Neutral Citation No: [2022] NIMaster 11 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **2022NIMaster11** *ICOS No:* **20/34521** *Delivered:* **16/12/22**

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

BRIAN BRADLEY AND TARA BRADLEY

Plaintiffs

and

GERARD RODGERS, BRENDAN RODGERS, & JUDITH O'HAGAN TRADING AS RGS PROPERTIES

Defendants

Master Harvey

Introduction

[1] There are three separate applications before the court for determination.

[2] Firstly, a summons dated 10th May 2021 in which the plaintiff's Solicitor is seeking an Order under Order 2 rule 1 of the Rules of the Court of Judicature (NI) 1980 ("the 1980 Rules") that the proceedings were validly served on the defendants, or alternatively under Order 6 rule 7 of the 1980 Rules to extend the validity of the writ.

[3] Secondly, the second defendant, further to a summons of 19th August 2021, applies under Order 12 rule 8 of the 1980 Rules declaring the writ was not duly served and/or setting the writ aside. Further, or in the alternative, an order pursuant to Order 2 rule 2 of the 1980 Rules declaring that the writ is void by reason of

irregularity and/or setting the writ aside on a number of grounds set out in the application:

(i) The writ was only intended for service within the jurisdiction.

(ii) The writ specifies 14 days for appearance which is time allowed for a defendant living in NI.

(iii) The second defendant lives outside the jurisdiction in England.

(iv) The writ mis-states address for service as c/o Leicester City FC, King Power Stadium, Filbert Way, Leicester LE2 7FL.

[4] Thirdly, the third defendant, further to a summons dated 29th February 2022, applies under Order 12 rule 8 of the 1980 Rules declaring the writ was not validly served.

[5] The plaintiffs were represented by Mr Donaghy, instructed by Madden and Finucane solicitors. The first defendant did not take any part in the applications. The second defendant was represented by Mr Girvan, instructed by Finucane Toner Solicitors. The third defendant was represented by Mr Fletcher instructed by King and Gowdy Solicitors.

[6] I am grateful to counsel for their skeleton arguments in advance and the quality of their oral submissions. I am also grateful to Ms Day on behalf of the plaintiffs for lodging a helpful hearing bundle and to all parties for lodging voluminous bundles of authorities, citing a long list of cases, all of which I have considered even if not expressly referred to in this judgment.

Background

[7] Proceedings were commenced by writ of summons issued on the 5th May 2020. The plaintiffs claim they agreed to lend money to the first defendant and that representations were made by him that the second defendant would effectively underwrite the agreement.

[8] The plaintiffs claim they were induced to lend the sum of £80,000 to the first defendant on the 30th May 2008. The nature of this purported agreement was that the plaintiffs would receive £80,000 back at the end of year 2, a further £100,000 at the end of year 5 and in addition would receive £600 interest per month. The terms of the agreement were signed by the plaintiffs and first defendant, Gerard Rodgers, on behalf of RGS properties on 10th October 2008.

[9] In or around February 2010, the plaintiffs were contacted by the first defendant indicating that due to the economic downturn the defendants were not able to make the £80,000 payment at the end of year 2, but the plaintiffs would continue to receive £600 per month until the £180,000 was paid at the end of year 5. The plaintiffs agreed to this alteration to their agreement. The interest payments

continued to be paid until 6th May 2014. The plaintiffs then orally sought payment under the agreement in or around May 2014.

[10] The plaintiffs claim the first defendant informed them, at a meeting at his home on 3rd July 2014, that the second defendant, Brendan Rodgers was just a phone call away and would "sort this out."

[11] The plaintiffs claim breach of contract and misrepresentation and that they suffered loss of £180,000, interest of £42,600 from June 2014 to the date of issue of the writ, interest at the rate of £600 per month under the agreement until judgment or sooner payment and interest pursuant to section 33A of the Judicature (NI) Act 1978.

The plaintiff's submissions

Pre-action correspondence

[12] The correspondence between the solicitors is a central issue in this case. For that reason, I have set out the chronology in some detail at various points in this judgment. The plaintiffs' solicitor was first instructed in 2016 and served a pre-action letter on the proposed defendants dated 3rd April 2020. King and Gowdy solicitors indicated they acted for the third defendant on the 20th April 2020. A letter from BSG Valentine accountants on behalf of the second defendant on the 30th April 2020 asked for further time and that solicitors would be in touch.

[13] A pre-action protocol letter was then sent to King and Gowdy solicitors on the 5th May 2020 stating "I trust you are in a position to accept service." There was further correspondence and then on 15th June 2020, King and Gowdy responded substantively to the pre-action letter, stating "we act for Judith O'Hagan" inferring, the plaintiff argues, they did have authority to accept service.

[14] On the 3rd February 2021 the plaintiffs write to the third defendant and stated "if we do not get an admission from your client within 7 days of the date of this letter then the proceedings that have been issued will be served on you." The plaintiffs claim there was a reasonable inference they had authority to accept service. This was the equivalent of an "opt out, not an opt in" and the defendants were estopped from raising issues with service of the writ.

[15] On the 13th May 2020 a pre-action protocol letter was sent to the other parties. A firm of solicitors (EDG) replied on behalf of the second defendant on the 2nd June 2020. The first defendant Mr Gerard Rodgers never corresponded at any stage. I note the plaintiff solicitor who had been dealing with the case up to then in Madden and Finucane left the firm on 23rd October 2020.

[16] On the 17th February 2021 Finucane Toner solicitors wrote to indicate they now acted for the second defendant, Mr Brendan Rodgers, and asked the plaintiff solicitor to:

"Please direct any and all future correspondence to this office regarding this matter."

[17] The plaintiff solicitor apparently then undertook some investigations that took a period of time.

[18] The plaintiff argues the chronology in the case is important as "context is everything." The defendant's solicitors either did not respond or responded in such a way as to lead the plaintiff solicitor to genuinely believe they had authority to accept service of proceedings.

[19] Moreover, the plaintiff asserts that the third defendant submitted a late application for a conditional appearance meaning their conditional appearance had become an unconditional appearance.

Service of the writ

[20] The writ, having been issued on the 5th May 2020, had to be served under the rules, by 4th May 2021. It was hand delivered to Finucane Toner on the 30th April 2021 by letter of the same date stating "We…enclose Writ of Summons by way of service."

[21] The writ was posted to King and Gowdy on the 30th April 2021 and also emailed to a solicitor in the firm at 16.30 on the same day.

