APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Numbers: 2023 37, 38, 43, 44

Neutral Citation Number [2024] IECA 47

Pilkington J.

Allen J.

Butler J.

BETWEEN/

MICHAEL POWER

PLAINTIFF

- AND –

CJSC INDIGO TADJIKISTAN,

TELIA COMPANY AB

AND

AGA KHAN FUND FOR ECONOMIC DEVELOPMENT SA

DEFENDANTS

JUDGMENT of Mr. Justice Allen delivered on the 1st day of March, 2024

Introduction

1. This is a judgment on four appeals against the judgment of the High Court (Egan J.) delivered on 29th July, 2022 ([2022] IEHC 534) and consequent orders made on 18th January, 2023 by which the High Court declined to set aside the renewal of two summonses as against

the second defendant; declined to set aside the renewal of one of the summonses as against the third defendant; and granted an order setting aside the renewal of the other summons as against the third defendant.

2. The second and third defendants have appealed against the refusal of the High Court of the relief which they sought and the plaintiff has appealed against the order setting aside the renewal of the summons as against the third defendant.

3. In 2019 and 2020 the plaintiff issued two High Court summonses against each of the defendants. As provided by the Rules of the Superior Courts – and as was set out of the face of the summonses – they were to be served within twelve calendar months of the date issue unless the time had been extended by the court. The summonses were not validly served on either the second or the third defendants within twelve months.

4. Under the Rules, the summonses might be renewed in *"special circumstances"*, such circumstances to be stated in the order. The core issue before the High Court was whether the plaintiff had made out sufficient special circumstances – specifically, *"difficulty in effecting service of the proceedings"* – as justified the renewal of the summonses. The issue before this court is whether the appellants had established that the High Court erred in concluding – in the case of both summonses against the second defendant and one of them against the third defendant – that he had, and – in the case of one of the summonses against the third defendant – that he had not.

Dramatis personae

5. The plaintiff is a chartered accountant who lives in Waterford. He professes a particular expertise in emerging markets.

6. The first defendant is a corporation registered in Tajikistan where it carries on the business of a mobile telephone operator.

7. The second defendant is a corporation registered in Sweden. At the time of the events giving rise to the proceeding, it was, indirectly, the majority shareholder in the first defendant.

8. The third defendant is a corporation registered in Switzerland. It was, indirectly, the minority shareholder in the first defendant and appears to have been in discussions for the acquisition of the second defendant's interest in the first defendant.

The summonses

9. The plaintiff was employed by one or other of the first and second defendants from 20th January, 2016 until 28th February, 2017, when his employment was either terminated or came to an end.

10. In the course of the plaintiff's employment in Tajikistan unhappy differences arose between the plaintiff and the first and second defendants for which the plaintiff held all three defendants to be responsible.

11. On 3rd July, 2019 the plaintiff commenced proceedings by personal injuries summons against all three defendants – claiming damages for personal injuries – and on 7th February, 2020 he commenced a second action by plenary summons claiming damages for detriment suffered by reason of his having made a protected disclosure pursuant to s. 13 of the Protected Disclosures Act, 2014.

12. Neither summons was served in time on the second or third defendants but both were renewed by order of the High Court made on 21st June, 2021 on *ex parte* application on behalf of the plaintiff. By notices of motion issued on 30th July, 2021 and 12th January, 2022 the second and third defendants applied to set aside the renewal.

13. It was common case that the plaintiff bore the burden of satisfying the court that there were special circumstances which justified the renewal. The special circumstances relied

upon by the plaintiff were that there had been difficulty in effecting service of the proceedings.

14. In *Murphy v. Health Service Executive* [2021] IECA 3, Haughton J. (Whelan and Noonan JJ. concurring) held that while *"... the use of the word 'special' ... does not raise the bar to 'extraordinary', it nonetheless suggests that some fact or circumstance that is beyond the ordinary or usual needs to be present."* Without getting ahead of myself, the circumstances in which the need for the renewal of the summonses arose were extraordinary. However, it is not sufficient for the plaintiff simply to show that the circumstances are unusual. Besides being beyond the ordinary or unusual, the circumstances must be such as to justify the renewal of the summons. The question – on all four appeals – is, generally, whether the High Court judge erred in her assessment of whether the circumstances were such as could have justified the renewal and, more particularly, whether the fact that the summonses had not been served was attributable to a *"difficulty in effecting service."*

The circumstances

15. On 26th June, 2017, the plaintiff, by his then solicitors, wrote to each of the defendants – and to a Netherlands corporation called Central Asian Telecommunications Development B.V. – in precisely the same terms. Although not stated in the letter, it appears that it was through this Netherlands corporation that the second defendant held its interest in the first defendant.

16. It was said that the plaintiff had been employed as chief financial officer of *"Indigo Tajikistan t/a Tcell"* which, it was said, was a subsidiary of the *"TeliaSonera Group/Telia Company, 'Telia'"*, and was controlled and operated by Telia which, it was said, was responsible for the corporate governance and ethics of Tcell. A substantial part of the plaintiff's duties, it was said, was to oversee the sale by Telia to AKFED – Aga Khan Fund for Economic Development – of Telia's stake in Tcell.

17. The plaintiff claimed that in the course of his employment he had been mistreated and that Telia and AKFED had failed to respond to or to adequately investigate his complaints and that as a result he had sustained personal injuries. The plaintiff, it was said, was unable with certainty to state whether Telia, Tcell or Central Asian Telecommunications Development were liable in respect of the matters complained of. They were each given fourteen days within which to admit liability, failing which proceedings would be issued against all of them. If that claim should succeed against one of them but fail against either or all of the others, an application would be made under s. 78 of the Courts of Justice Act, 1936 for an order over in respect of the costs of any party against whom the action might fail.

18. The letter concluded by saying that in circumstances in which the harmful events had occurred in Ireland, article 5(3) of Council Regulation 44/2001 applied and that Ireland was the appropriate jurisdiction in which to bring proceedings against Telia. By the way, Council Regulation 44/2001 had been replaced upwards of ten years previously by Council Regulation 1215/2012 but in the scale of what was to come it hardly seems worth mentioning.

19. If, inferentially, the plaintiff's solicitors' letter conveyed that such proceedings as might be brought in default of an admission of liability would be proceedings in Ireland, there was no indication of the basis on which the Irish courts might have jurisdiction to deal with the claim against the addressees other than the E.U. domiciled Telia. If it was to be inferred from the fact that the letter was sent or copied to the third defendant that the third defendant would be named as a party to threatened proceedings, the letter did not say so.

20. The letter of claim to the second defendant was replied to by Swedish lawyers on 10th July, 2017. The letter rejected the plaintiff's claims and said:-

"As to jurisdiction and applicable law, we cannot conclude based on your account of what Mr. Power regards as facts that Irish courts would be competent or that Irish law would apply."

21. The letter to the third defendant was replied to by Irish solicitors on 18th July, 2017. It was not, they said – nor was it – apparent from the plaintiff's solicitors' letter of 26th June, 2017 on what basis they had written to the third defendant or whether they were asserting that the third defendant had any liability to their client. For the record, the third defendant denied any liability. The letter concluded by saying:-

"Furthermore, your letter does not disclose the basis on which the Irish courts would have jurisdiction to deal with the matter if your client were to issue proceedings here.

If, notwithstanding the foregoing, your client institutes proceedings in Ireland and names our client as a defendant in those proceedings, our client has instructed us to fully defend those proceedings, including on jurisdictional grounds."

22. On 8th August, 2017 the plaintiff's solicitors submitted data access requests directly to the second and third defendants. The request to the second defendant was dealt with by its Swedish lawyers. The request to the third defendant was copied to its Irish solicitors but was dealt with by Swiss lawyers. A similar request made directly to the first defendant was dealt with by the first defendant directly.

23. On 18th October, 2017 the plaintiff's solicitors wrote to the second defendant's Swedish lawyers advising them that they had been instructed to draft the appropriate proceedings and asking them to nominate Irish solicitors to accept service. That letter appears to have crossed with a letter of the same date from the Swedish lawyers in relation to the data access request, which the Swedish lawyers thought made the request to nominate

solicitors no longer relevant, but the request was repeated on 14th November, 2017. On 28th November, 2017, the second defendant's Swedish lawyers wrote:-

> *"Telia Company AB denies any liability to Mr Power. There is no basis for a claim by Mr Power against Telia Company AB, whether in Ireland or elsewhere. In the circumstances, Telia Company AB does not propose to engage Irish lawyers at this stage."*

24. On 19th June, 2018 the plaintiff's solicitors wrote again to second defendant's Swedish lawyers enclosing a copy of an application which had been made to the Personal Injuries Assessment Board and asking for confirmation that they would consent to the receipt of documents in the proceedings by electronic mail in accordance with the Rules of the Superior Courts (Service) 2017. On 18th July, 2018 the Swedish lawyers replied that:-

> *"We do not have instructions to accept electronic service of legal proceedings on behalf of our client. Accordingly, our client expects that you will comply with the appropriate rules relating to foreign service if legal proceedings are to be served on our client in Sweden."*

25. A similar request sent to the third defendant's Irish solicitors but appears to have gone unanswered.

26. In the meantime, a PIAB authorisation had issued on 2nd July, 2018 authorising the plaintiff to bring proceedings against all three defendants, as well as Central Asian Telecommunications Development.

27. There matters rested until 28th June, 2019 when the plaintiff's solicitors wrote to the second defendant's Swedish lawyers. The letter to the Swedish lawyers suggested that there was – or was to have been – enclosed a copy of a letter of the same date sent directly to the second defendant and asked for confirmation that the Swedish lawyers had authority to accept service of *"both sets of proceedings in relation to the above matter."*

28. The Swedish lawyers replied on 15th July, 2019 referring to their letter of 18th July, 2018 and repeating that they did not have instructions to accept service of legal proceedings and that the second defendant expected that the plaintiff's solicitors would comply with the appropriate rules relating to foreign service if legal proceedings were to be served on their client in Sweden.

29. In the meantime, on 3rd July, 2019 the plaintiff had issued a personal injuries summons against each of the defendants by which he claimed damages for personal injury, loss and damage sustained by him by reason of the alleged negligence and breach of duty and breach of contract of the defendants. That summons was issued without leave.

30. Order 5, rule 14 of the Rules of the Superior Courts provides:-

> *"14. (1) Save as is otherwise provided for in these Rules, no summons or other originating document for service out of the jurisdiction or of which notice is to be given out of the jurisdiction shall be issued without leave of the Court.*
>
> *(2) Service of an originating summons or other originating document or notice of an originating summons or other originating document out of the jurisdiction is permissible without the leave of the Court, if, but only if, it complies with the following conditions:*
>
> *(i) each claim made by the summons or other originating document is one which by virtue of Regulation No. 1215/2012, Regulation No. 2201/2003, the 1968 Convention or the Lugano Convention, the Court has power to hear and determine, and*
>
> *(ii) no proceedings between the parties concerning the same cause of action are pending between the parties in another Member State of the European Union or in a Contracting State of the Lugano Convention."*

31. The rules governing service out of the jurisdiction are set out in O. 11 of the Rules. Order 11 applies to any originating summons that is not a summons to which O. 11A applies.

