[2020] IEHC 172

THE HIGH COURT

[2018 No. 2186 P]

BETWEEN

CARINA BRERETON

PLAINTIFF

– AND –

THE GOVERNORS OF THE NATIONAL MATERNITY HOSPITAL, HEALTH SERVICE EXECUTIVE, ST JAMES'S HOSPITAL BOARD, MUREDACH FERGAS AND ST VINCENTS UNIVERSITY HOSPITAL

DEFENDANTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on the 9th day of April 2020

Introduction

1. This is an application by the second and third named defendants to set aside renewal of a Personal Injury Summons (hereafter the "Summons") granted by Barr J. by order of 28 May 2019 following an *ex parte* application to renew, as provided for by Order 8, Rule 1 of the Rules of the Superior Courts ("RSC").

2. The plaintiff alleges medical negligence against the defendants prior to and following the birth of her child on 27 February 2016. She issued proceedings on 13 March 2018 but did not serve them within the 12 month period identified by Order 8, Rule 1(4) of the RSC. She obtained a medical report from a gynaecologist in late 2018 who recommended obtaining a report from a consultant microbiologist. A report from a consultant microbiologist was obtained on 15 February 2019 and thereafter some queries arose and were answered in March 2019, though the precise date was not given by the plaintiff in her application to renew the summons. On 10 March 2019, letters of claim indicating an intention to bring proceedings were sent to the second and third defendants. No such letter was sent to any other defendant and the plaintiff now seeks to proceed only against the second and third defendants. Following the order of Barr J., the Summons was served on the second and third defendants on 14 June 2019. The defendants brought this motion seeking to set aside the renewal on 4 October 2019.

3. Before addressing the particular arguments raised by each party, I should address at the outset an argument raised by the plaintiff to the effect that she was in an unusual situation as compared with plaintiffs who were bringing proceedings for personal injury and who had to go through Personal Injuries Assessment Board in that such plaintiffs had, overall, a considerably longer period within which to serve a personal injury summons. I do not accept this submission. The fact that the rules applicable to medical negligence cases differ from those applicable to other types personal injury actions cannot mean that plaintiffs bringing medical negligence cases are to be treated in a more indulgent fashion insofar as renewals of a summons is concerned.

Interpretation of Order 8

4. To determine this application, it is necessary to consider the legal test. The defendant points to the amendments made to Order 8, Rule 1 of the RSC (S.I. 482 of 2018: Rules of the Superior Courts (Renewal of Summons) 2018) and particularly the necessity to show "special circumstances". Order 8, Rule 1(4) of the RSC provides as follows:

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

5. Both parties agree that the special circumstances test imposes a higher bar than the test previously in place, being the necessity to show good reason. However, they disagree in respect of the matters to which the special circumstances test applies. The plaintiff says that following the decision of Meenan J. in *Murphy v. A.R.F. Management Ltd. & Ors.* [2019] IEHC 802, the special circumstances test has been substituted for the good reason test and a court now has to be satisfied there are special circumstances to justify a renewal. The defendant says that, following the decision of O'Moore J. in *Ellahi v. Governor of Midlands Prison* [2019] IEHC 923, the plaintiff must show special circumstances justifying an extension of time to seek leave to renew the Summons but must show "good reason" to justify renewal of the Summons. In response the plaintiff urges me to depart from *Ellahi* and follow *Murphy*.

6. In Murphy, Meenan J. held that "*the amended Order 8 has brought about a change in that under the original Order 8 the court may order a summons be renewed 'if satisfied that reasonable efforts have been made to serve ... but for other good reason' whereas now a court has to be satisfied 'that there are special circumstances' which justify a renewal*" (para. 10). He then went on to consider whether an order can be made by a court on more than one occasion.

