Thus, the relevant period (23rd July 2018 to 7th November 2019) was somewhat over 15 months. It is useful to quote the following from the judgment of the Court of Appeal (Noonan J) in *Nolan:*

> "15. The relevant provisions of the RSC governing the renewal of summonses are to be found in O. 8 which, in its current guise, replaced the previous O. 8 regime on the 11th January, 2019. I think it is fair to say that the new rule was introduced to tighten up and limit the circumstances in which a renewal would henceforth be permitted. Most causes of action, including claims for personal injuries, are subject to statutory limitation periods such as, in this instance, two years from the accrual of the cause of action. When the cause of action accrues is often a complex question, particularly in a case of this nature where the matters

complained of extend well beyond the limitation period. Fortunately, however, we are not concerned with that issue today.

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** – see for example *Moloney v Lacey Building and Civil Engineering Limited* [2010] 4 IR 417, *Monahan v Byrne* [2016] IECA 10 and *Darjohn Developments Limited (in Liquidation) v IBRC Ltd* [2016] IEHC 535" (emphasis added)

108. With regard to the "*tension"* referred to by the learned judge, in the present case the very object of the *ex parte* renewal application (which was made in April 2021) was to circumvent the effect of the statute of limitations. Not only this, it was to circumvent the effect of the statute of limitations, not on the present proceedings (which were issued 'in time' on 8th August 2017) but on entirely different proceedings (which were issued a day late, on 3rd April 2020). The Court of Appeal's decision in *Nolan* continued as follows:

"17. I think it fair to say that at one time in the past, the bar was relatively low in terms of renewal applications which were frequently granted more or less for the asking. That culture, which in another context has been described as one of "endless indulgence" (see *Gilroy v Flynn* [2004] IESC 98), has changed very significantly in recent years, not least by virtue of the State's, and thus the court's, obligations under Art. 6 of the ECHR. The new O. 8 seeks to address the perceived laxity arising under the old rule where it was not too difficult to surmount the "good reason" hurdle in cases not concerned with difficulties of effecting service. The question of prejudice has, in general, no relevance to limitation periods and its application to the renewal of summonses must be carefully scrutinised.

…

24… Haughton J. recognised that **special circumstances alone are not enough and placed emphasis on the requirement for those circumstances to justify extension**. His reference to there not being a second tier or limb to the test refers to the fact that special circumstances and the justification for renewal are not two separate and distinct matters, but fall to considered together in the analysis of whether it is in the interest of justice to renew the summons. Prejudice is a component of that analysis.

26. However, **before that analysis can be arrived at, it must be established that there are special circumstances."** (emphasis added)

109. For the reasons set out in this decision I am not satisfied that special circumstances have been established. None of the four matters relied on by the plaintiff at the *ex parte* stage, and which appear in the order renewing the summons, stand up to scrutiny. They are not, individually or collectively, special circumstances.

Due diligence

110. Earlier in this judgment I made reference to the obligation which rests on every plaintiff to prosecute their claim with due diligence. In *Nolan*, the Court of Appeal specifically referred to this issue, in the context of considering what was contended to amount to special circumstances in that case (Mr. Donagher being the plaintiff's solicitor):

> "36. Turning to the second, and possibly overlapping, ground advanced that Mr. Donagher considered that the personal injuries action should not proceed until, first, the retirement claim was disposed of and second, advice was taken on the prospect of reviewing it, again, I find it hard to see how this can possibly amount to a special circumstance. Every party who institutes litigation has a duty to pursue that litigation with reasonable diligence and expedition.
>
> 37. In *Darjohn*, which was a renewal application under the previous Order 8, I noted, at para. 14, that "*[l]itigation cannot be conducted on the speculative basis of issuing proceedings but not pursuing them until some event favourable to the plaintiff occurs*", citing the views of Lord Denning in *Thorpe v Alexander Forklift Trucks Limited* [1975] 1 WLR 1459 which in turn approved the dicta of Lord Goddard in *Battersby v Anglo-American Oil Company Limited* [1945] 1 KB 23 where he said (at p. 32): -"*It is the duty of a plaintiff who issues a writ to serve it promptly…**ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried or to await some future development*."
>
> 38. In *Darjohn,* the following was said in this regard (at para. 15): -
>
> "***Once proceedings have commenced, the plaintiff is under a duty to prosecute them with reasonable promptness.*** *The courts are increasingly conscious of their obligations under the Constitution and the European Convention on Human Rights to ensure that litigation is disposed of in a timely manner. Where proceedings are issued but not served, the defendant and the court are deprived of the normal control mechanisms that exist to ensure that undue delay does not occur**. In general, it is not permissible to issue proceedings and then 'park' them without service** in the hope or anticipation, for example, that a change in the law may render them viable or an impecunious defendant may become a mark."* (emphasis added)