32. The rules governing service out of the jurisdiction under Regulation 1215/2012 and the Lugano Convention (Civil and Commercial Matters) are set out in Order 11A. Order 11A, r. 4(1) provides:-

> *"4.(1) Where two or more defendants are parties to proceedings to which the provisions of this Order apply, but not every such co-defendant is domiciled in:*
>
> (i) *A Member State of the European Union, or*
>
> (ii) *A Contracting State of the Lugano Convention,*
>
> *for the purposes of Regulation No. 1215/2012, the Lugano Convention or the 1998 Act, then the provisions of Order 11 requiring leave to serve out of the jurisdiction shall apply to each and every such co-defendant."*

33. Tajikistan is neither a member of the European Union nor a contracting state to the Lugano Convention. Sweden is a member of the European Union. Switzerland is a contracting state to the Lugano Convention.

34. The personal injuries summons was plainly not a summons which came within the exception in O. 5, r. 14(2) and, by O. 11A, r. 4(1), was plainly a summons to which the provisions of O. 11 requiring leave to serve out of the jurisdiction applied to each and every named defendant. As I will come to, this was later – much later – recognised and acknowledged by the plaintiff's solicitors but it should have been recognised at the time.

35. The personal injuries summons was indorsed with a statement that the High Court had jurisdiction to hear and determine the claim against the second defendant under Council Regulation (EC) 44/2001 and should assume jurisdiction under article 5(3) of that Regulation – the courts for the place where the harmful event occurred – and with a statement that the High Court had jurisdiction to hear and determine the claim against the third defendant under

the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16th September, 1988 and should assume jurisdiction under article 5(3) of that Convention – the courts for the place where the harmful event occurred; and that there were no proceedings pending between the parties in any other Member State or in Switzerland.

36. On 17th July, 2019 – undaunted by what the second defendant's Swedish lawyers had previously said twice, most recently in their letter of only two days earlier – the plaintiff's solicitors sent the second defendant's Swedish lawyers a copy of the personal injuries summons and asked that they would confirm that they had authority to accept service and would consent to the receipt of documents by e-mail. The answer, on 31st July, 2019, repeated that the second defendant denied any liability and that the lawyers did not have authority to accept service and they enclosed a copy of their letter of 15th July, 2019.

37. On 28th June, 2019 the plaintiff's solicitors also wrote to the third defendant's solicitors, again suggesting that there was enclosed – or was to have been enclosed – a copy of a letter of the same date sent directly to the third defendant and asking for confirmation that they had authority to accept service of both sets of proceedings, to which the third defendant's solicitors replied on 17th July, 2019 that they required a copy of both sets of proceedings to enable them to take instructions.

38. The copy correspondence as exhibited is rather jumbled. If – as their letters to the second and third defendants' lawyers suggested – the plaintiff's solicitors wrote directly to the second and third defendants on 28th June, 2019, those letters were not included in the exhibits (or at least in the books of appeal) but there was exhibited a letter of 19th July, 2019 which was sent by the plaintiff's solicitors to each of the first defendant, directly, and to the second defendant's Swedish lawyers and the third defendant's solicitors, and possibly to the second and third defendants directly. The plaintiff's solicitors set out his claims at some

length. They asserted that the first defendant was owned, controlled and operated by the second and third defendants who, it was said, were liable not only for their own actions and omissions but for those of the first defendant as well. It is not necessary to dwell on the detail of the plaintiff's complaints but the letter presaged an action against all three defendants under s. 13 of the Protected Disclosures Act, 2014 which, it was said, could be instituted under Irish law irrespective of whether a relevant wrongdoing had occurred in Ireland or elsewhere and whether the applicable law was that of Ireland or of any other country or territory. It was asserted that the harmful events complained of occurred in Ireland and/or that the claim was a civil claim for damages based on an act giving rise to criminal proceedings, so that articles 7(2) and 7(3) of Regulation 1215/2012 applied to the proposed action against the second defendant and articles 5(3) and 5(4) of the Lugano Convention applied to the proposed action against the third defendant.

39. The second defendant's Swedish lawyers replied by e-mail of 31st July, 2019 to say that their client contested any liability and that they did not have authority to accept service of proceedings. They attached a copy of their letter of 15th July, 2019.

40. The third defendant's solicitors replied on 1st August, 2019 repeating their denial of the allegations against the third defendant and saying:-

> *"Furthermore, your letter fails to address the basis on which the Irish Courts would have jurisdiction over such claims if your client were to issue proceedings here. Please note that if your client institutes proceedings in Ireland and names our client as a defendant to those proceedings, our client has instructed us to fully defend those proceedings, including on jurisdictional grounds."*

41. The plaintiff's solicitors' response to that was to send an e-mail on 2nd August, 2019 attaching a copy of their letter of 17th July, 2019 and a further copy of the personal injuries summons. The third defendant's solicitors were asked to confirm that they had received the

letter of 17th July, 2019 and it was suggested that the personal injuries summons *"deals with the jurisdictional issue"* – but not how.

42. The plaintiff's solicitors' letter of 17th July, 2019 was not dealt with by the third defendant's solicitors until 6th December, 2019 when they wrote to say that they did not have authority to accept service of the personal injuries summons, adding that they could see no basis on which the Irish courts would have jurisdiction over the claims.

43. The third defendant's solicitors' letter of 17th July, 2019 – by which they asked for a copy of both sets of proceedings, to enable them to take instructions as to whether they would accept service – may have crossed with the plaintiff's solicitors' letter of 17th July, 2019 enclosing a copy of the personal injuries summons. At that stage, there was only one set of proceedings.

44. At some stage between 17th July, 2019 and January, 2020 a second set of proceedings was drafted by which the plaintiff would make a claim for damages pursuant to s. 13 of the Protected Disclosures Act, 2014 for detriment allegedly suffered because he had made a protected disclosure or protected disclosures.

45. I pause here to say that – as Egan J. later put it – the plaintiff's solicitors' initial letter of claim of 26th June, 2017 communicated the bulk of the factual details on which the proceedings were later based. As I read in to the case, I was inclined to wonder if it was permissible for the plaintiff to have issued two actions based on the same facts but no point was taken by either of the second or third defendants as to the plaintiff's entitlement to have done so.

46. It appears that it was then, for the first time, that any consideration was given to the requirement for leave to issue proceedings against foreign defendants.

47. What happened then, according to the affidavit of the plaintiff's solicitor sworn on 21st May, 2021, in support of the renewal application, was that:-

"38. … by email dated 23rd January 2020 I wrote by email to our town agents in Dublin to confirm whether it was only necessary to obtain leave to serve the first named defendant in circumstances where we had understood the rules for service on the second and third named defendants to be contained in the Service Regulation (Council Regulation (EC) No. 1393/2007 and the Hague Convention, respectively.

39. By replying email dated 24th January 2020, our town agents confirmed that the Central Office had confirmed that leave was only required for the first named defendant but that the plaintiff was required to issue two separate summons, one in respect of the first named defendant (in Tajikistan) and third named defendant (in Switzerland) both of whom have 42 days in which to enter an appearance and a separate summons in respect of the second named defendant (in Sweden) who has 35 days within which to do so. The advice was that the relevant jurisdictional clauses would be included on both summonses."

48. To anyone who has read the Rules, the premise of the question was plainly wrong. Council Regulation 1393/2007 and the Hague Service Convention – and Orders 11D and 11E by which they were transposed – are directed to the service of proceedings which have been validly commenced. The availability of those regimes for the service of proceedings which have been properly commenced against defendants domiciled in a member state of the European Union or a contracting state to the Lugano Convention had nothing to do with the question of whether leave was required to issue and serve out of the jurisdiction.

49. This enquiry was said to be part of *"the bona fide efforts made to effect service on the parties."* I will come to the question of whether it was or not, but I observe at this point that there was no evidence of any similar consideration or enquiry in respect of the issue and service of the personal injuries summons, or of any dawning realisation that if leave was required to issue the proposed plenary proceedings – even against the first defendant – it must

have been obvious that leave ought to have been obtained for the issue and service of the personal injuries summons.

50. On 3rd February, 2020 on the *ex parte* application on behalf of the plaintiff, the High Court (Murphy J.) made an order pursuant to O. 11, r. 1(e) of the Rules giving liberty to the then intended plaintiff to issue and serve notice of *"the proceedings"* out of the jurisdiction on the first defendant in Tajikistan, and fixing six weeks as the time within which an appearance was to be entered. On close examination, the order of 3rd February, 2020 has an *"IA"* record number (2014 No. 14 IA) and identified the plaintiff as the intended plaintiff and the three defendants as the intended defendants, so that it must have been limited to the then intended plenary proceedings but, as I will come to, the order was widely circulated with notice of the issue of both sets of proceedings.

51. By O. 11A, r. 4(1) the plaintiff was plainly required to apply for leave to issue and serve notice of the proceedings on each and every one of the defendants but this was not done.

52. On 7th February, 2020 the plaintiff issued a plenary summons directed to the second defendant and a concurrent summons directed to the first and third defendants, by which he claimed damages for detriment allegedly suffered because he had made a protected disclosure pursuant to s. 13 of the Protected Disclosures Act, 2014.

53. The plenary summons was indorsed with a statement that the High Court had jurisdiction to hear and determine the claim against the second defendant under Regulation (EC) 1215/2012 and should assume jurisdiction under article 7(2) – the place where the harmful event occurred – article 7(3) – a civil claim for damages based on an act giving rise to criminal proceedings – and article 21(b)(i) of that Regulation – the place from where the employee habitually carried out his work. There was a separate indorsement that the High Court had jurisdiction to hear and determine the claim against the third defendant under the

Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16th September, 1988 and should assume jurisdiction under article 1 – the place of the third defendant's domicile *[sic.]* – article 5(3) – the place where the harmful event occurred – and article 5(4) – a civil claim for damages based on an act giving rise to criminal proceedings – of that Convention; and that there were no proceedings pending between the parties in any other Member State or in Switzerland.

54. As the personal injuries summons had, so the plenary summons carried, the standard form printed statement that:-

> *"NB This summons is to be served within TWELVE calendar months form the date hereof unless the time for service has been extended by the Court."*

55. By the time the plenary summons issued on 7th February, 2020 the plaintiff's solicitors had been told unequivocally three times by the second defendant's Swedish lawyers that they did not have authority to accept service of proceedings and – if only once, then no less unequivocally – by the third defendant's solicitors that they did not have authority to accept service of proceedings. If the plaintiff's solicitors were hopelessly confused as to the interaction between Regulation 1215/2012 and Regulation 1393/2007, on the one hand, and the Lugano Convention and the Hague Convention, on the other, they knew, by then, that there were rules governing the service of proceedings on the second and third defendants.