7. In *Ellahi*, O'Moore J. acknowledged the prior decision of *Murphy* but noted that in *Murphy*, Meenan J. was not deciding the particular issue of the test but was rather considering the question of whether there could be a series of renewals and that the requirements of the new version of the Order were not the ratio of his decision (para. 17). He went on to reference the observation by Kelly J. in *Whelan v. H.S.E*. (Unreported, High Court, 31st May 2017) (para. 30) to the effect that in a renewal application, there are essentially two orders to be sought – an order extending time for the making of the application for leave to renew the summons and second, an order granting leave to renew the summons. O'Moore J. held that the special circumstances test applied to the extension of time application but that the good reason test remained the applicable test when considering whether to renew.

8. I should say first that in the circumstances of this case, this question is somewhat academic. Both parties agree that the special circumstances test imposes a higher bar than the good reason test. Here, the application for an extension of time between 13 March 2019 and 28 May 2019, where the special circumstances test undoubtedly applies, is at the heart of this case. For the reasons I explain below, I have come to the view that there are special circumstances justifying the extension of time to bring the application for renewal. Those same circumstances justify a renewal of the summons, whether one applies the special circumstance or good reason test.

9. As to which is the applicable test for renewal, one could certainly argue coherently that the special circumstances test applies. The reference to "renewal" in the rule suggests that Order 8, Rule 1(4) provides for the substantive renewal of the summons and requires the court to be satisfied of special circumstances. Moreover, there is the obligation to identify the special circumstances in the order, a most unusual requirement in the architecture of the RSC. It seems improbable that the drafters of the amended Rule would require only the special circumstances mandating the extension of time to be identified in the order, but not the good reason for the renewal of the summons to be similarly identified. Finally, it seems somewhat unlikely that the drafters of Order 8, Rule 1(4) would have imposed a two-tiered test for renewing a summons – special circumstances in respect of the extension of time for the application and good reason for the renewal of the summons – without making it explicit.

10. On the other hand, there is a distinct ambiguity in the wording of the new rule. The reference to the Court ordering a renewal where satisfied there are special circumstances which justify an "*extension*" suggests that the special circumstances test only applies to the extension of time application for leave to renew the summons and not to the renewal of the summons. Had the word "*renewal*" been used rather than "*extension*", the situation would have been far clearer. Nor is there any explicit disapplication of the good reason test.

11. In all the circumstances, given that the matter was explicitly argued in *Ellahi*, but not, it appears, in *Murphy*, I will follow *Ellahi* and apply the good reason test to the renewal of the Summons here.

Special Circumstances Invoked by the Plaintiff

12. The special circumstances identified by the plaintiff are somewhat involved and a little difficult to understand. On the one hand, in the affidavit of the plaintiff of 16 December 2019, she avers that having made the decision to proceed against the second and third defendants, it appeared that service of the Summons within 12 months was unintentionally overlooked (para. 14). At para. 18, she says it is true that the Summons was not served within 12 months due to an oversight but it is not claimed that the oversight itself gives rise to special circumstances. Rather, she says that it was not until she obtained an expert report of 15 February 2019 and received clarifications from that report in March 2019 that she could be properly advised whether she had a case in medical negligence against any one defendant. She goes on to say that arising from the report on 15 February and the clarifications in March 2019, she decided to proceed against the second and third defendants only. At para. 19, she says that because she was waiting for expert liability reports following the issue of the Summons, she was "*in special circumstances which justify an extension*". It is important at this stage to note that in an earlier affidavit sworn on 24 May 2019 to ground the application before Barr J., the solicitor for the plaintiff, Mr. Ryan, had averred that there were special circumstances justifying an extension of time, and set out a chronology of events culminating in an averment that the service of the Summons had been unintentionally overlooked (para. 13). An affidavit in similar terms had been sworn by the plaintiff herself on 14 May 2019.