111. In the manner examined in this judgment, the evidence in this case entirely undermines the proposition that the plaintiff 'stayed' or 'parked' these proceedings, from June 2018 onwards, or that the plaintiff regarded itself as having done so. This is illustrated by what the plaintiff *said* (in the final response to the complaint, dated 22nd June 2018) and what the plaintiff *did* (as regards instructing its solicitors, in June 2018 and, again, in the latter half of 2019, to explore steps to continue this claim or issue an alternative claim; abandoning these proceedings by the end of 2019; and issuing fresh proceedings consistent with the decision not to progress these). However if I am entirely *wrong* in my view (that the plaintiff did not 'stay' or 'park' this claim) it seems to me that, having regard to the particular facts in this case and guided by the principles in *Nolan,* it was not permissible for this plaintiff to 'park' this claim (e.g. for so long as it took to deal with the complaint)

and any such decision to 'park' the claim does not constitute a special circumstance. If a decision to 'park' a claim while attending to another issue is, ordinarily, not a *good reason* for failing to prosecute it, I am entirely satisfied that any such decision is not a *special circumstance* on the facts of the present case.

112. The decision of Ms Justice Butler in *Klodkiewicz v Palluch* [2021] IEHC 67 was also furnished to this court. To my mind, it illustrates that each case will turn on its own facts. The period for service of the personal injuries summons in that case expired in October 2018 (the application to PIAB and the institution of the claim both having been on time). Of the 2-year period prior to the *ex parte* renewal application granted in 2018, a year had been spent by the plaintiff's solicitors attempting to obtain the plaintiff's file and clarity from her former solicitors as regards service. Early notice of the claim had also been given. Furthermore, there were other proceedings in being, arising out of the same accident, such that the steps required to deal with the issue of liability were steps which were likely to have already been take place on the defendant's behalf. In short, the factual position was entirely different.

***Special circumstances* which *justify* renewal**

113. This Court is obliged to decide whether there are *special circumstances* which *justify* a renewal of the plenary summons. A careful consideration of the facts in this particular case reveals that what the plaintiff contended to be special circumstances do not stand up to scrutiny. None of the four matters referred to in the Order obtained at the *ex parte* stage constitute special circumstances in my view. Ord. 8, R.1 (4) does not seem to me to empower this Court with the *discretion* to grant a renewal, in the *absence* of special circumstances and, even though there is a single test *per* Ord. 8, R.1 (4), the existence of special circumstances on the facts of a given case seem to me to be a *sine qua non* for the grant of any renewal by this Court under Ord 8 1 (4). Not having established the existence of special circumstances, there is simply no question of special circumstances which *justify* renewal of the summons in these proceedings in this case.

114. Lest I be entirely wrong in coming to the view that no special circumstances have been established, I have taken account of all relevant matters including, but not limited to, issues such as: the extent to which the defendants were on notice of the plaintiff's claim; potential prejudice or hardship to the defendants (e.g. such as might arise from the fact that the original defendant died after the summons issued and long before the renewal application and, thus, her evidence will no longer be available); potential prejudice or hardship to the plaintiff (in circumstances where it is common case that 2 of the sets of proceedings issued by the plaintiff appear to be statute-barred, and a setting-aside of the order obtained on 26th April 2021 at the *ex parte* stage will mean that this 3rd set of proceedings cannot be progressed); the length of the period of time between the expiry of the summons and the application to renew; and, without for a moment purporting to determine any issue, whether it is possible that an alternative remedy might be open to the plaintiff to pursue; as well as the fact that the fundamental aim of the renewal application is to avoid the effect on different proceedings of the 2-year limitation period laid down by the Oireachtas with respect to making a claim against a deceased's estate. In short, having weighed all relevant matters in the balance, in the context of a careful consideration of the *interests of justice*, I am also satisfied that the plaintiff has not established special circumstances which *justify* extension.

In summary

115. A consideration of the evidence allows me to hold that it is only because different proceedings were issued (in April 2020), a day *after* the statute of limitations period expired that the plaintiff sought, a year later (in April 2021), to try and 're-animate' the present proceedings which, having been issued in August 2017, were deliberately abandoned (by the end of 2019). As counsel for the defendants correctly submits, the plaintiff's informed and unilateral decision *"backfired because the plaintiff failed to issue those proceedings in time"* and this was, as he also pointed out correctly *"due to no fault of the defendants"*. On the plaintiff's behalf, Mr. Browne averred, at para. 42: *"I believe that if this Honourable Court were to grant the relief sought that the rights of the estate of* ***the defendant can still be protected on the basis that the personal representative of the estate would be permitted to apply to set aside the renewal should they wish*** *and they would also be entitled to defend the proceedings should they see fit"* (emphasis added). The text I have highlighted reflects, of course, what is provided for in Ord. 8. 2 and, for the reasons set out in this judgment, I am satisfied that the plaintiff has not met the relevant onus of demonstrating the existence of special circumstances which justify the renewal. Thus, the renewal must be set aside.

116. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."* My preliminary view is that 'costs' should 'follow the event' and the event is, very obviously, the success of the defendants' motion. The parties should correspond with each other, forthwith, regarding the appropriate form of order, in particular, as to costs which should be made. In default of agreement between the parties on any issue, short written submissions should be filed in the Central Office within 2 weeks.