56. Order 11D of the Rules of the Superior Courts, under the heading *"Service of Documents Outside of the Jurisdiction but within the EU (Regulation No 1393/2007)"* provides for the service of documents outside of the jurisdiction but within the EU.

57. Order 11E of the Rules, under the heading *"Service of Documents Outside of the Jurisdiction (Hague Convention)"*, provides for the service of documents outside of the jurisdiction in countries which are party to the Hague Convention, other than member states of the EU.

58. On 12th February, 2020 the plaintiff's solicitors wrote to each of the second defendant's Swedish lawyers and the third defendant's solicitors enclosing *"by way of courtesy"* a copy of the High Court order of 3rd February, 2020 and a copy of notice of the two actions. The letter suggested that both actions had been commenced by plenary summons but gave the separate record numbers for both actions. The plaintiff's solicitors said that they were arranging service directly on each of the second and third defendants *"to comply with the applicable rules relating to foreign service"* and warned that if an appearance was not entered within the time allowed, they would proceed to mark judgment without further notice.

59. The inclusion of the copy order with notice of both summons was calculated to – and, as I will come to, did – cause confusion. If, as it said, the order gave liberty to issue and serve out against the first defendant only, why was it being sent to the second and third defendants' solicitors? On close reading, the order predated the plenary summons only and identified the parties as intended parties. But the defendants in both actions were the same and if leave had been obtained in respect of one action, surely leave was required in respect of both.

60. On 28th February, 2020 similar letters were sent directly to the second and third defendants. On the one hand, it was said that the enclosed documents were sent *"by way of courtesy."* Of the other, there was a warning that if an appearance was not entered within the time limit, judgment would be marked without any further notice.

61. Meanwhile, on 12th February, 2020 – in furtherance of their declared determination to arrange service directly on each of the second and third defendants to comply with the applicable rules relating to foreign service – the plaintiff's solicitor telephoned the Combined Court Office in Castlebar, which is the transmitting authority for the service of documents within the EU. He was provided with a blank Request for Service of Documents form and

information sheet. He completed the form and returned it under cover of a latter of 17th February, 2020 together with *"Original documents to be served in triplicate".* It is not clear from the letter or the form what documents to be served were enclosed. The letter referred to *"Original documents."* The form identified the *"Documents to be served"* as *"Writ of summons."*

62. The Request for Service of Documents form was a complete mess. It identified the transmitting agency as Service of EU Documents, Courts Service Centralised Office, Combined Courts Office; the receiving agency as Länsstyrelsen Stockholms Iän, with an address in Stockholm; and the addressee as Aga Khan Fund for Economic Development S.A. – the third defendant – at the second defendant's address in Stockholm.

63. In an undated letter to the plaintiff's solicitors – reference T2020/0049 – the Combined Court Office confirmed that whatever it was had been sent to them – described in the letter of confirmation as *"lodged in the Circuit Court in the above case … **Writ of summons**"* – addressed to Aga Khan Fund for Economic Development SA, had been sent to the relevant receiving agency under EU Regulation 1393/2007. By a letter dated 9th March, 2020 – reference T2020/0061 – the Combined Court Office confirmed that *"the documents lodged in the Circuit Court in the above case … **Writ of summons**"* – addressed to Telia Company AB, had been sent to the relevant receiving agency under EU Regulation 1393/2007. From the different reference numbers and from the later confirmations that something was sent by the transmitting agency to the relevant receiving agency, it seems reasonable to infer that something else was later sent to the Combined Court Office but there was no copy correspondence exhibited from which it might have been deduced what it was that was later sent, or when. The only Request for Service of Documents form exhibited was that to which I have already referred.

64. The Request for Service of Documents form invited the person making the request to indicate *"Date or time limit after which service is no longer required."* The date indicated by the plaintiff's solicitor was 30th December, 2020. At the end of the form was a printed statement – which is part of the prescribed form annexed to Regulation 1393/2007 – to the effect that:-

> *"1. You are required by Article 7(2) of Regulation (EC) No 1393/2007 to take all necessary steps to effect the service of the document as soon as possible and in any event within one month of receipt. If it has not been possible for you to effect service within one month of receipt, you must inform this agency by indicating this in point 13 of the certificate of service or non-service of documents.*
>
> *2. If you cannot fulfil this request for service on the basis of the information or documents transmitted, you are required by Article 6(2) of Regulation (EC) No 1393/2007 to contact this agency by the swiftest possible means in order to secure the missing information or document."*

65. Just to recapitulate, on 17th February, 2020 something was sent to the transmitting agency in Ireland for the service of documents in the EU addressed to the third defendant with a request that it be sent to the receiving agency in Sweden for service on the Swiss registered third defendant at the second defendant's address in Stockholm, and with a request that it be served by 30th December, 2020; and some time later something was sent to the Combined Court Office addressed to the second defendant which was sent to the relevant receiving agency under Regulation 1393/2007 – presumably the Swedish agency. As I will come – more despite than by reason of the plaintiff's solicitors efforts' – the notice the personal injuries summons and notice of the plenary summons were eventually delivered together to the second defendant. According to the affidavit of the plaintiff's solicitor grounding the renewal application, what was sent to the Combined Court Office on 17th

February, 2020 was notice of the personal injuries summons, with a request for service on the third defendant, and what was later sent – inferentially with a request for service on the second defendant – was notice of the plenary summons.

66. On 6th March, 2020 the third defendant's solicitors acknowledged receipt of the plaintiff's solicitors' letter of 12th February, 2020. They wrote:-

> *"We note that the Order of Ms Justice Murphy dated 3 February 2020, provided to us with your letter, does not grant leave to serve proceedings on our client.*
>
> *Until such time as any proceedings issued by your client are properly served, our client will not be entering an appearance."*

67. If the third defendant's solicitors left open the possibility that the plaintiff might by some other order have obtained leave to issue and serve the third defendant, the plaintiff's solicitors knew that they had not. If the third defendant's solicitors did not spell out that the plaintiff needed leave to issue and serve as against the third defendant, it was clear that that was their contention.

68. The personal injuries summons expired on 2nd July, 2020.

69. On 3rd September, 2020 the Combined Court Office e-mailed the Swedish receiving agency to say they it had, that day, received an urgent request for a status update on T2020/0049 – which was said to have been made on 21st February, 2020 and to have been acknowledged on 30th June, 2020 – and T2020/0061 – which was said to have been made on 9th March, 2020 and to have been acknowledged on 25th August, 2020, and asking for an update as a matter of urgency. Coincidentally, and notwithstanding the fact that the first request for service of whatever had then been sent had been for service on the third defendant, the notice of the plenary summons and personal injuries summons and a copy of the High Court order of 3rd February, 2020 had been delivered by the Swedish agency to the second defendant on 1st September, 2020.

70. By letter dated 6th October, 2020, the second defendant's solicitors confirmed to the plaintiff's solicitors that they had been instructed and had entered conditional appearances. They said that they had entered the conditional appearance in the personal injuries proceedings strictly without prejudice to the fact that it had not been served within twelve months of its date of issue and that they had been instructed to bring a motion in both actions to challenge the jurisdiction of the High Court. Without prejudice to that position, they asked that the plaintiff's solicitors would deliver a statement of claim in the plenary action, which the plaintiff's solicitors did on 13th October, 2020.

71. As each member state of the EU has a designated transmitting agency and receiving agency for the service of documents within the EU, each contracting state to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents has designated a Central Authority to receive and arrange for transmission of requests for service from other states. The Hague Convention was transposed into Irish law by Order 11E of the Rules of the Superior Courts, which is entitled *"Service of Documents Outside of the Jurisdiction (Hague Convention)."* The Central Authority in Ireland is the Master of the High Court. Order 11E sets out the procedure to be followed by a party who wishes to have documents served pursuant to the Convention, the first step in which is to lodge with the Central Authority a request for service and copies of the documents to be served. No application was made to the Master of the High Court.

72. Instead, on 7th October, 2020 the plaintiff's solicitor sent an e-mail to *tpi.securise@justice.ge.ch* to say that he was looking to serve legal documents in accordance with the Hague Convention and asking for an address to which the documents could be sent. On 14th October, 2020 he sent directly to the Office federal de la Justice in Berne two copies of a Request for Service Abroad of Judicial and Extrajudicial Documents; two copies of the order of Murphy J. of 3rd February, 2020; two copies of notice of each of the plenary

summons and personal injuries summons; and a French translation of each. The Summary of Documents to be Served identified the requesting authority as the Master of the High Court, High Court Central Office, Four Courts, Inns Quay, Dublin 7. On 10th November, 2020 the documents were collected by a representative of the third defendant's Swiss lawyers from the Swiss court authority.

73. On 17th November, 2020 the third defendant's solicitors wrote to the plaintiff's solicitors to say that a number of documents had been collected from the Swiss court authority, purportedly by way of service under the Hague Convention. It was not clear, they said, whether all steps required to effect proper service had been taken, pointing, for example, to the fact that while the forms referred to the Master of the High Court as the requesting authority, it was not dated and did not identify which of the proceedings was to be served. They asked for confirmation, by return, of the precise steps which had been taken to effect service under the Hague Convention and when, including the dates of his interaction with the Master of the High Court. In addition, the solicitors pointed out that the personal injuries summons had expired before service had been effected, if effected at all. The plaintiff's solicitors were asked to:-

> *"Please note that if and when service of one or both sets of proceedings is properly effected on our client, our client has instructed us to fully defend those proceedings, including on jurisdictional grounds, and to seek to recover from your client its costs of dealing with the matter."*

74. There having been no reply in the meantime, a reminder was sent on 4th December, 2020 and another on 8th January, 2021, to which the plaintiff's solicitors replied by e-mail on 16th January, 2021 to say that the papers were with senior counsel and that they would reply to the letter on the return of same.

75. On 19th November, 2020 the plaintiff's solicitors replied to the second defendant's solicitors letter of 6th October, 2020. They suggested that the proceedings had been *"issued to the Courts Service of Ireland to act as a transmitting agency pursuant to and in reliance on"* Council Regulation 1393/2007 on 21st February, 2020 and 9th March, 2020 *"respectively"*. It was said that the plaintiff's solicitors had reasonably expected that the proceedings had been served by the receiving agency within one month and had learned with shock that service had not been effected within twelve months of the date of issue of the personal injuries summons. *"In [those] circumstances and in the interests of not wasting precious court time"*, the plaintiff's solicitors sought *"agreement on service"* and that the second defendant would waive its right to apply to set aside service; failing which an application would be made for the renewal of the summons. The second defendant's solicitors were asked to confirm their agreement by close of business on 24th November, 2020, failing which a motion would be issued and the letter would be issued to fix the second defendant with the costs.