13. When one turns to the pre-litigation letter of 10 March 2019 sent by her solicitor to the second and third defendants, it does not support the suggestion in the affidavit of 16 December 2019 that she was still waiting for expert reports when the Summons expired. That letter is exhibited to the affidavit of Mr. Finnegan sworn 3 October 2019 grounding the defendant's application to set aside the renewal of the Summons on the basis that no special circumstances exist justifying such an extension. In that letter, it is stated that a Summons was issued but not served on 13 March 2018 "*under pressure from the Statutes of Limitations"* pending completion of our investigations. The letter went on as follows:

> *"Please also note that we are now serving proceedings on you without further notice so as to protect Ms. Brereton's position having regard to the time limit for the service of that Personal Injuries Summons as provided for by the Rules of the Superior Courts. Should we not hear from you in the terms just set out, within 21 days of the date of this letter, we shall continue with these proceedings and we shall rely on the contents of this letter in relation to any matter arising in respect of the costs thereof".*

14. The letter went on to say that investigations into whether there was negligence on the part of the plaintiff's GPs are ongoing and that proceedings were being served on those defendants on a protective basis. It added *"[f]inally, you will see that the National Maternity Hospital was named on the Personal Injury Summons issued, in addition to the other Defendants. Please note that, following investigations, Ms. Brereton does not intend to proceed as against the National Maternity Hospital." That letter concluded by stating that "in addition to the Personal Injuries Summons, we are also serving updated Particulars of Negligence and Breach of Duty of the Second and Third Defendants on you".*

15. That letter makes it clear in my view that (a) a decision had been taken to issue proceedings against the second and third defendants at that point in time without the necessity to wait for any further medical reports; (b) it was intended that the proceedings would be issued before the expiry of the Summons; and (c) it was intended that the Summons would be sent with that letter.

16. That this was the plaintiff's intention may be seen from the affidavit of Mr. Ryan, the solicitor on record for the plaintiff, sworn on 24 May 2019 to ground the application before Barr J. At para. 13, he averred as follows: "*Having made the decision to proceed against those proposed defendants, it appeared that service of the Personal Injury Summons within twelve months was unintentionally overlooked*". Finally, at para. 16, he noted that the defendants were put on notice by the letter of 10 March 2019 (referred to above) that the plaintiff intended to pursue a claim before the court. An affidavit in similar terms was sworn by the plaintiff on 14 May 2019.

17. Regrettably, there is no explanation as to when this mistake was discovered, how it came about or why the application was only made on 28 May 2019 and the affidavits for same only sworn on 14 May 2019 in the case of the plaintiff and 24 May 2019 in the case of Mr. Ryan. That explanation ought to have been in the affidavits.

18. To summarise, given the state of the evidence before the court, I therefore fully agree with the submissions of the defendant to the effect that although the plaintiff invoked the necessity to obtain medical reports by way of background to explain the delays in service, in fact the reason the Summons was not served within the 12 month period was not a delay in obtaining expert reports but rather the fact that the solicitor overlooked serving it.

19. I am conscious that Barr J. gave a different reason for renewing the Summons at the *ex parte* hearing, namely the complexity of the case and the plaintiff's requirement to obtain specialist and expert reports to proceed with the matter. However, having heard the defendant's analysis of the evidence (an analysis that was not of course available to Barr J.) and having considered the affidavits and exhibits carefully, I conclude that although this may be a complex case (though it is premature to determine same in the absence of detailed particulars being furnished) and the plaintiff was required to obtain detailed expert reports prior to serving the Summons, those reports had been obtained prior to the expiry of the Summons. Accordingly, this was not in fact the reason for the failure to serve within the 12 month period. Rather, the reason was the inadvertence of the solicitor in serving the Summons.

Special Circumstances

20. The meaning of the term "special circumstances" in the context of Order 8, Rule 1(4) has not yet been judicially explored. Both parties in the motion before the court accepted that the imposition of a test of special circumstances was a higher test than that of good reason but neither party explored the precise parameters of the test in the context of Order 8, Rule 1(4).

21. Similar wording may be found in the case law on security for costs, where once it is established that a plaintiff company will be unable to meet the costs of a successful defendant, the onus shifts to the plaintiff to establish special circumstances. In *West Donegal Land League v. Udaras Na Gaeltachta* [2006] IESC 29, Denham J., as she then was, noted that in considering the concept of special circumstances, it should be remembered that the essence of the order for security for costs is to advance the interests of justice and not hinder them and that it is for a court on such an application to consider and balance the interests of the plaintiff company and those of the second named defendant in a fair and proportionate manner. That observation supports me in concluding that the previous case law on good reason, which refers, *inter alia*, to a consideration of the interests of justice and potential hardship to each party, is still relevant in the context of the special circumstances test.