[22] The writ was posted to the unrepresented first defendant on the 30th April 2021.

[23] On the 5th May 2021 Finucane Toner replied by letter to say they did not have authority to accept service on behalf of the second defendant and returned the writ.

[24] On the 7th May 2021 King and Gowdy wrote to the plaintiff solicitor to state they did not have authority to accept service, indicating they "have to be served directly on her."

[25] The plaintiff solicitor claims, at paragraph 10 of her affidavit, that she had genuinely formed the view that both firms did have authority to accept service. Her counsel contends this was a reasonable proposition and approach.

[26] The plaintiff's case is, inter alia, that the defendants were "lying in wait" and waited until the writ expired before raising an issue regarding authority to accept service. They seek a declaration that service was valid and the court should set aside the irregularities in the writ. The plaintiff argues there would be considerable prejudice to the plaintiffs if the court did not grant their application. There would be hardship on the plaintiff who could not bring their case if the application is not granted, as against the loss of a limitation defence for the defendants.

[27] The plaintiff solicitor further asserts that once advised of the service issues, she acted promptly and lodged a summons with the court to remedy matters on the 11th May 2021. She highlights that the second defendants, Finucane Toner had sought and obtained a copy of the writ via an online "writ search" from the court office on the 23rd February 2021. In light of this, she contends the writ came to their attention, and no doubt their client, long before attempted service of the writ in late April 2021.

[28] The plaintiff solicitor states that the indicative date for service on the third defendant was on the 4th May 2021 as her letter of 30th April 2021 to them was date stamped by King and Gowdy on that date, therefore, she asserts they received it while it was still within its 12 month period of validity.

[29] The plaintiff argues that the writ was properly served, the solicitors held themselves out as acting on behalf of their clients. It was reasonable to take the view they had authority. If the court rules with the plaintiff on the Order 2 rule 1 of the 1980 Rules "that is the end of the matter," as it cures any defect. The writ was served by post and email on King and Gowdy and received on 4th May 2021. Service was affected by hand delivery on Finucane Toner. While neither is technically within the rules, the court can apply Order 2 rule 1 of the 1980 Rules and deem service good.

The defendant's knowledge of the proceedings

[30] The plaintiffs claim the defendants had knowledge of the cause of action and the existence of proceedings from various correspondence. The two letters to King and Gowdy in February 2021 indicated "proceedings…have been issued." While the second defendant's new firm of solicitors were not specifically asked regarding authority for service, in their letter to the plaintiff of 17th February 2021, they did acknowledge they had sight of a letter of 4th February 2021 to their predecessors in which the plaintiff indicated proceedings had been issued and queried if they (EDG) had authority to accept service. Furthermore, the third defendant obtained a copy of the writ directly from the court. At no point had the second defendant disavowed that they had done so. It would, the plaintiff argues, have been downloaded and seen by the second defendant's solicitor and their client on or around 23rd February 2021.

[31] While the plaintiff withdraws any accusation of bad faith on the part of the defendants, at the very least they say a question was asked and should have been answered. This distinguishes the present case from other authorities in this area as the question regarding authority was expressly asked and a clear response was given.

Prejudice

[32] In terms of prejudice, the plaintiffs argued that the defendants suffer only the loss of the right to rely on a limitation defence. Counsel stated that if the court "rules against me it will cast a dark cloud over how defendants deal with these matters." If the court does not find for the plaintiffs, it would be "cataclysmic for the plaintiffs as opposed to the defendants."

Order 6 Rule 7 of the 1980 Rules

[33] Plaintiff counsel also addressed me on Order 6 rule 7 of the 1980 Rules, in the event the Order 2 rule 1 of the 1980 Rules application failed. He stated there was good reason for delay as investigations were ongoing from February to April 2021. The solicitor was trying to ascertain the business relationship of the defendants. This would assist in determining whether their client would "have a case at all as opposed to potentially having a good case". It was an "exercise of caution." If the defendants had come back to say they did not have authority, the plaintiff solicitor would have served on the respective defendants.

[34] Plaintiff counsel asserted this was "not a case of nothing being done." They were first instructed in 2016 and proceedings were issued in 2020. There was a satisfactory explanation for not bringing the application sooner and the balance of hardship favoured the plaintiff, albeit acknowledging the plaintiffs can always sue their solicitor but that professional negligence cases can be expensive and difficult to prove. Given the complexity and costs, it would be preferable to try the action of itself rather than a professional negligence action where the plaintiffs would effectively have to make a case against both the solicitors and defendants.

The second defendant's submissions

[35] Counsel for the second defendant argued that there is no recognized or reasonable cause of action against his client. The case arises from a one page agreement dated 2nd June 2008. It was signed by the plaintiff and first defendant only on 10th October 2008. There was no complexity in the case to explain the delay. It purported to be a loan, but it was in personal terms not a partnership, the words used were: "you give me" the sum of money in dispute.

[36] The second defendant entered a conditional appearance on the 13th August 2021 on the basis of the service issues and the irregularities set out at paragraph 3 of this judgment.

[37] Finucane Toner took over conduct of the case in February 2021 and contend they never indicated having authority to accept service of proceedings. Their correspondence on 17th February 2021 stated the plaintiffs should send "any and all future correspondence to this office," it was to assist with the robust defence of the case, not a hint of anything else. At that point the writ was still valid for another 3 months. The plaintiff would have then known that EDG were no longer acting yet

no further request was made of Finucane Toner regarding authority to accept service.

[38] They received a letter on Friday 30th April 2021 enclosing the writ of summons and replied on Wednesday 5th May 2021 to say they did not have authority to accept service. They wrote again on 1st June 2021 highlighting issues with service of the writ and reiterating they did not have authority.

[39] They claim there was no genuine attempt to serve the writ on the second defendant and there are no exceptional circumstances to grant an application under Order 2 rule 1 of the 1980 Rules. There was no attempt made by the plaintiff solicitor while undertaking investigations between 4th February 2021 and 28th April 2021, to extend validity of the writ or amend the irregularities with the writ itself. The court cannot extend time on a writ that is invalid or irregular. The plaintiff's application is fundamentally flawed.