76. By letter dated 25th November, 2020, the second defendant's solicitors advised that their position was unchanged.

77. On 6th February, 2021 the plenary summons expired.

The second defendant's challenge to jurisdiction

78. On 22nd December, 2020 motions were issued in both actions on behalf of the second defendant for orders pursuant to O. 12, r. 26, setting aside the service of the proceedings and seeking to have the High Court decline jurisdiction. Those motions were originally returnable for 12th April, 2021, from when they were adjourned to 10th May, 2021 to allow the plaintiff to file replying affidavits.

79. The second defendant's motions were grounded on an affirmation of its chief financial officer, Mr. Douglas Lubbe, in which it was erroneously stated that the order of 3rd

February, 2020 permitted the issue and service of the plenary proceedings on all of the defendants – which, of course, it did not – and that notice of the plenary summons had been issued on 3rd July, 2019 – which, of course, was the date of issue of the personal injuries summons. While, as I have said, it is clear on careful examination that the order of 3rd February, 2020 permitted only the issue and service of the plenary summons on the first defendant, the fact that it had been sent to or served on the second and third defendants was calculated to confuse. Moreover, the personal injuries summons was described in the plaintiff's solicitors' correspondence as a plenary summons.

80. At some time prior to May, 2021 the penny finally dropped.

81. On 7th May, 2021 – four months after the date of issue of the second defendant's motions and on the Friday before the first return date – the plaintiff's solicitors wrote to both the second defendant's solicitors and the third defendant's solicitors. They pointed out Mr. Lubbe's mistake as to the terms and effect of the order of 3rd February, 2020. It had by then been recognised and was thereby acknowledged that O. 11A, r. 4(1) required that the plaintiff should obtain leave to serve out of the jurisdiction in respect of all three defendants. It was acknowledged that both summonses had expired and that a renewal application would also be necessary. It was suggested that the second defendant's motions contesting jurisdiction had been *"rendered premature"* and should be adjourned until such time as the plaintiff's intended motions were determined. The plaintiff's solicitors asked that, in the event that they obtained the necessary orders, the second and third defendants' solicitors would accept service.

82. When the second defendant's motions came back into the list on 10th May, 2021, they were further adjourned to 26th July, 2021 on the basis that the plaintiff, in the meantime, would apply for the renewal of the summonses and for leave to serve notice of the

proceedings out of the jurisdiction on the second and third defendants. That application was to have been made by 20th May, 2021.

83. On 12th May, 2021 the solicitors for the third defendant replied to the plaintiff's solicitors' letter of 7th May, 2021. The plaintiff's solicitors, it was said, had not addressed the specific queries which had been raised in relation to the purported service abroad on their client. Rather, it was said, it had been indicated for the first time that leave had not been obtained. It was suggested that the clear implication from the fact that the proceedings had been served through the Swiss court authority was that leave had been obtained. The plaintiff's solicitors' suggestion that they would *"re-serve"* the proceedings ignored the fact that valid service had not been effected, so there could be no question of *"re-service"*. The letter concluded that if the summonses were renewed and service properly effected, the third defendant intended to fully defend the proceedings, including in jurisdictional grounds, and to seek to recover its costs.

84. On 4th June, 2021 the plaintiff's solicitors wrote to each of the second and third defendants' solicitors enclosing a copy *ex parte* docket and grounding affidavit for the application which it was said would be moved on 14th June, 2021. In the event, the application was put back to 21st June, 2021 owing to the unavailability of counsel.

The renewal of the summonses

85. On 21st June, 2021, on *ex parte* application on behalf of the plaintiff, orders were made in both sets of proceedings extending the time for the renewal application, renewing the summons for three months on the ground that the plaintiff had established *"special circumstances"*, specifically, *"difficulty in effecting service"*, and giving liberty to the plaintiff to serve notice of the proceedings out of the jurisdiction on the second and third defendants. Incidentally, the rule relied for the service out on was O. 11, r. 1(e) – an action to

recover damages for breach of a contract made within the jurisdiction or by its terms or by implication to be governed by Irish law.

86. On 8th July, 2021 the plaintiff's solicitors notified the second and third defendants' solicitors of the making of the orders and enclosed copies. They asked for confirmation that the defendants' solicitors had instructions to accept service and to waive the requirement of formal service. The second defendant's solicitors said that they would. The third defendant's solicitors said that they would not. In a triumph of optimism over experience, the third defendant's solicitors wrote that they trusted that the plaintiff would take all proper and required steps to serve both sets of proceedings on their client in Switzerland, through the relevant authorities, in accordance with the Hague Convention and Order 11E.

87. The third defendant's solicitors' optimism was not justified. On 4th August, 2021 – again by passing the Irish Central Authority – the plaintiff's solicitors wrote directly to the Office federal de la Justice in Berne enclosing some documents for service. It is by no means clear that the documents enclosed were the correct documents but it is not necessary to dwell on that.

88. On 22nd September, 2021 the plaintiff's solicitors wrote to the third defendant's solicitors. They referred to the third defendant's solicitors' letter of 27th July, 2021 – by which the third defendant's solicitors had said that they would not accept service – and enclosed *"by way of service"*, various copy documents.

89. On 13th October, 2021, the third defendant's solicitors said that they would proceed on the basis that service was effected on 22nd September, 2021. That, of course, was one day beyond the three month renewal, and set another potential bomb ticking.

The motions to set aside the renewal

90. By notice of motion issued on 30th July, 2021 the second defendant applied for orders pursuant to O. 8, r. 2 of the rules setting aside the renewal of each of the summonses. The

motions were grounded on materially identical affidavits of the second defendant's solicitor, Mr. Michael Doyle, who averred that the affidavit of the plaintiff's solicitor sworn in support of the renewal application did not meet the necessary threshold for establishing special circumstances such as to warrant the renewal of the summonses and that the plaintiff had been guilty of inordinate and inexcusable delay such as warranted the setting aside of the renewal. Not least, Mr. Doyle suggested that there was no basis in fact or in law for the plaintiff's solicitor's averment that the proceedings would be rendered potentially out of time *"for reasons clearly outside the control of the plaintiff and [his] legal advisors."* He suggested that, on the contrary, the ongoing and repeated delays and/or inadvertence and the persistent failure to act with appropriate expedition were matters singularly within the control of the plaintiff and his solicitors. A replying affidavit of the plaintiff's former solicitor was filed, to which Mr. Doyle responded.

91. By notice of motion dated 12th January, 2022 the third defendant applied in each case for orders pursuant to O. 8, r. 2 setting aside the order for renewal, and/or pursuant to O. 12. r. 26 setting aside the purported service for want of jurisdiction and on several procedural grounds.

92. The third defendant's motions were grounded on affidavit of its solicitor, Mr. Twomey, which addressed all of the alleged infirmities in the proceedings as well as the renewal of the summonses. This gave rise to a protracted exchange of affidavits which got well into the weeds of the substance of the plaintiff's claims – which perhaps goes some of the way towards explaining why the motion papers eventually mushroomed into eight folders. It is neither necessary nor useful to go into all of the detail.

93. What was done – and not done – with the summonses was chronicled in the correspondence.

The High Court judgment

94. The second and third defendants' motions were heard together over three days in early July, 2022 and judgment was reserved.

95. For the reasons given in a comprehensive written judgment delivered on 29th July, 2022, ([2022] IEHC 534) the High Court judge concluded that the plaintiff had established special circumstances relating to difficulty in effecting service of both sets of proceedings on the second defendant which justified the renewal of both summonses; and that he had established special circumstances which justified the renewal of the plenary summons, but not the personal injuries summons, against the third defendant.

96. At para. 5 the judge identified the issue as to whether the difficulty in effecting service constituted a special circumstance and if so, whether this justified the renewal of each of the summonses against each of the defendants. The judge said that she must consider not simply the practical difficulties encountered in serving each individual defendant but what she referred to as the cumulative complexities in serving three separate defendants domiciled in three separate jurisdictions. It was, she said, also relevant to consider the engagement of the parties and their respective legal representatives both prior and subsequent to the expiry of the summonses.

97. The judge started by examining the legal principles. She noted that while in the past the threshold to be met in applying for the renewal of a summons was relatively low, the bar had been raised by the substitution of O. 8, r. 1(4) by S.I. No. 482 of 2018 which now requires that the court must be satisfied that there are special circumstances which justify an extension, and that such circumstances must be stated in the order. She referred to *Murphy v. Health Service Executive* [2021] IECA 3.

98. It was common case that although the second and third defendants were the moving parties, the burden remained on the plaintiff to justify the renewal of the summons.

99. It was further common case that new and different reasons should not ordinarily be advanced by a plaintiff at an *inter partes* hearing. The judge found that there was no new or different reason than had been advanced on the *ex parte* motion.

100. In the High Court, there was an issue as to whether – as contended for by the plaintiff – the issue of special circumstances was to be considered in tandem with any question of prejudice, or whether – as contended by the defendants – the onus was on the plaintiff to first establish the existence of special circumstances before the court moved on to consider whether those special circumstances justified renewal. That issue had previously been considered by this court in *Nolan v. Board of Management of St. Mary's Diocesan School* [2002] IECA 10, which the High Court judge applied. She said, at para. 12, that:-

> *"... [A] party seeking renewal of a summons must, as a 'gateway requirement' establish that special circumstances exist. In the light of the judgment in Nolan, I cannot accept the argument of the plaintiff that in determining whether the special circumstances exist, the court is required to consider prejudice. Rather, the presence or absence of material prejudice to either party is relevant in determining whether the special circumstances found to exist justify the renewal of the order or whether, notwithstanding that special circumstances exist, a renewal ought not be granted. In this latter respect, the court considers whether it is in the interests of justice to renew the summons which entails considering any general or specific prejudice or hardship alleged by the defendant and balancing that against the prejudice or hardship that may result for the plaintiff if renewal is refused."*

101. It was common case on the appeal that this was a correct statement of the law.

102. In the High Court, there was also a dispute as to whether the fact that the second defendant had entered a conditional appearance to contest jurisdiction precluded an application to set aside the renewal of the summons or otherwise impacted on the approach

the High Court should take to the application. On the authority of the judgment of Sanfey J. in *Kearns v. Evans* [2020] IEHC 257, Egan J. concluded that it did not. Shortly before the hearing of the appeals in these cases, this court (Butler J., Faherty and Haughton JJ. concurring) delivered judgment in *Kearns v. Evenson* [2023] IECA 197 affirming the judgment and order of Sanfey J. Butler J., at paras. 50 to 79, comprehensively considered the effect of a conditional appearance and concluded that a conditional appearance cannot be treated as a partial submission to jurisdiction; that a failure to mention in a conditional appearance any other preliminary ground of challenge such as service cannot be construed as an acceptance of the validity of service; and that a request for a statement of claim was not by itself to be taken as submission to jurisdiction.

103. I am bound to say that it was by no means clear to me that the plaintiff in his respondent's notices on the second defendant's appeals had taken issue with the conclusion of the High Court as to the effect of the conditional appearances but in any event, in the light of the judgment of this court in *Kearns*, the point was not argued.

104. As in the High Court it was common case that the onus was on the plaintiff to establish the existence of special circumstances which justified the renewal of the summonses, so, on the appeal, it was common case that the onus was on the appellants to establish that the High Court judge had erred in her approach or conclusions.