Inadvertence

22. Because I have concluded above that the necessity to await medical reports was not the reason for the failure to serve the Summons within the 12 month period, the only reason that the plaintiff can potentially rely upon to demonstrate special circumstances is inadvertence in the context of this case. The defendant relies upon the case law on inadvertence to support the proposition that inadvertence on the part of a legal advisor is not a "good reason" and still less can it constitute a special circumstance.

23. Reliance was placed upon the cases of *Allergan Pharmaceuticals (Ireland) Ltd. v. Noel Deane Roofing and Cladding Ltd. & Ors*. [2006] IEHC 215 and *Moynihan* (referenced below) in this respect. In *Allergan*, a roof sustained storm damage on 26 December 1998. A plenary summons was issued in respect of that damage on 23 December 2003, *inter alia*, in respect of alleged professional negligence on the part of the architects and specialist roofing contractors involved in providing the roof. In September 2005, the plaintiff's solicitors sent an expert report to their counsel in circumstances where the solicitor had thought he had done so on receipt of the report a year earlier but only realised he had not in September 2005. The plaintiff applied to the High Court to renew the summons on 7 November 2005. The headnote to that case notes that O'Sullivan J., in setting aside the renewal of the plenary summons, held that inadvertence by professional legal advisors did not of itself constitute a good reason to renew the summons. However, when one looks to the judgment itself, his finding is somewhat more nuanced. First, he found that when considering if there is good reason to renew a summons, one may consider the overall interests of justice as between the parties and he rejected the proposition that there were three separate and watertight sequential steps the effect of which would be to exclude consideration of questions relating to the interests of justice when the court considers if there is good reason to renew.

24. Next, dealing with the question of inadvertence, he identified that the inadvertence was against a background, *inter alia*, of considerable preceding delay in the progressing of the case on the part of the plaintiff. He observed that the passage of time gives rise to a presumption of prejudice, particularly where oral evidence is required and referred to the dicta in *Gilroy v. Flynn* [2004] IESC 98 in respect of inadvertence by a legal advisor.

25. In my view, *Allergan* is not authority for the broad proposition sought to be advanced by the defendant that inadvertence on the part of a professional advisor can never constitute a good reason to renew the summons. Rather it is a finding that in the particular circumstances of that case it did not constitute a good reason.

26. I am conscious also of the comments of Peart J. in *Moynihan v. Dairygold Co-Operative Society Ltd.* [2006] IEHC 318, where he set aside the renewal of a summons. As noted by Peart J., the plaintiff in that case had not put her case that her solicitor, simply through mistake or inadvertence, overlooked serving the proceedings (p. 13) but nonetheless he took the opportunity of making some observations about the justification often advanced for renewing a summons, i.e. mistake or inadvertence on the part of the solicitor. He noted that when the court is considering competing interests in an application for renewal, it is hard to see that much weight in the basket of interests to be weighed should be given to a solicitor's mistake. As in *Allergan*, he focused upon the independent obligation of the courts under Article 6 of the European Convention on Human Rights to avoid delay in the conduct of litigation.

27. I should say that I am in full agreement with the views of Peart J. and O'Sullivan J. in relation to the necessity to avoid delay in litigation and the obligation on plaintiffs to advance their cases with expedition, particularly (though by no means exclusively) where

those cases will be determined by way of oral evidence and include claims of professional negligence.