[40] Unlike the position with King and Gowdy, Finucane Toner, were not directly asked at any point if they had authority to accept service. The plaintiff's view that this correspondence somehow amounted to an indication they had authority to accept service was an assumption and an ill founded one which could not withstand serous scrutiny. It was disavowed within 3 working days. It is, they argued, for the plaintiffs to serve proceedings in line with the rules of court. Hand delivery of a writ on a solicitor firm, without prior agreement or indication of authority to accept service, is not valid service or personal service in accordance with the rules. There is no good reason shown to extend time. They point out the plaintiff solicitors were instructed in October 2016. There was no pre-action letter for 3 years. The writ issued on 5th May 2020 was replete with errors and irregularities. The plaintiff solicitor failed to adopt any proper method of service. There was no application for substituted service nor agreement for alternative service.

[41] In short, the second defendant contends this was an irregular and invalid writ and if it is remedied and service deemed good, there is potential prejudice to the second defendant as the limitation date has passed. They state it is unclear what action has been taken against the first defendant, although I pause to note that counsel for the plaintiffs claimed that the first defendant "was not a mark for damages."

[42] The second defendant argues that the duty is on the plaintiff to serve the writ properly. If they dally, they will get scant sympathy. If the plaintiffs provide no satisfactory explanation for failure to renew the writ, before the validity of the writ expired, on that basis alone, the application should be refused. In this case the plaintiffs did not apply until 11th May 2021 and they fail to disclose a good reason why the writ was not served in time.

[43] In an addendum skeleton argument the second defendant raised the prospect of seeking an order for costs on an indemnity basis arising from an allegation by the

plaintiff of "sharp practice." In advance of the hearing, the plaintiff withdrew the assertion. Nevertheless, this issue resurfaced in oral submissions. Counsel for the plaintiffs indicated that while they query the way the matter was dealt with by the defendants there was a difference between "sharp practice" and "sitting back" and this was the difference between the "sin of commission and sin of omission."

[44] The second defendant rejects the proposition of an "obligation to disclose" whether the solicitor has authority to accept service. Given the history of the case, they disagree with the plaintiff's contention that if they had been told sooner, they would have acted more promptly. The plaintiff solicitors were approached in October 2016. There was a delay of 8 ½ years before seeking advice by plaintiff, then a further 3 ½ years before a pre-action letter was served in July 2020. The claim in its entirety is denied and disputed. His client did not receive any benefit of the loan as alleged. The service issues are simple carelessness but instead the plaintiffs are suggesting some misconduct by the second defendant. The plaintiffs imply some duty on the part of the defendants to disavow the concept of having authority. That is not accepted.

[45] Contrary to the assertion by counsel for the plaintiffs that if they lose this application, the plaintiffs have no case, the second defendant highlighted there is a remedy against the first defendant or in the alternative, a case in professional negligence against the plaintiffs' solicitor.

[46] The second defendant claims the plaintiffs sat on their hands with the instructions they received and the writ. Everything was done at the last minute, it amounted to carelessness and there was extraordinary delay by the plaintiffs.

[47] Further, the second defendant asserts the plaintiff had a full year to apply to extend validity and there is a history of gross delay. The case was time barred when writ was issued. This case is not unique in this jurisdiction, the plaintiffs did not serve proceedings on time and did not serve them properly. It is of their own making, there was no misleading. The claim was not brought to the attention of the second defendant and, therefore, the court should not use Order 2 rule 1 of the 1980 Rules to deem service good and the application should be refused.

The third defendant's submissions

[48] There was understandably considerable overlap in the applications of the second and third defendant. Thus, respective defence counsel commendably kept their submissions concise and focused on the key issues in dispute.

[49] The plaintiff solicitors sent a pre-action letter directly to the third defendant Ms O'Hagan on the 3rd April 2020. King and Gowdy replied on 20th April 2020 asking for a protocol compliant letter and additional time to reply in light of the pandemic. The plaintiffs emailed King and Gowdy on the 5th May 2020, coincidentally on the same day the writ was issued, indicating "I trust you are in a

position to accept same on behalf of Ms O'Hagan and it is not necessary to direct a copy to her also." King and Gowdy replied on 6th May 2020 stating, "I will have to seek instructions" and asking for a copy of the contract which was not enclosed. King and Gowdy provided a response to the letter of claim on 15th June 2020 and they claim the plaintiff solicitors only asked if they had authority for service of the pre-action letter, not the proceedings.

[50] As previously observed, further letters were sent to King and Gowdy on the 3rd and 4th February 2021, asking them to confirm if they had authority to accept service. No reply was received.

[51] In short, the third defendant's case is that King & Gowdy did not have authority to accept service and service has not been affected. They received a copy of the writ via email on 30 April 2021. It was posted to them on the same date. Order 10 rule 1 of the 1980 Rules lists four methods of service, none were used. The parties can agree an alternative method of service but there was no agreement between the third defendant's solicitors and plaintiff that the former could accept service.

[52] On the 7th May 2021, the third defendant wrote to the plaintiffs advising them the writ was out of time and under the court rules it should have been posted to the address of the defendant or at her usual or last known address. The plaintiffs did not reply to this letter and then issued a summons on 11th May 2021, purporting to serve this on King and Gowdy on the 4th June 2021.

[53] The court must determine whether there is good reason for failure to serve the writ during the period of validity. If not, the third defendants say that is end of the matter. The only reason here is carelessness and no good explanation has been given. If the plaintiffs succeed, the defendant loses a limitation defence and the balance of hardship is in the defendant's favour. The plaintiffs can pursue their solicitor, if required.

[54] The third defendant also addressed whether the conditional appearance was out of time and became unconditional. On this point, counsel made a number of detailed oral submissions including that under Order 18 rule 2 of the 1980 Rules, time had not expired. The defendant must serve a defence before the expiry of 6 weeks or after the statement of claim is served on him, whichever is later. This pre-supposes that service is effective. We are in a "twilight zone" as the defendants are faced with a writ not served. I pause to observe that, in all the circumstances of this case, balancing the rights of the parties and bearing in mind the overriding objective, I exercise my discretion under Order 2 rule 1 of the 1980 Rules and allow the conditional appearance of the third defendant.

[55] The third defendant asserted that the court must consider the narrower remit under Order 6 rule 7 of the 1980 Rules. If Order 2 rule 1 serves to widen Order 6 rule 7, it makes the latter otiose and of no import. No one would apply under Order 6 rule 7 if that were the case. The plaintiffs have to go through the Order 6 rule 7

gateway. There is no genuine reason for failure to serve on time, it is a case of "dilly dallying" and the plaintiff must reap the consequences of the lack of care and attention. The substantive action is a hopeless case and this is a clear case of professional negligence. They claim the court should also consider the merits of the underlying action.