The appeals

105. The High Court judge dealt separately with the applications to renew each of the personal injuries summons and plenary summons against each of the second and third defendants and it will be convenient to examine the judge's reasoning and conclusions and the appeals together.

106. In general terms, the second and third defendants' submission is that although the judge correctly identified the legal principles to be applied, the focus of her judgment was on

whether the defendants would be prejudiced by the renewal, rather than examining in the first place whether the plaintiff had met the *"gateway"* requirement of establishing that there were special circumstances which could justify the renewal.

107. The anchor of the plaintiff's argument – in opposing the defendants' appeals and in advancing his own appeal – is the proposition that *"the first and most fundamental principle … is that the purpose of service is 'to ensure that the party concerned is adequately informed of the matters contained in the notice so as to suffer no prejudice."* The special circumstance on which the plaintiff relies was *"the difficulty which was experienced in effecting valid service of both summonses upon both"* the second and third defendants. [Emphasis added.] It has to be said at the outset that plaintiff's focus on whether the second and third defendants might be prejudiced by the renewal – as Noonan J. put in in *Nolan* – rather puts the cart before the horse. Moreover, the emphasis which the plaintiff would put on notice of the claims or of the proceedings rather glosses over the requirement that in the case of a foreign defendant, the jurisdiction of the Irish court must be established.

Special circumstances – second defendant

108. The judge was persuaded that the plaintiff's solicitor had made a reasonable effort to serve the personal injuries summons on the second defendant prior to its expiry. While service had not been effected until 1st September, 2020, the plaintiff's solicitor was unaware of that until 6th October, 2020. She held that by article 7 of Regulation 1393/2007 the Swedish receiving agency ought to have served the proceedings within one month of transmission or to have reported a failure to have done so to the transmitting agency, whereupon the delay could have been explained to the plaintiff. The plaintiff's solicitor might, she said, have followed up to confirm that service had been effected but the failure of the Swedish agency to effect service or to communicate the failure to effect service for six months constituted special circumstances.

109. The fundamental difficulty with this finding, it seems to me, is that it ignores the fact that the personal injuries summons could not have been validly served without leave.

110. As I will come to, the judge was of the view that the fact that the third defendant's solicitors had in their letter of 6th March, 2020 drawn the plaintiff's attention to the fact that the order of 3rd February, 2020 did not grant leave to serve the plenary summons out of the jurisdiction was of little weight as far as the second defendant was concerned. I am not sure that I agree with this. If the plaintiff needed leave to serve out on the third defendant, this must have undermined the mistaken belief that leave was only required in respect of the first defendant. But more fundamentally, the focus on whether the defendants pointed out to the plaintiff the error of his ways tends to confuse where the responsibility lay to ensure that valid service was effected. In my firm view, it was the responsibility of the plaintiff's solicitors to first of all establish what the requirements of the Rules were, and then to ensure that they were complied with; and it was not the responsibility of the defendants' solicitors to first of all try to work out whether the requisite leave had been obtained and if it had not, to point out any deficiency.

111. That, in truth, is the beginning and the end of the matter. Absent leave, I cannot see how anything that might have been done with either of the summonses could have amounted to a reasonable attempt to serve it.

112. As to what in fact was done with the summonses, the onus was clearly on the plaintiff to establish the difficulty in effecting service on which he relied. The evidence was that on 17th February, 2020 the plaintiff's solicitor had sent something – he suggested that it was the personal injuries summons – to the Combined Court Office in Castlebar for transmission to the Swedish agency for service on the third defendant at the second defendant's address in Stockholm. If, willy nilly, this eventually ended up in the hands of the second defendant, I cannot agree that the request for service could have been a reasonable effort to serve it on the

second defendant. As to what was sent to the Combined Court Office shortly before 9th March, 2020 – perhaps notice of the plenary summons – it appears from the acknowledgement that that was sent for transmission to the Swedish agency for service on the second defendant but the request for service was not exhibited and having regard to the earlier request for service it is difficult to be confident as to what was requested to be served.

113. As to the date given in the request for service beyond which service was no longer required – 30th December, 2020 – the judge found that the plaintiff's solicitor was entitled to rely on the obligation of the Swedish agency to effect service within a month or to notify the Irish authority that service had not been effected. In any event, she said, there was no evidence of any causative link between that date and the failure of the Swedish agency to effect service within the appropriate time. In the view of the judge, it would be unreasonable to infer that the delay was referable to the date on the form or meant that the plaintiff's solicitor should have anticipated delay. Rather, she said, she suspected that there was validity in the plaintiff's solicitor's suspicion that the delay was linked to the COVID-19 pandemic.

114. Leaving aside again the fact that leave had not been obtained – and the fact that somehow or other the documents sent for service on the third defendant came to be delivered to the second defendant – the fact is that the delay between the transmission of the documents and the delivery to the second defendant was unexplained. If the plaintiff's solicitor suspected that it might have had something to do with COVID-19, there was no evidence of that.

115. The date given by the plaintiff's solicitor in the requests for service was entirely unexplained. The judge was not prepared to infer that the date entered in the forms caused the delay or meant that the plaintiff's solicitor should have anticipated delay but it seems to me that what, if anything, might be inferred from the date may well have depended on why that date was chosen.

116. The judge found that the plaintiff's solicitor was entitled to rely on the obligation of the Swedish agency to effect service within a month or to notify the Irish agency that service had not been effected. Article 7(2) of the Regulation requires the receiving agency, in the event that it has not been possible to effect service within one month, to immediately notify the transmitting agency by means of the certificate in the standard form in Annex I, which is to be drawn up under the conditions referred to in article 10(2). Article 10(1) requires that when the formalities concerning the service of documents have been completed, a certificate of completion shall be drawn up in the – same – standard form in Annex 1. The certificate in Annex 1 is a single *"Certificate of Service or Non-Service of Documents"* by which the receiving authority certifies the completion of service or the reason for non-service of the document. The obligation on the receiving agency is to the transmitting agency. By O. 11D, r. 3(5) – if he knew of it – the plaintiff's solicitor was entitled to expect that the Irish agency would, on receipt of the article 10 certificate, forthwith transmit the certificate or a copy of it to him. The certificate, when it came, would show whether or not service had been effected. If the absence of a certificate tended to show anything, it was that service had not been effected. But at best from the plaintiff's point of view, it left the question of whether service had been completed entirely open.

117. In his letter of 19th November, 2020 to the second defendant's solicitors – in response to their letter of 6th October, 2020 pointing out that the personal injuries summons had expired before it was served – the plaintiff's solicitor expressed shock that the proceedings had not been served within twelve months of the date of issue and asserted that he had reasonably expected that the proceedings had been served pursuant to article 7. However, in his affidavit grounding the renewal application, the plaintiff's solicitor did not aver that he had expected or assumed that the personal injuries summons had been served in time. That is unsurprising since the e-mail from the Combined Court Office to the Swedish agency of 3rd

September, 2020 shows that the office had, that day, received an urgent request for a status update from the applicant and asked for an update as a matter of urgency. If the plaintiff's solicitor believed or expected or had assumed that notice of the personal injuries summons had been served before it had expired, there could have been no need for a status update, still less could there have been any urgency.

118. At para. 39 of her judgment, the judge attached some significance to the fact that the second defendant's solicitors, in their letter of 6th October, 2020, had not objected to service on the ground of non-compliance with O. 11A, rule 4(1). As I have previously observed, the affirmation of Mr. Lubbe on the second defendant's jurisdiction motions showed that there was confusion as to whether service on the second defendant was permitted by the order of 3rd February, 2020, which it was not. If, by the plain terms of the order of Murphy J., Mr. Lubbe's confusion is not easy to understand, the fact that service on the second defendant was not permitted by the copy order enclosed with the notices of proceedings did not necessarily mean that such service was not permitted by some other order. If Mr. Lubbe assumed that leave had been obtained for the issue and service of the proceedings before they were sent to the Irish transmitting agency, I cannot see how he could be faulted for that.

119. The judge accepted that service on the second defendant without leave was irregular and said that she was acutely aware that inadvertence or misconception on the part of a plaintiff's solicitor would very rarely constitute special circumstances – irrespective of whether such inadvertence or misconception was contributed by *"other parties such as the Central Office"* – but thought that it would go too far to say that such inadvertence or misconception could never constitute or contribute to the establishment of special circumstances.

120. Having referenced the judgments in *Chambers v. Kenefick* [2007] 3 I.R. 156 and *Brereton v. National Maternity Hospital* [2020] IEHC 172 the judge concluded that the

plaintiff had established special circumstances in relation to the difficulty of serving the second defendant at least until the end of November, 2020. I pause here to say that at this point the judge referenced the second defendant's solicitors' letter of 25th November, 2020 notifying the plaintiff's solicitor that the personal injuries summons had expired prior to service but, as will have been seen, that point had already been made in the second defendant's solicitors' letter of 6th October, 2020.

121. *Chambers v. Kenefick* was a case under the old O. 8, under which the threshold was *"good reason."* In that case a copy of the plenary summons had been sent to the defendant's insurer, who had nominated solicitors to accept service, but due to inadvertence and oversight the summons was not served – or, strictly speaking, had not been sent to the nominated solicitors in order that they might endorse their acceptance of service. Finlay Geoghegan J. emphasised that it was not the inadvertence or oversight which constituted the good reason but that the inadvertence and oversight, coupled with the fact that a copy of the summons had been delivered, explained why the summons had not been formally served.

122. *Brereton v. National Maternity Hospital* was a case under the new rules. The plaintiff's solicitor intended to serve the summons in time but by inadvertence failed to do so. The solicitor had, however, written to the defendant during the life of the summons and had said that it would be served, and the renewal application was made within ten weeks of the expiry of the summons. In the circumstances, Hyland J. was persuaded that the plaintiff had established that there were special circumstances which justified the renewal.

123. In this case, the judge identified as critical the fact that a copy of the personal injuries summons had been sent to the second defendant and its Swedish lawyers as early as 19th July, 2019, and that, as in *Chambers* and *Brereton*, the plaintiff's solicitors had intended to formally serve it in time.

124. It is the case, as the judge said, that a copy of the personal injuries summons was sent to the second defendant and its Swedish lawyers and that the plaintiff's solicitors intended to formally serve it in time. However, in this case, whatever they might have intended, the plaintiff's solicitors could not have validly served either summons without leave. It seems to me that the failure of the plaintiff's solicitors to read the Rules cannot be properly characterised as inadvertence or oversight. As far as the plenary summons was concerned, the solicitors decided that they did not need leave. If they thought about it at all, there was no reason to believe that the position was any different as far as the personal injuries summons was concerned. The third defendant's solicitors' letter of 6th March, 2020 – pointing out that the order of 3rd February, 2020 did not grant leave to serve proceedings on their client – afforded an opportunity for reconsideration which, unfortunately, was missed.