Legal principles

Curing the irregularities: Order 2 Rule 1

[56] Order 2 rule 1 of the Rules of the Court of Judicature (NI) 1980, is in the following terms:

> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein.
>
> (2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."

[57] In *O'Shea v Southern Health and Social Care Trust & another* [2014] Lexis Citation 2088 it was held that the court could exercise its discretion pursuant to Order 2 rule 1 in order to correct an irregularity in relation to service where the existence of the proceedings is known to the defendant and the defendant had not demonstrated any prejudice. In that case the plaintiff was still within the primary limitation period. At para 28 the Master stated:

> "…it is not too controversial to say that a plaintiff coming from a starting point of seeking to cure an irregularity where the mistake causing the irregularity was not that of itself or its lawyer but of someone else, will generally be in a stronger position than where the irregularity was caused by its own mistake. However, there is no authority to say that for Ord 2, r 1 relief to be granted in this type of circumstance, the mistake must be by a third party. Of more importance, in terms of establishing where justice lies, and whether the circumstances are truly exceptional, is to consider whether the service which has been achieved was effective in bringing to the attention of the party served the details of the claim made against it, and whether or not

there has been prejudice to the party being served by the failure by the plaintiff to effect service by a stipulated method."

Ultimately, at para 30 the court concluded that the only loss to the defendant was:

"…an opportunity of taking advantage of the point that service was not in accordance with the rules."

[58] In *O'Shea,* the court noted that for the purposes of the application the defendant received a valid notice of writ and had done so within its period of validity, therefore, retrospective validation was not required under Order 6 rule 7 of the 1980 Rules. An important consideration in that case was whether the defendant was denied a limitation defence. It was found there was no real prejudice but merely a lost opportunity to argue the plaintiff failed to comply with the rules.

At para 14 of *O'Shea* there was consideration:

"… as to whether the appropriate test to be applied by the court in deciding whether to not to exercise the Order 2 Rule 1 discretion is "exceptional circumstances" or the Order 6 Rule 7 test of "good reason."

[59] The Master in that case helpfully cited other authorities in relation to the exercise of the court's discretion to set aside service. In *Olafsson v Gissurarson (No. 2)* [2008] 1 WLR 2016, which was a case with an international perspective, a claim form and accompanying documentation was purportedly served on the defendant personally in Iceland and although this method was permitted it was not fully effective as the claimant did not obtain a written receipt as was required from the defendant. Clarke MR at para 23 stated:

"...It requires an exceptional case before the court will exercise its power to dispense with service under r 6.9, where the time for service of claim form in r.75(2) has expired before service was effected in accordance with CPR Part 5. Secondly, and separately, the power is unlikely to be exercised save where the claimant has either made an ineffective attempt in time to serve by one of the methods permitted under r 6.2 or has been served in time in a manner which involved a minor departure from one of those permitted methods of service. Thirdly, however, it is not possible to give an exhaustive guide to the circumstances in which it would be right to dispense with service of the claim form."

The court determined this was an exceptional case and at para 32 stated:

"In my judgment, on the particular facts of this case, where the claim form was issued in time, and delivered to the defendant within the period for service by a method of service which the claimant and his solicitors could reasonably have thought was a reasonable method of service, and where the

> defendant know precisely what the claim was from the claim form, it would be unjust and contrary to the principles of the overriding objective that cases should be determined justly to refuse the relief."

[60] The subject of service issues and failure to effect proper service also arose in *Golden Ocean Assurance Ltd. v. Martin (The Goldean Mariner*) [1990] 2 Lloyd's Rep. 215, C.A in which at page 216, it was stated:

> "This failure was to be treated as an irregularity and so not nullify the proceedings"

At page 223 of the court's decision, on the issue of the defendant's knowledge of proceedings and prejudice to the defendant, in circumstances where it was clear that service had plainly been attempted, the court went on to state;

> "There is no evidence before the court that they were ever in doubt that the plaintiff intended to sue them or as to the nature of the proceedings or that they suffered any prejudice by the irregularity in service."

[61] In the present case, the interplay between the different court rules was discussed as to whether the court should cure irregularities with service in circumstances where perhaps an Order 6 rule 7 of the 1980 Rules application would be unlikely to succeed. *The Supreme Court Practice (White Book) (*1999 Edition), at 2/1/3 states:

> "The Plaintiff should not be allowed to enter through the back door of O.2 r.1 where he could not properly enter through the front door of O.6, r.8." (the pre 1999 English equivalent of order 6 Rule 7).

[62] This was affirmed in *Emmett Sweeney v national Association of Round Tables – Enniskillen Branch and Waterways Ireland* [2015] NI Master 6, where the Master stated at para 22:

> "It is well established that a court should be reluctant to exercise its discretion under Order 2 Rule 1 where the validity of the writ of summons has expired and an application under order 6 rule 7 to extend the validity of the writ would not have been successful."

At para 24, the Master emphasised that if the application for renewal of the writ is after the date the writ expired and after expiry of limitation period, there must be a good reason and the plaintiff must give a satisfactory explanation for failure to apply for renewal before validity expired. If no good reason was offered, the court had no need to look at the balance of hardship. If served within the period of validity, it is an irregularity and can be cured by Order 2 rule 1 of the 1980 Rules.

At para 30, the Master stated:

> "…the outcome as is so often the case and properly so, depends upon what is fair and just."

In that case, the defendant knew about the case, was not taken aback, or not able to defend the action albeit they would lose the benefit of an accrued limitation defence.

[63] In *O'Neill (Cahir) v Eddie Rowan trading as PLM Promotions* [2014] NI Master 9, as with the present case, there were issues regarding the content of the correspondence between the parties as to whether it contained language that could be interpreted by the plaintiff as an indication the defendant solicitor had authority to accept service. It was stated at para 15 that the words "could you please address all future correspondence to us" could not be read as meaning "we have authority to accept service."

[64] The issue of observing court rules and the use of the court's discretion where the rules have not been followed frequently appears in the authorities. LJ Mummery at para 36 of *Anderton v Clwyd CC* [2002] EWCA Civ 933 stated:

> "Justice and proportionality require that there should be firm procedural rules which should be observed not that general rules should be construed to create exceptions and excuses wherever those who could easily have complied with the rules, have slipped up and failed to do so."

[65] In *Tavera MacFarlane* [1996] PIQR, which was a case in which the mistake was due to something done by insurers or solicitors, at page 292 the court stated*:*

> "There was a clear distinction between cases where the court was asked to extend the validity of the writ after the limitation period had expired and cases where it was said that there had been a mere irregularity in service and the court was asked to treat the service as good service."

[66] In *Patterson v The Trustees for the time being of St Catherine's College* [2003] NIQB25, a case in which the plaintiff was misled by defendants' insurers, at para 32 LJ Nicholson stated:

> "I was entitled to exercise my discretion under Order 2 Rule 1 whether or not the court was willing to exercise powers under Order 6 Rule 7."

At para 26, he further stated that:

> "The plaintiff's solicitors cannot escape criticism for their delays and carelessness, but the circumstances are exceptional. If the original Writ had been returned unendorsed, I would have held that the conduct of the plaintiff's solicitors was inexcusable."

[67] In *Leal v Dunlop Bio Processors Ltd* [1984] 2 All ER 207, Sir Roger Ormrod emphasized*:*

> "the importance to ensure compliance with the Rules of Court and that only in exceptional circumstances should irregularities be cured or deemed good by exercise of the court's discretion."

In *Leal,* it was held that Order 2 rule 1 of the 1980 Rules was wide enough to give the court the jurisdiction to cure irregular service of a writ, the validity of which had expired before the purported service, but that it would be an improper exercise of discretion under that rule to make good the irregular service retrospectively where the writ could not properly have been renewed under (our Order 6 rule 7 of the 1980 Rules):

[68] *The White Book* (1999 edition), at 2/1/3 states:

> "defective service of proceedings, however gross the defect and even a total failure to serve where the existence of the proceedings is nevertheless known to the defendant, is an irregularity which can be cured by the court by the exercise of discretion under Order 2 Rule 1."

[69] Counsel for the plaintiffs referred me to a case of *Chohan Clothing Co (Manchester) Ltd v Fox Brooks Marshall (a firm)* [1997] Lexis Citation 4704. In *Chohan,* the complaint was that numerous defendants were handed the writ in a sealed envelope by their own secretaries instead of personally by the messenger who had brought it from the plaintiff's solicitors, unlike the facts of the present case where it is alleged both the writ and service were defective. In *Chohan* it was concluded:

> "The present case is one where the defect is so minor that it seems to me that no other course could properly be appropriate than to hold that it may be excused under Ord 2 r 1. That takes account of the limitation aspects as well as the whole justice of the case... I would have no hesitation in holding that this is a case where Ord 2 r 1 should cure the defect in service as regards the ten defendants who were served in the manner described…"

[70] In *Holden (Personal Representative of Bowden (Deceased)) v Whiterock Health Centre* [2011] Lexis Citation 2248, the court determined a similar Order 2 rule 1 application and weighed up the procedural failures in failure to serve the writ as against the court's discretion to cure defective service. Master McCorry stated:

> "[13] The White Book, 1999 edition, para 2/1/93 states that the authorities, taken as a whole, show that Ord 2 r 1 should be applied liberally in order, so far as is reasonable and proper, to prevent injustice being caused to one party by mindless adherence to the technicalities in the rules of procedure. It points out that defective service of proceedings, however gross the defect, and even total failure to serve where the existence of the proceedings is nevertheless

known to the defendant, is an irregularity which can be cured by the court by the exercise of its discretion under Ord 2 r 1. As Mr O'Hare submitted, and as The White Book authors observe in paragraph 2/1/6 the rule is so framed as to give the court the widest possible power to do justice.

[14] However, para 6/8/3 of the *White Book* also states: This rule provides a comprehensive code for the renewal of a writ and therefore an irregularity in procedure caused by failure to renew a writ under this rule is such a fundamental defect in the proceedings that the wide powers of the court under Order 2 Rules 1 and 2 to cure non-compliance with the rules ought not to be exercised by treating a writ which has become invalid for service as though it had been renewed and is therefore valid for service (*Breenstein v Jackson* [1982] 1 WLR 1982; [1982] 2 All ER 806 CA)."

[15] The plaintiff's solicitors appear either to have simply delayed making an attempt to serve the Writ on Dr Wasson or alternatively, having taken out a Writ on a protective basis, have failed to apply for its validity to be extended. Whatever the reason, although the plaintiff argues that Dr Wasson will suffer no prejudice from the failure to serve, no exceptional circumstances have been argued such as would justify granting an application under Ord 2 r 1.

…[18] In respect of the plaintiff's application in this case, which comes before me some 9 years after the validity of the Writ has expired, no explanation at all has been furnished as to why the Writ was not served during its period of validity. Nor has any explanation been offered as to why the court should extend its validity (other than, by inference, that the plaintiff's action against Dr Wasson will otherwise be unsuccessful). In such circumstances, the application of the legal principles must inevitably result in a declining to extend the validity of the Writ against Dr Wasson.

[19] I therefore grant the application sought by Dr Wasson under Ord 12 r 8 for a declaration that the Writ was not duly served upon him. I also refuse the applications by Mr Holden under Ord 6 r 7 to extend the validity of the Writ and under Ord 2 r 1 allowing the action to continue despite the procedural failures in relation to service which have taken place. It appears from counsel's submissions that this decision may place Mr Holden's entire action in jeopardy… It is a matter entirely for Mr Holden and his legal advisers as to whether the circumstances set out in this judgment provide a good cause of action against any solicitor or counsel who has acted for him."

Extending the validity of the writ

[71] The relevant rule is Order 6 rule 7 of the Rules of the Court of Judicature (NI) 1980, which is in the following terms:

(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for 12 months beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.
(2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.
(3) Before a writ, the validity of which has been extended under this rule, is served, it must be sealed with a seal showing a period for which the validity of the writ has been so extended.
(4) Where the validity of a writ is extended by order made under this rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served so as to extend the validity of that other writ until the expiration of the period specified in the order.