125. I think that it is fair to say that as far as the plaintiff's failure to comply with O. 11A, r. 4(1) is concerned, the focus of the High Court judgment was on whether and when the second and third defendants objected to service on that ground and attached little or no weight to the indirect enquiry which the plaintiff's solicitors had made to the Central Office as to the requirement for leave. However, the plaintiff relied on this enquiry in support of his assertion that he had exercised all due and reasonable diligence in endeavouring to effect service and in his written submissions of the appeals was so bold as to suggest that:-

> *"[T]he error made by the Central Office in advising the plaintiff's former solicitors that leave to serve the defendants out of the jurisdiction pursuant to Order 11A of the Rules was only required in connection with [the first defendant], and not the other two defendants, excuses the plaintiff's failure to bring an application in connection with [the second and third defendants]. While [the second defendant] in their written submissions (at §16(f)) refers to the evidence adduced as to the advice received from the Central Office as being 'hearsay evidence of informal advice from*

the Central Office of the High Court.' Regardless of how [the second defendant] chooses to characterise the plaintiff's evidence in this regard, it is absolutely clear (a) that such advice was given and (b) that the plaintiff's legal representatives acted on it. No other explanation is possible for the fact that the plaintiff did not pursue an application under Order 11A."

126. In oral argument – perhaps, it has to be said, under mortar fire from the bench – the plaintiff's reliance on the inquiry to the Central Office was more tentative, but the submission needs to be knocked on the head.

127. It is the case that the evidence as to the advice said to have been obtained from the Central Office was hearsay evidence of informal advice. It is evident from the question as formulated by the plaintiff's former solicitors in their e-mail to their town agent that they were hopelessly confused between the requirement for leave and the requirements for service of documents out of the jurisdiction. There was no reference in the question as formulated, or in the reported answer, to Order 11A. And, although it is not evident from the narrative of the affidavit, it is from the exhibits, that the enquiry to the Central Office was prompted by junior counsel, who asked the solicitors to *"Please confirm that this fits with the advice of the Central Office."*

128. It is no part of the function or duty of Central Office staff to dispense legal advice. Still less is it appropriate that solicitors or counsel, whose duty it is to advise their clients with skill, care and diligence to abdicate their responsibility to the staff of the Central Office. The staff in the Central Office are invariably approachable and endeavour to give such assistance to solicitors and litigants as they can. However, while the more senior and experienced members of staff have a detailed knowledge of the Rules, the more junior and less experienced staff cannot fairly be expected to provide definitive legal advice on an ad hoc basis to those attending at the counter – *a fortiori* on what are thought to be unusual queries.

If the explanation for the failure to apply for leave to issue and serve out of the jurisdiction on the second and third defendants is that the lawyers relied on report of the solicitors' town agent as to what someone in the Central Office had said, that is not a satisfactory explanation and it is certainly not the only explanation. The only explanation is that the lawyers did not read the Rules. And, by the way, the required leave application was an application under O. 11, and not Order 11A.

129. If the plaintiff's solicitors' reliance on the advice of the Central Office was out of the ordinary, it was not a circumstance that could have justified a renewal of the summonses.

130. The judge next examined the lapse of time between 25th November, 2020 – which the judge identified as date of the second defendant's solicitors' letter which had notified the plaintiff that the personal injuries summons had expired prior to service – and the date of the *ex parte* application for the renewal of the personal injuries summons. I pause here to say that six or seven weeks earlier in their letter of 6th October, 2020 the second defendants' solicitors had made the point that the summons had expired prior to service. Even assuming that the relevant starting date was the date on which the second defendant's solicitors pointed it out – which, for the reasons already given, it was not – the time to be accounted for between then and the date of the renewal application was upwards of eight months.

131. While, said the judge, this lapse of time might at first sight be thought to be excessive, it was apparent that *"developments during this period were part of an ongoing process as between the plaintiff and the two defendants in relation to the litigation."* At para. 46, the judge found that:-

> *"... the time needed by all parties to bring forward the complex and overlapping series of applications necessary to bring clarity to this matter is itself a manifestation of the special circumstances existing in this case."*

132. At para. 52, the judge said that she could not see how the circumstances described were not, as contemplated by Haughton J. in *Murphy, "out of the ordinary and unusual"* and that the plaintiff had crossed the bar.

133. At para. 53, the judge found that this was not fundamentally altered by the fact that leave for service out had not been obtained. She found that a foreign defendant who entered a conditional appearance was under an obligation at least to notify the plaintiff of its objections to service with reasonable expedition. The second defendant, she said, had first sought to raise the O. 11A, r. 4(1) in the oral argument of the motion to set aside the renewal of the summonses.

134. The second and third defendants submit that the judge erred in this assessment of what was – and was not – happening during this time and it seems to me that they are correct in that submission.

135. In the first place, there were no significant developments in this period. In response to the second defendant's letter of 6th October, 2020 the plaintiff's solicitor sent them a statement of claim on 13th October, 2020 and followed up on 19th November, 2020 gamely proposing that the second defendant might waive its right to apply to set aside service and indicating that should agreement not be forthcoming, an application would be made for renewal of the summons. On 25th November, 2020 the second defendant's solicitors declined the proposal and reserved its rights in relation to the renewal application. On 17th November, 2020 the third defendant's solicitors queried the service or purported service on their client and followed up with reminders on 4th December, 2020 and 8th January, 2021. The plaintiff's solicitors indicated by e-mail of 16th January, 2021 that they would deal with the queries when they heard back from counsel and eventually did so by their letter of 7th May, 2021.

136. Secondly, with respect, there was no need for a complex and overlapping series of applications to bring clarity to the matter. By 6th October, 2020 the personal injuries

summons had not been validly served and had expired three months previously. If that action was to be revived, it would be necessary to renew the summons and to obtain leave for service out of the jurisdiction, and to serve it out of the jurisdiction in accordance with the rules. There was still time to apply for leave to serve the plenary summons. The second defendant's challenge to jurisdiction would not arise unless it was first properly served.

137. The judge attached significance to the fact that the plaintiff's solicitors gave notice of a renewal application on 19th November, 2020 and provided draft *ex parte* application papers on 7th May, 2021. That was of some significance, but far from justifying the delay in the renewal application, it seems to me that this correspondence only makes matters worse. As far as the renewal of the personal injuries summons was concerned, the plaintiff's solicitors manifestly understood what needed to be done and how they might go about it but they did not do it until 21st June, 2021.

138. As to what the judge was persuaded was active engagement in relation to the second defendant's jurisdictional motions, what happened was that on 7th May, 2021 – three days before the first adjourned date and about four months after those motions had been served – the plaintiff's solicitors proposed that those motions should be adjourned until such time as the plaintiff's proposed applications were determined. By then, of course, the plenary summons had also expired and – if that action was to progress – needed to be renewed and properly served. This made sense and was agreed but it does not explain why the necessary applications had not been made long ago.

139. The judge attached significance to the fact that the second defendant's motions for orders declining jurisdiction and setting aside service did not address the issues that the personal injuries summons had expired or the leave issue. I cannot agree. It was clear from the affirmation of Mr. Lubbe, on which the second defendant's motion was grounded, that there was a misunderstanding in relation to the leave issue. It was clear from the plaintiff's

solicitor's letter of 19th November, 2020 – which long predated the second defendant's motions – that the plaintiff's solicitors knew that they would have to apply for a renewal of the personal injuries summons. That ball was squarely in the plaintiff's court. If the second defendant's jurisdiction motions were premature, they were eventually stood over by agreement.

140. I find it difficult to understand the judge's observation that the second defendant's motions might have diverted the plaintiff's legal team from the course of preparation of the *ex parte* application. In the first place, the second defendant's motions significantly post-dated the plaintiff's solicitors' recognition that a renewal application would be necessary. Secondly, the plaintiff's solicitor's letter of 7th May, 2021 apologised for his failure to meet an agreed timeframe for the delivery of a replying affidavit on the second defendant's motions: so whatever the plaintiff's solicitor was doing, it was not working on the jurisdiction motions.

141. In assessing the delay in the making of the *ex parte* application, the judge thought that the preparation of the application papers was not straightforward and entailed complex decisions and judgment calls. Again with respect, I cannot agree. I can see that the plaintiff might have faced a challenge in persuading an Irish court that it had jurisdiction to deal with a claim or claims arising out of his employment in Tajikistan by a Tajiki or Swedish company but that die had been cast by the decision to sue in Ireland. I can see, also, that the jurisdiction conferred by Regulation 1215/2012 and the Lugano Convention does not dovetail with the requirements of O. 11 for service out of the jurisdiction but any potential difficulty arising from that dissonance would only arise on the making of the application. What immediately needed to be done was set out in O. 8, r. 1(4) and O. 11A, rule 4(1). In the event, the affidavit of the plaintiff's solicitor grounding the *ex parte* application was in

substance a summary of the correspondence which did not engage at all with the litany of errors and confusion.

142. The judge took into account the fact that the second defendant's motions, the plaintiff's renewal application, and the defendants' intended applications to set aside the renewal were case managed together – incidentally by me – in the Chancery list.

143. It is instructive to recall precisely what happened. The second defendant – under the mistaken impression that the plaintiff had obtained leave to serve out – moved to set aside service for want of jurisdiction. Those motions were initially returnable for 12th April, 2021 and were adjourned to 10th May, 2021 on the basis that the plaintiff would file a replying affidavit. On 7th May, 2021 the plaintiff's solicitors corrected the second defendant's error and acknowledged that they needed to apply for the renewal of the summonses and for leave to serve out of the jurisdiction. Strictly speaking, the second defendant's motions were not – as the plaintiff's solicitor suggested – *"rendered premature"* but were demonstrated to have been premature, albeit for reasons the second defendant had not readily appreciated. Accordingly, the first step was the plaintiff's application for renewal and service out, which, under the rules, would be made *ex parte*. If that application was refused, that would be the end of the matter. If – as in the event was the result – the plaintiff's application was granted, the second defendant would be entitled to apply to set aside the order. If that application succeeded, that would be the end of the matter. It was only in the event that the plaintiff held his order that the court would be asked to deal with the second defendant's jurisdiction motions. If at first glance, the various motions and portended motions were being case managed together, in reality all that was done was that a timetable was fixed to allowed them to be dealt with sequentially in logical order.

144. The plaintiff moved his *ex parte* application on 21st June, 2021. The second defendant's solicitors accepted service and issued their motions to set aside on 30th July,

2021. In the meantime, the second defendant's motions had come back into the list on 26th July, 2021 and had been adjourned until 7th October, 2021 and from then until 16th December, 2021.