[72] In *McGuinness v Brady* [2017] NIQB 46, at para 3, Stephens J summarised the principles in relation to whether validity of the writ should be extended:

> "There was no dispute …as to the applicable legal principles. I was referred to the *Supreme Court Practice 1999* at p 54 and para [6/8/6] and to *Kleinwort Benson Limited v Barbrak* [1987] 2 All ER 289, *Brennan v Beattie and another [1999] NIJB 54, Bailey v Barrett and Others* [1988] NI 368 and *Sweeney v National Association of Round Tables* [2015] NI Master 6. In the White Book the principles to be deduced from the cases are summarised in ten separate paragraphs. I have considered all of those principles but only incorporate into this judgment the following:
> (1) It is the duty of the Plaintiff to serve the writ promptly. He should not dally for the period of its validity; if he does so and gets into difficulties as a result he will get scant sympathy.
> (2) Accordingly, there must always be a good reason for the grant of an extension. This is so even if the application is made during the validity of writ and before the expiry of the limitation period; the later the application is made, the better must be the reason.
> (3) It is not possible to define or circumscribe what is a good reason. Whether a reason is good or bad depends on the circumstances of the case. Normally the showing of good reason for failing to serve the writ during its original period of validity will be a necessary step to establishing good reason for the grant of an extension."

In that case, it was agreed the writ was not served, therefore the issue was whether its validity should be extended in circumstances where the insurers had the writ and were on notice of the claim.

[73] *The Supreme Court Practice* (1999 edition), at 6/8/6 states that the plaintiff:

> "…should not dally for the period of its validity; if he does so and gets into difficulties as a result, he will get scant sympathy."

[74] The construction of the English equivalent of our Order 6 rule 7 of the 1980 Rules was discussed in *Kleinwort Benson Ltd v Barbrak Ltd (The Myrto)* [1987] 2 WLR 1053:

> "the power to extend the validity of a writ should only be exercised for good reason; that whether there was good reason depended on all the circumstances of the particular case and the question whether an extension should be allowed was accordingly one for the discretion of the judge, who was entitled to have regard to the balance of hardship between the parties and the possible prejudice to the defendant if an extension were allowed."

[75] In that case, the court concluded that it was a wholly exceptional case and found there was good reason to extend validity. It found that where the application is made at a time when the writ is no longer valid and limitation has expired, the plaintiff must show good reason and a satisfactory explanation for failure to apply for extension before the validity of the writ expired. It was further noted the later the application is made under Order 6 rule 7 of the 1980 Rules, the better the reason must be.

[76] The issue of what constitutes a good reason for failure to serve a writ arose in several other cases, including *Baly v. Barrett* (1989) 103 N.R. 379 (HL) where at para 12, in the context of an application under order 6 rule 7, it was indicated that "difficulty in effecting the service of the writ may well constitute good reason." The court went on to state that if good reason is shown, the court then must assess the:

> "…balance of hardship between the parties…(this) only arises if matters amounting to good reason, or at least capable of so mounting, have been established."

At para 13 of *Baly,* it was again affirmed that:

> "When limitation has expired…the applicant must give a satisfactory explanation for his failure to apply for an extension of time before the validity of the writ of summons has expired."

[77] *The Supreme Court Practice* (1999 edition), lists some good and bad reasons for failure to effect service. Examples of good reasons include difficulty finding or serving the defendant, the defendant evading service or an agreement with defendant to defer service. Examples of bad reasons are that negotiations are

ongoing with no agreement to defer, difficulty tracing witnesses or obtaining evidence or carelessness.

[78] In *Hamilton v Personal Representative of Dornan (Deceased)* [2006] NIQB 104 at para 13 (my emphasis added);

> "The plaintiff's solicitor was conscious of the limitation period in May 2005 and the protective writ was issued with a day or two to spare. Over twelve months was allowed to elapse before anything further was done. It is insufficient to say as counsel for the plaintiff did that the application to extend time was made within two weeks of the expiry of the validity of the writ. The plaintiff has to show good reason why no application was made to extend time before the validity of the writ expired and why several further weeks were allowed to pass before the application was made. This has to be seen in the context of a case in which the limitation period had expired over twelve months previously. There is no express agreement to extend the validity of the writ. There is nothing in the correspondence or the conduct of the parties which would justify the inference of such an agreement. … Solicitors acting on behalf of plaintiffs should be aware of the difficulties that may arise through deferral of the service of a writ in order to save the costs of an insurance company. The better practice should be that once a writ is issued it should be served immediately, particularly when a substantial part of the limitation period has expired."

[79] In *Sproule v Cardwell Motor Factors Limited* [2017] NIQB 129, service of the writ was outside its 12 month period of validity and also outside the limitation period. At para 18, the court stated that although there was contact over a prolonged period between the solicitors, the court was:

> "struggling to be able to accept that this represents any good reason for the failure to serve the writ on time."

At para 22, the court considered whether the defendants were, as has been asserted by the plaintiff in the present case:

> "lying in wait for a slip up."

[80] The issue of lying in wait, or the inference that should be drawn from a defendant's silence was explored in *Higgins and others v ERC Accountants & Business Advisers Ltd and another* [2017] EWHC 2190 (Ch):

> "Those responses are not capable of supporting an inference that they were aware that a mistake was being or was about to be made by Cs' solicitor. In order for there to be a factual basis for the issue I am now considering, I would have to infer from the silence that followed the emailed letters of 17 March that all three defendants' solicitors had decided either independently

or otherwise to say nothing until after the time for compliance with the consent orders had passed. I am not prepared to infer that such was the case from silence particularly over so short a period. In any event, as I have said, I do not consider that the defendants' solicitors were under a duty to correct the errors by Cs' solicitors assuming they knew or suspected they had been made."

[81] A further case in which the court considered the reasons given as to why the plaintiff failed to avoid the expiry of the writ and whether the court should grant an extension of time is *Mooney v Declan Rodgers P/A Declan Rodgers and Company Solicitors* [2020] NIQB 41 where at para 6, the court held:

> "…The application to renew the writ should be made within the appropriate period of validity, but the court has power to allow extension after expiry as long as the application is received during the "first period of expiry" (ie the year following) … This is arguably subject to a wider power to allow later extension according to a number of propositions.
>
> Unfortunately, there has, to the court's mind, been no good reason which has been demonstrated to the court. While the court can accept that the window of time for service of the writ as a valid writ after the position of the Defendant became known was relatively short, it was not so short as to mean that it would not have been reasonable to have expected that it would have been attended to. On this issue the court does not have before it any convincing explanation as to why steps were not taken to avoid the expiry of the writ. While various alleged "good reasons" were advanced in argument (for example, the Defendant's change of address; alleged delay by the Defendant in taking proceedings for a declaration that the writ had not been duly served; the Defendant's bankruptcy) none of these, in the court's estimation, carries significant weight given the overall circumstances of this case."

[82] On the issue of whether the proceedings had come to the attention of the defendant, counsel for the plaintiffs referred me to the case of *Frampton v McGuigan and others* [2018] NIQB 52. In that case the learned judge referred to the decision of the UK supreme court in *Barton v Wright Hassall LLP [2018] UKSC 12.* That case concerned the issue of purported service of a claim form via email. The Supreme Court, by a majority of 3-2, held that what constitutes "good reason" for validating the non-compliant service of a claim form is essentially a matter of factual evaluation. At para 49 of the *Frampton* case, the judge summarised the main factors, the weight of which will vary with the circumstances and are likely to be:

> "(i) Did the Claimant take reasonable steps to serve in accordance with the rules?
> (ii) Did the Defendant or his solicitor know of the contents of the claim form when it expired?

(iii) What, if any, prejudice will the Defendant suffer from validation of the non-compliant service?"

[83] In *Kenneth Allison Ltd. and Others Appellants And A. E. Limehouse & Co. (A Firm) Respondents* [1991] 3 WLR 671, the court considered the issue of estoppel, an argument that has been advanced by counsel for the plaintiffs in the present action who contends the actions of the defendants' solicitors were such that they should be estopped from raising issues regarding service. In *Allison,* service of the writ was attempted on the basis of a mistaken assumption by the plaintiff as to what would constitute good and effective service upon the defendants. At page 687 the court stated (my emphasis added):

> "For what in reality happened was that both Mr. Hall and the plaintiffs (acting through their agent Mr. Swann) proceeded on the common but mistaken assumption that service of the writ upon the duly authorised agent of Mr. Hall would constitute good and effective service upon the defendants. Furthermore it is legitimate to infer that the course of action of Mr. Swann was influenced by the adoption by both parties of that common mistaken assumption in that, if they had not proceeded on the basis of it, Mr. Swann would in all probability not have been content with service upon Mrs. Morgan but would have asked to serve the writ upon Mr. Hall personally, and there is no reason to suppose that that request would have been refused. On these facts, in my opinion, the defendants will be estopped by convention from thereafter contending that there was not good and effective service of the writ upon them, on the principle established in *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] Q.B. 84. In that case, the Court of Appeal invoked the principle of estoppel by convention as expressed in *Spencer Bower and Turner, Estoppel by Representation,* 3rd ed. (1977), p. 157, which was founded upon "an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter," but proceeded to extend it to apply to the rather different situation where both parties proceed on the basis of a common, but mistaken, assumption as to the legal effect of a certain transaction between them, and in consequence one party is so influenced by the conduct of the other that it would be unconscionable for the latter to take advantage of the former's error (see, in particular, the judgment of Brandon L.J., at[1991] 3 WLR 671 at 688pp. 130–131). It is the principle of estoppel by convention in this sense that can, in my opinion, be invoked by the plaintiffs in the present case."

[84] There are several methods by which a writ can be served pursuant to Order 10 rule 1 of the Rules of the Court of Judicature (NI) 1980. They are:

(i) Personally.
(ii) By post to the defendant's usual or last known address.
(iii) By inserting the writ through the letter box of that address.

(iv) By the defendant's solicitor indorsing on the writ that they accept service of the writ.

[85] Finally, the court must also consider the overriding objective under Order 1 rule 1a of the Rules of the Court of Judicature (NI) 1980.

Conclusion

Chronology

[86] I was repeatedly informed by counsel for the plaintiffs that the chronology in the case is important and that "context is everything." In the present case, I have considered the chronology, the correspondence and all steps taken and those which were not taken. The plaintiff solicitor had a number of options. This included an application to extend the validity of the writ before it expired under Order 6 rule 7 of the 1980 Rules. This would have required a good reason to be demonstrated to the court. That would likely have included the same reasons offered in the course of the present application. A further option would have been to serve the writ and thereafter seek, either from the court or agree between the parties, additional time within which to serve a statement of claim. Moreover, there was an opportunity to seek to amend the writ to cure the irregularities which have been highlighted in the second defendant's application such as the address for service or to apply for substituted service if genuine issues arose. None of the above reasonable steps were taken.

The correspondence between the parties – authority to accept service

[87] The content of the various correspondence was referred to in the submissions of all counsel. Nothing in the correspondence indicated the defendants had authority to accept service of proceedings. It is common between solicitors to ask that correspondence is sent to them and not their client. In line with the authorities, the use of phraseology such as "could you please address all correspondence to us" did not mean they had authority to accept service. In the present case the language used by Finucane Toner was: "Please direct any and all future correspondence to this office regarding this matter" and in response to the pre-action letter of claim; "we act for Judith O'Hagan." The plaintiffs view that this somehow amounted to an indication they had authority to accept service was just that, an assumption. As a matter of fact, the second defendant's solicitors did not. If the plaintiff solicitors had attempted to serve the writ promptly, the lack of instructions to accept service would have been realised sooner and they could have remedied the matter by obtaining an address for the second defendant.

[88] I further note the pre-action correspondence between the plaintiff and third defendant. Similarly, nothing in this correspondence could be read as positively indicating their authority to accept service of proceedings.

Were the defendants lying in wait?

[89] On balance, I do not conclude that either defendant was "lying in wait for a slip up." The correspondence from either defendant is not capable of supporting an inference that they were aware the plaintiffs genuinely thought they had authority to accept service or were about to make a mistake.

[90] I also do not consider that the defendants' solicitors had committed a "sin of omission" by failing to alert the plaintiff to their mistaken assumption as to their authority to accept service. The purported service was affected late in the day on the 30th April which was the Friday of a bank holiday weekend following which, in a matter of days, both defendants replied indicating they did not have authority to accept service of the writ.

[91] The plaintiffs asserted that if the defendant solicitors had come back to say they did not have authority sooner, the plaintiffs' solicitor would have served on the respective defendants directly. The onus was on the plaintiff to serve the writ, not for the defendants to "keep them right." Unlike the position with King and Gowdy who act for the third defendant, it is clear the second defendant's solicitors Finucane Toner, were never even directly asked if they had authority to accept service of proceedings, having assumed carriage of the case from February 2021. It is not reasonable to conclude they would have been aware of the plaintiff's mistaken assumption or alerted the plaintiff that they were about to slip up.