145. The third defendant – as it is acknowledged it was entitled to do – insisted on service in accordance with the rules. It is hard to credit after all that had gone before, but the plaintiff's solicitors again bypassed the Master of the High Court and sent the papers directly to the Swiss Central Authority and, between the jigs and the reels, it was accepted by the third defendant's solicitors on 13th October, 2021 that service had been effected on 22nd September, 2021. By the same letter, the third defendant's indicated that the third defendant intended to apply in both sets of proceedings to set aside the renewal of the summonses and to challenge the jurisdiction of the High Court to deal with the claims. In their response of 29th October, 2021 the plaintiff's solicitors advised the third defendant's solicitors that identical applications had been made by the solicitors for the second defendant, which were listed for mention on 16th December, 2021, and it was suggested that the third defendant's solicitors might then make *"a suitable application to the court to be joined in the proceedings."* That was sensible, and on 16th December, 2021 an order was made in both actions permitting the third defendant to bring its motions returnable for 31st January, 2022: from when they were case managed with the second defendant's set aside motions with a view to having them all tried together on 2nd July, 2022.

146. I have dwelt on the progress of the motions to set aside the renewal of the summonses for two reasons; first, to show that there was no complexity and secondly, to show that the lapse of time between the date of issue of the second defendant's motions on 30th July, 2021 and the date of issue of the third defendant's motions on 12th January, 2022 was fully accounted for by the time taken for the service of the renewed summonses on the third

defendant and the agreed postponement of the issuing of the third defendant's motions so that they would travel together with the second defendant's motions.

147. The High Court judge concluded that, overall, she could not see how all of the circumstances in the period between the time when it had been pointed out by the second defendant's solicitors and the date of the renewal application were not, as contemplated by Haughton J. in *Murphy*, out of the ordinary and unusual. But when one stands back, nothing really happened between 6th October, 2020 and 21st June, 2021 other than the drafting of the papers for the *ex parte* motion and the inevitable lapse of the plenary summons in February, 2021. The plaintiff's renewal applications – and probably his substantive response on 7th May, 2021 to the second defendant's solicitors' letter of 6th October, 2020 and to the third defendant's solicitors' letter of 17th November, 2020 – were precipitated by the second defendant's jurisdiction motions but there was no explanation of the delay.

148. As far as the second defendant is concerned, the affidavit of the plaintiff's solicitor grounding the renewal application jumped from 31st July, 2019 – when the second defendant's Swedish lawyers re-confirmed that they did not have authority to accept service of the personal injuries summons – to 23rd January, 2020 when, he said, he wrote to his town agents to confirm whether it was only necessary to obtain leave to serve the first defendant. It is clear from the narrative, as it is from the documents exhibited, that the engagement with the Central Office was in relation to the then proposed plenary summons and not the personal injuries summons. It is far from clear from the copy correspondence exhibited precisely what was sent to the Combined Court Office for transmission to the Swedish receiving agency but the plaintiff's solicitor's affidavit suggested that the first request was for the service of the personal injuries summons and the second for the service of the plenary summons. Somehow or other notice of both sets of proceedings was delivered to the second defendant on 2nd September, 2020.

149. The judge was critical of the fact that the second defendant did not notify the plaintiff of its objection to service by reference to O. 11A, r. 4(1) whether at the time it entered its conditional appearances or prior to the *ex parte* renewal application or in its motion papers or at any time prior to the oral argument of the motions to set aside the renewal of the summonses. The second defendant now submits first, that *Kearns v. Evenson* is authority for the proposition that a defendant is not precluded from raising this objection because he has not raised it earlier; secondly, that the problem had been pointed out by the third defendant's solicitors on 6th March, 2020; and thirdly, that the earlier failure to obtain leave loomed large in the plaintiff's solicitor's affidavit as part of the renewal application. I agree. On the renewal applications, the plaintiff relied on his earlier failure to appreciate the need to have obtained for leave to issue and serve out of the jurisdiction as constituting or contributing to special circumstances which justified the renewal of the summonses. If the fact that the second defendant had not previously highlighted its reliance on that failure might have gone to the balance of justice in the renewal of the summons, the first question was whether it met the gateway requirement of being a special circumstance which could justify the renewals sought. As a matter of law, the onus was squarely on the plaintiff to satisfy the court that this was so.

150. In her consideration of whether the special circumstances justified the renewal of both summonses, the judge focussed on the fact that the second defendant was aware of the claims and – by his solicitor's correspondence with the second defendant's Swedish lawyers and the second defendant directly – was aware of the fact of, and had been copied with, the proceedings. This, said the judge, meant that the second defendant could have preserved its records, started collecting evidence, and notified its insurers. While it is true, as the judge observed, that one of the factors than can be taken into account on a renewal application is

whether the defendant was on notice of the proceedings, it is not the case that notice or knowledge of the existence or nature of proceedings can substitute for service.

151. The judge also took into account the fact that the proceedings would in all probability be statute barred if the renewal were set aside as an appropriate consideration.

152. In short, I am persuaded that while the High Court judge correctly identified the legal principles to be applied, she fell into error in focussing on the question as to whether the second defendant would be prejudiced by the renewal of the summons rather than on whether the plaintiff had met the gateway requirement of demonstrating that the matters which the plaintiff relied upon as constituting special circumstances were capable of justifying renewal.

Special circumstances – third defendant

153. Having examined the exchange of correspondence between the plaintiff's solicitors and the third defendant and its solicitors, the judge concluded that the plaintiff's solicitors had a reasonable basis for believing that the third defendant's solicitors would have authority to accept service of the personal injuries proceedings and that this explained why the necessary steps were not taken to effect service on the third defendant in Switzerland.

154. It will be recalled that the third defendant's solicitors, in their response of 18th July, 2017, had confirmed that they had been instructed to defend any proceedings that might be issued against the third defendant, as well as questioning the jurisdiction of the Irish courts. If this might have been misunderstood as conveying that the solicitors had authority accept service, it was not, for on 28th June, 2019, the plaintiff's solicitor wrote to the third defendant's solicitors to ask whether they had authority to accept service of *"both"* sets of proceedings. In fact, at that stage, there was only one set of proceedings. On 17th July, 2019 the third defendant's solicitors asked for a copy of both sets of proceedings to enable them to take instructions. This, it seems to me, could only have been understood as meaning that the solicitors did not have instructions to accept service. I cannot see how this might have given

rise to a belief that the third defendant would eventually authorise its solicitors to accept service. If anything, the request for a copy of both sets of proceedings meant that the solicitors could not or would not take instructions as to service until they were provided.

155. As to whether the correspondence between the plaintiff's solicitors and the third defendant's solicitors explained why the necessary steps were not taken to effect service in Switzerland, it seems to me that it could not have. Nor, indeed, did the plaintiff's solicitor rely on this correspondence as explaining why no step was taken to serve the personal injuries summons for about eight months. By 31st July, 2019, the plaintiff's solicitors had been told three times by the second defendant's solicitors that they did not have authority to accept service, yet nothing was done to serve the second defendant until February, 2020. The position in relation to the third defendant was no different.

156. When, in January, 2020, the plaintiff's lawyers directed their minds to the fact that they had three foreign defendants, there was hopeless confusion of the need to apply for leave to serve out of the jurisdiction and the requirements for such service.

157. As was eventually acknowledged, the service on both the second and third defendants of both sets of proceedings was – as the judge put it – *"unfortunately impacted upon"* by the failure to comply with O. 11A, rule 4(1). The judge was inclined to see this omission as having some merit in the case of the third defendant, whose solicitors had pointed it out, but little weight in the case of the second defendant.

158. I cannot agree that there was any distinction to be drawn between the second and the third defendants. First and foremost, the requirement for leave was plainly set out in the Rules. Secondly, it is quite clear that the second defendant was confused by the circulation of the order giving leave to issue and serve against the first defendant. Thirdly, the focus on whether the second and third defendants identified and pointed out the omission tends to apportion responsibility for an omission which was solely that of the plaintiff's solicitors.

159. The judge next identified a second misconception arising from the distinction between the appropriate method for service between the second defendant (Regulation 1393/2007 and O. 11D) and the third defendant (Hague Convention and O. 11E). She suggested that on 17th February, 2020 the plaintiff's solicitors requested the Irish transmitting agency to effect service of both sets of proceedings on the third defendant pursuant to the Regulation and O. 11D rather than the Convention and O. 11E; and that the plaintiff's solicitor erroneously provided an address for the third defendant in Sweden.

160. I have earlier engaged in a close examination of the plaintiff's solicitor's correspondence with the Combined Court Office from which it is by no means clear what was sent to that office and when. I have the very greatest sympathy for the judge in having to try to work out what he did, but what the plaintiff's solicitor swore was that on 21st February, 2020 he sent to the Irish transmitting agency a request for service on the second defendant of the personal injuries proceedings and on 9th March, 2020 sent a request for service on the second defendant of the plenary proceedings. He deposed that the Swedish receiving agency had acknowledged receipt of these requests on 30th June, 2020 and 25th August, 2020.

161. The plaintiff's former solicitor also deposed that *"While the transmitting agency purported to have sent the proceedings to the relevant receiving agency in Switzerland, I fully accept that the third named defendant is not an European Union member state and that the Brussels Regulations (Recast) do not apply to it for the purpose of service apply."* This last statement makes no sense and was contradicted by the correspondence. There is no *"relevant receiving agency in Switzerland."* The documents were not sent by the Irish transmitting agency to Switzerland but to the receiving agency in Sweden – which was where the plaintiff's solicitor had asked that they should be sent. The Brussels Regulation Recast does not apply to service.

162. As far as the evidence goes, it is incontestable that the plaintiff's solicitor made a complete mess of service. On the plaintiff's solicitor's narrative, his telephone call to the Combined Court Office on 12th February, 2020 was *"to act as transmitting agency to effect service of legal proceedings outside the jurisdiction pursuant to Council Regulation (EC) No. 1393 2007"* – which could only have been on the second defendant – and what was sent to the Combined Court Office on 21st February, 2020 was notice of the personal injuries proceedings, only, for service on the second defendant, and not the third defendant. By reference to the request for service, the addressee was the third defendant. If there was any confusion in the mind of the plaintiff's solicitor as to which of Regulation 1393/2007 or the Hague Convention applied to service out of the jurisdiction on a Swiss domiciled defendant, there was no conceivable justification for it. If documents sent to the Irish transmitting agency for transmission to the Swedish receiving agency addressed to a Swiss corporation at an address of a Swedish corporation in Stockholm were not served, I find it quite impossible to characterise that chaos even in the loosest language as a difficulty in effecting service, much less as a difficulty in effecting service such as might justify a renewal of the summons.

163. On 7th October, 2020 the plaintiff's solicitor telephoned the Central Office of the High Court to enquire about serving documents under the Hague Convention. On the evidence, this was the first time that the solicitor had directed his mind to service on the third defendant and by then, of course, the personal injuries summons had long ago expired. If this telephone call was somehow prompted by the second defendant's solicitors' letter of the previous day, he did not say so. If the plaintiff's solicitor's enquiry was dealt with by the Central Office, he did not say so. Certainly he did not say that it was anyone in the Central Office of the High Court who put him up to e-mailing the Swiss Central Authority, or to sending directly to the Swiss Central Authority the documents which should have been sent to the Master of the High Court: which the judge identified as the third misconception.

164. On 10th November, 2020 the documents which had been sent to the Swiss Central Authority were collected by a representative of the third defendant's Swiss lawyers and on the same day a form of attestation certificate was sent by the Swiss authority to the plaintiff's solicitor confirming that notice of both sets of proceedings and French translations had been served in conformity with article 6 of the Hague Convention. The judge found that the collection of the documents had been authorised *"notwithstanding"* the fact that the documents had been sent directly to the Swiss authority but of course at the time the collection was authorised, the third defendant's Swiss lawyers could have had no means of knowing that the service or purported was irregular: whether on the ground that the personal injuries summons had by then expired, or that the required leave for service out of the jurisdiction had not been obtained, or because the purported service was not in accordance with the Hague Convention or Order 11E.

165. The judge noted that following the collection of the documents on 10th November, 2020 the third defendant's solicitors, by their letter of 17th November, 2020, queried compliance with O. 11E and the jurisdiction of the Irish Courts but did not advert to the non-compliance with O. 11A, rule 4. She then identified the relevant correspondence between then and the issue of the third defendant's motions on 12th January, 2022.

166. The judge found that notice of the personal injuries summons had been irregularly served on the third defendant four months after it had expired. She recalled that in the case of the second defendant she had found that the plaintiff's solicitor had a reasonable expectation that service would be accepted and that the unexplained failure of the Swedish receiving agency to effect service constitutes special circumstances. The same, she said, could not be said of the efforts to serve the personal injuries summons on the third defendant. She found that although the circumstances disclosed *"difficulty in effecting service"* they were not on a par with those either in *Chambers* or *Brereton.*

167. As far as the plenary summons was concerned, the judge saw an essential difference that it had been served, albeit irregularly, in November, 2020, before it expired.

168. The judge asked herself whether the irregularity of service of the plenary summons arising from the O. 11A, r. 4 leave issue or the O. 11E service issue prevented the establishment of special circumstances and concluded that they did not. The difficulty with this approach, as the third defendant argues, is that it tends to focus the analysis on whether the summonses ought not to be renewed rather than whether the plaintiff has established special circumstances such as may justify the renewal. The truth is that the circumstances relied upon by the plaintiff as justifying the renewal were the acknowledged irregularities and those irregularities arose solely and simply from the plaintiff's solicitor's failure to read the Rules.

169. At para. 94 of her judgment, the judge observed that:-

> *"94. I have also carefully considered whether the overall complexities in effecting service on the three separately domiciled defendants can in itself constitute a special circumstance justifying the renewal of the plenary summons and have concluded that it cannot. Were it otherwise, the same rationale could presumably apply in any action in which a plaintiff institutes proceedings against several foreign defendants. It would in my view be unfair to such defendants to hold, virtually as a matter of principle, that the complexities inherent in such litigation, without more, gives rise to special circumstances."*

170. Earlier in her judgment, in the course of her consideration of the renewal of the personal injuries summons against the second defendant, the judge had observed:-

> *"40. I accept of course that service on the second defendant without leave being obtained in accordance with O. 11A, r. 4(1) was irregular. I am also acutely conscious of the fact that inadvertence or, indeed, a misconception on the part of the*

plaintiff's legal advisers (in this instance in relation to the need to seek leave to serve out of the jurisdiction) would very rarely constitute a special circumstance, irrespective of whether or not such inadvertence or misconception may have been contributed to by other parties such as the Central Office. However, I think it would be going too far to state that such inadvertence or misconception can never either constitute or contribute to the establishment of special circumstances. Inadvertence or errors in relation to service may provide an explanation as to why service was not effected, was delayed, or was effected incorrectly or irregularly. On rare occasions, the courts have been prepared to find that such an explanation for non-service is sufficient to establish special circumstances justifying renewal.

171. Working backwards, service of the plenary summons on the third defendant was accepted as having been effected on 22nd September, 2022: which was one day after the expiry of the renewed plenary summons. The immediately preceding attempt at service was the obviously irregular sending of the papers directly to the Swiss Central Authority on 14th October, 2020. Unaware of the irregularity, the Swiss authorities had issued a certificate on 10th November, 2020 confirming service in accordance with the Hague Convention. I would not disagree with the judge that this certificate might have reassured the plaintiff but any such reassurance must have been short lived, for the third defendant's solicitors in their letter of 17th November, 2020 raised a number of queries, not least – for present purposes – as to whether the papers had been sent through the proper channels, specifically, the Master of the High Court. If, for the sake of argument – and I very much doubt it – the plaintiff's solicitor's *"inadvertence or misconception"* might have provided an explanation for the manner in which the papers were sent directly to the Swiss Central Authority in September, 2020, that could not have survived the third defendant's solicitors' letter of 17th November, 2020. Because they did not know and could not have known precisely how the papers had

come to be in the hands of the Swiss Central Authority, the third defendant's solicitors could not definitively say that the purported service was irregular on that account but they clearly identified the issue. Fully eight months earlier, in their letter of 6th March, 2020, the third defendant's solicitors had effectively pointed out the requirement for leave. The third defendant's solicitors had no obligation to advise the plaintiff's proofs but to a large degree they had done so and their warnings had been ignored.

172. The High Court judge contemplated that the irregular service on the third defendant in November, 2020 might have been deemed good, or at least that the plaintiff was entitled to think that it might, if necessary, have been deemed good. However, the fact of the matter is that there was no application to deem good and the premise of the plaintiff's renewal applications was that the summonses had not been served in time. If the only irregularity had been the fact that the papers were sent directly to the Swiss Central Authority and an application had been made during the life of the summons to deem the irregular service good, I should have thought that the first hurdle which the plaintiff would have had to cross was to say why he should not serve in accordance with the Rules. In fact, there was a further real problem that leave had not been obtained, which could only be addressed by an application for leave.

173. The error in *Chambers* and *Brereton* was a simple human oversight in failing to serve a summons which could have been served on an Irish defendant and in each case the renewal application was made promptly. This is not such a case. In February, 2020 the plaintiff's solicitor well knew that he needed to serve both actions on the second defendant and if he hoped that the third defendant would nominate solicitors to accept service, there was, in my view, no objective basis for any such hope.

174. On the plaintiff's solicitor's account, he first directed his mind to the requirements for service on the second defendant on 12th February, 2020 when he telephoned the Combined

Court Office and did not consider the requirements for service on the third defendant until 7th October, 2020, when he telephoned the Central Office of the High Court to enquire about the service of documents under the Hague Convention. He does not claim that he was in any way misled as to the requirements for service under the Hague Convention but manifestly failed to comply with them.

175. I have already examined the delay on the part of the plaintiff in applying for the renewal of the summonses and for leave to serve out of the jurisdiction. The judge was critical of what she perceived to be delay on the part of the third defendant in moving to set aside the order of 21st June, 2021 but as set out at para. 148 above, I am satisfied that the lapse of time was fully accounted for.

176. I am persuaded that the High Court judge erred in failing first to assess whether the plaintiff had made out that there were special circumstances which could justify the renewal of the plenary summons. The plenary summons had been issued without leave and could not have been validly served without leave. Whatever was done with it could not have amounted to a *bona fide* attempt to effect valid service. The plaintiff's failure to obtain leave could not properly be characterised as a difficulty in effecting service or as a special circumstance which could justify the renewal.

Special circumstances – the plaintiff

177. The plaintiff's appeal against the order of the High Court setting aside the renewal order in respect of the personal injuries summons against the third defendant was on the entirely vague ground that the judge erred in deciding that the plaintiff had not established special circumstances justifying the renewal of the personal injuries summons against the third defendant. The substance of the argument was that the plaintiff's solicitor had been misled by the Central Office of the High Court as to the requirement for leave and that the

third defendant was estopped by the Swiss Central Authority's certificate of 10th November, 2020 from objecting to the service on the ground of non-compliance with Order 11E.

178. I have addressed the arguments in relation to the inquiry made in the Central Office and the Swiss Central Authority's certificate. The personal injuries summons could not have been validly served during its life. It follows that the fact that it was not served could not be attributed to a difficulty in effecting service.

179. That apart, the fact of the matter is that the personal injuries summons expired on 2nd July, 2020, three months before the plaintiff's solicitor first attempted to serve it.

180. If by a different route, the High Court judge was correct in her ultimate conclusion that the plaintiff failed to establish any special circumstances which could justify the renewal of the personal injuries summons against the third defendant.

Summary and conclusions

181. Order 8, r. 1(4) allows the High Court to order a renewal of a summons where satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order.

182. A *"special circumstance"* is one which is beyond the ordinary or usual.

183. It is not sufficient that the circumstances are simply beyond the ordinary or usual. Rather the special circumstances must be such as justify the renewal.

184. A misconception or misunderstanding as to the requirements for valid service which is plainly attributable to a failure to read the Rules of the Superior Courts cannot properly be characterised as a special circumstance which could justify the renewal of a summons.

185. The plaintiff's solicitor's reliance on the answer to an informal inquiry made to the Central Office of the High Court is not a special circumstance which could have justified the renewal of the summonses.

186. The plaintiff's attempt to serve, without leave, the summonses which had been issued without leave was not a reasonable effort to effect valid service. Any difficulties which may have been encountered in doing so could not amount to difficulties in effecting service of the proceedings.

187. The plaintiff's solicitor was not entitled to assume from the fact that the Swedish receiving agency failed to report whether service had or had not been effected that service had been effected. In any event, he did not so assume.

188. The plaintiff having failed to meet the gateway requirement of establishing special circumstances which could justify the renewal of the summonses, the discretion of the court as to whether they should be renewed was not engaged.

189. For all these reasons, I would:-

(1) allow the appeal of the second defendant (2023 37) and substitute an order pursuant to O. 8, r. 2 of the Rules of the Superior Courts setting aside the renewal of the personal injuries summons against the second defendant;

(2) allow the appeal of the second defendant (2023 38) and substitute an order pursuant to O. 8, r. 2 of the Rules of the Superior Courts setting aside the renewal of the plenary summons against the second defendant;

(3) allow the appeal of the third defendant (2023 44) and substitute an order pursuant to O. 8, r. 2 of the Rules of the Superior Courts setting aside the renewal of the plenary summons against the third defendant;

(4) dismiss the appeal of the plaintiff (2023 43) and affirm the order of the High Court.

190. The second defendant having been entirely successful on its appeal, and the third defendant having been entirely successful on its appeal and in resisting the plaintiff's appeal, my provisional view is that they are both entitled to their costs of the appeals. The end result

being that the second and third defendants were successful is setting aside the High Court orders renewing the summonses, it seems to me – again provisionally – that they are entitled to their costs in the High Court. If the plaintiff wishes to contend for any other costs order, he may, within ten days of the delivery of this judgment, notify the Court of Appeal office and the second and third defendants' solicitors and the panel will reconvene to deal with the costs.

191. As this judgment is being delivered electronically, Pilkington and Butler JJ. have authorised me to say that they agree with it and with the orders proposed.