[92] I do not infer from the silence that followed the plaintiffs' correspondence of 3rd and 4th February 2021 to the third defendant that they had decided to say nothing until after the time for compliance with the rules for service of the writ had expired or this amounted to an estoppel. While it is at the very least disappointing that the third defendants did not respond to this reasonable query, the plaintiff still had a further 3 months from the date of their correspondence, and the non-response thereto, to satisfactorily address the issue, either by follow up correspondence, a phone call or a genuine effort to seek the correct address of the second defendant. The position in relation to the third defendant was even more straightforward as it is clear the plaintiff solicitor had the address of Ms O'Hagan, having previously written to her.

The method of service

[93] The purported method of service was threefold. It was posted to the first defendant at his last known address, hand delivered to Finucane Toner and both posted and emailed to King and Gowdy. Hand delivery to a solicitor firm, without prior agreement or indication of authority to accept service, is not valid service nor does it constitute personal service in accordance with the rules. The service by email and post to King and Gowdy was also not effective in circumstances where they had not indicated authority to accept service by this means.

[94] In all the circumstances of this case, on balance, I reject the assertion that the plaintiff solicitor had genuinely formed the view that both firms did have authority to accept service. This was not as her counsel contended "a reasonable proposition and approach." It was wholly unreasonable in all the circumstances.

Was there a good reason to extend the validity of the writ

[95] On balance, I conclude there was no good reason to delay service of the writ or for the court to now extend its validity. I note the solicitor dealing with the case in Madden and Finucane left on 23rd October 2020, however, the main reason given for the delay in serving the writ was that the plaintiffs' solicitor apparently undertook some investigations to ascertain the business relationship of the defendants to assist in determining whether their client would have a case. I was informed this was an "exercise of caution." I consider that if the motivation for these seemingly time-consuming enquiries was borne out of caution, the priority should instead have been to protect their clients' interests and serve the writ in a timely manner and to do so properly.

[96] While counsel for the plaintiffs asserted this was "not a case of nothing being done" there is little evidence as to what was actually being done and nothing that would suggest a proactive approach or anything that might suggest they were dealing with the case expediently. The plaintiffs' solicitor firm was first instructed in October 2016. It was then almost 4 years before proceedings were issued and a further 12 months before the attempted service of the writ. There was no urgency, it was a classic case of "dilly dallying".

The balance of hardship and prejudice

[97] As the plaintiff has not overcome the first hurdle, in line with the authorities, of demonstrating a good reason for the delay in bringing an application under Order 6 rule 7 of the 1980 Rules, I do not need to consider the balance of hardship.

[98] On the issue of prejudice to the parties and bearing in mind the overriding objective to deal with cases justly, I note the plaintiff argues there would be considerable prejudice to the plaintiffs if the court did not grant their application. I was informed such an outcome would be "cataclysmic for the plaintiff as opposed to defendants." While I have taken all such factors into account, I also observe the potential prejudice to the defendant of losing an accrued limitation defence. The plaintiffs are also not completely devoid of options as they can either pursue the remaining (first) defendant or a claim against their solicitor.

The exercise of discretion to correct the irregularity in relation to service

[99] It is clear from the authorities that it is important to ensure compliance with the Rules of Court and that only in exceptional circumstances should irregularities be cured or deemed good by exercise of the court's discretion. Moreover, justice and proportionality require there to be firm procedural rules which should be observed

not general rules permitting exceptions and excuses whenever a party who could easily have observed the rules has failed to do so.

[100] The plaintiffs' solicitors cannot escape criticism for the delays and seeming carelessness and while I note the authorities relied upon by the plaintiffs, all of which were determined in light of their own unique circumstances, this case is distinguishable on the facts and is not exceptional.

[101] It is noteworthy that Finucane Toner had sought and obtained a copy of the writ via an online "writ search" on 23rd February 2021 suggesting their client knew of the existence of the proceedings. I consider it is inconceivable they would not have advised their client of this development as any reasonably competent solicitor would. Likewise, in correspondence from the plaintiff to the defendants, reference was made to the plaintiff having issued proceedings, therefore both defendants were aware to a greater or lesser extent there was a claim against them.

[102] What distinguishes this from cases such as *O'Shea v* SHSCT, a case in which the court did exercise its discretion in favour of the plaintiff is that in that case the plaintiff served a valid notice of writ and was still within the primary limitation period. As noted in that case, a plaintiff seeking to cure an irregularity where the mistake was not of their own making would generally be in a stronger position than where the irregularity was caused by its own mistake. In the present case, the writ was replete with irregularities which were more than just trivial in nature and the issues with service arose from a mistaken assumption of the plaintiffs' own making or at worst, their carelessness. I do not consider the circumstances of this case are truly exceptional, and again unlike in *O'Shea,* there will be potential prejudice to the defendants more than simply denying them the opportunity of taking advantage of the point that service was not in accordance with the rules.

[103] As previously observed, it is the duty of the plaintiffs to serve the writ promptly and they should not dally for the period of its validity. If they do so and get into difficulties as a result, as has happened here, they should get scant sympathy.

[104] I take into consideration the need to prevent injustice being caused to any party by what is described in the authorities as "mindless adherence to the technicalities in the rules of procedure," and note the court has the widest discretion to do justice, however, the irregularities in procedure in the present case, caused by failure to renew the writ or to serve it in accordance with the rules is such a fundamental defect in the proceedings that the court's powers under Order 2 rule 1 of the 1980 Rules to cure the defects should not be exercised.

[105] Counsel for the plaintiff rather dramatically implored that if the court "rules against me it will cast a dark cloud over how defendants deal with these matters." I conclude to the contrary that the facts of this case and this judgment will not cast a

dark cloud but rather should shine a bright light on the steps which should be taken by plaintiffs to effect service of proceedings and follow the disciplinary framework established by the rules of the court which are designed to ensure the fair and proper conduct of litigation.

[106] In all the circumstances of this case, I conclude that the plaintiffs have not satisfied the various legal tests and should not be allowed to enter through the "front door" of Order 6 rule 7 or the "back door" of Order 2 rule 1 of the 1980 Rules.

Costs

[107] I dismiss the plaintiffs' applications under Order 6 rule 7 and Order 2 rule 1 of the 1980 Rules and grant the second and third defendants' applications under Order 12 rule 8 of the 1980 Rules setting aside service of the writ and award costs to the defendants.