28. Finally, I should refer to *Chambers v. Kenefick* [2007] 3 IR 526, a medical negligence case, where Finlay Geoghegan J. refused to set aside the order renewing a summons in circumstances where the summons was issued on 25 June 2002, a copy of the summons was sent on 2 September 2002 to the defendant's insurers, who accepted service, and the summons was not served due to the solicitor's inadvertence. The application to have the summons renewed was made on 15 December 2003. There was significant delay on the part of the solicitor making the application to set aside the renewal. Because of the similarity of certain of the facts of that case to those of the present case, I will quote in extenso from the judgment as follows:

> *"9. Applying those principles to the facts of this application I am satisfied that at the time of the application to Kearns J. on the 15th December, 2003, there was a good reason identified on the application before him to renew the summons. That good reason was the fact that the plenary summons had been issued on the 25th June, 2002, a copy of the plenary summons was delivered to the defendant's insurers on the 2nd September, 2002, i.e. within a period of approximately less than two and a half months after the issue of the plenary summons, and on the 12th September, 2002, solicitors instructed by the insurers acknowledged that they had authority to accept the service. Combined with those facts, and as part of the good reason is the fact that the failure to serve the summons was due to inadvertence and oversight upon the part of the plaintiff's solicitor. I think in the light of the Supreme Court decision in O'Brien v. Fahy (Unreported, Supreme Court, 21st March, 1997) it is necessary for me to explain the manner in which I consider it as part of a good reason. It is not the inadvertence which constitutes the good reason, but rather it is that such inadvertence and oversight is the explanation for which the summons, a copy of which had been furnished, was not formally served. It appears to me important for this reason. If, contrary to the facts of this case, there had been a deliberate withholding of the service of a summons then the fact that the defendant through his insurers had received a copy of the summons might not of itself constitute a good reason. Therefore, it is the fact that the copy summons had been delivered, coupled with the fact that the failure to subsequently formally and properly serve under the rules was simply due to inadvertence, which I have concluded constitutes a good reason."*

29. In that case, the fact that the copy summons had been served within time was critical. In this case, it was clearly intended to serve the summons within time. In both cases, inadvertence explains why the summons was not served within time. In neither case was there excessive delay before the application was made. In *Chambers*, the application was made six months after the 12 month period expired. In this case, the application was made 2 ½ months after the 12 month period expired.

30. Finally, I acknowledge the approach of the Supreme Court in *Gilroy v. Flynn* to the effect that an assumption that even grave delay will not lead to the dismissal of an action if it emanates from a professional advisor may prove an unreliable one. The plaintiff in this case cannot rely on the fact that the inadvertence was that of her solicitor and in fairness, that approach has not been adopted.

Special Circumstances re Extension of Time

31. Turning now to apply the above principles, the question I must ask is whether there are special circumstances justifying an extension of time to bring the application for renewal of the Summons. In so doing, I am adopting the approach of O'Sullivan J. in *Allergan* (albeit in the context of the good reason test) and considering the interests of justice between the parties where appropriate as well as prejudice to each party, as identified by Finlay Geoghegan J. in *Chambers*. Although those tests were formulated in the context of good reason, they seem apposite in the "special circumstances" context, though requiring a more stringent application given the nature of that test. In my view, the following constitute special circumstances in this case justifying an extension of the time to bring an application to renew:

- The plaintiff's solicitor intended to serve the Summons before the expiry of the 12 month period within which the Summons could be served, as stated in the letter of 10 March 2019;

- The plaintiff's solicitor inadvertently failed to do so;

- The plaintiff's solicitor wrote to the defendant before the expiry of the twelve month period by letter of 10 March 2019, thus informing the defendant of the intended proceedings prior to the expiry of the 12 month period;

- The application to renew the Summons was made on 28 May 2019, and the period of delay is therefore a relatively short one, being 10 weeks from the date upon which the Summons expired. In the context of the cases opened before the court, given a spectrum of delay ranging from extreme (see for example *Moynihan* – elapse of 2 years 2 months from the expiry of the twelve month period, or *Moloney v. Lacey Building & Civil Engineering Ltd. & Ors.* [2010] IEHC 8 – elapse of 5 years 4 months from the expiry of the twelve month period) to moderate (*Roche v. Clayton* [1998] 1 IR 596 – elapse of 6 months from expiry of the twelve month period or *Allergen* – elapse of 10 months from expiry of the twelve month period), a period of 2 ½ months is at the lesser end of the spectrum. I am of course conscious that with the change in the legal test to "special circumstances", much shorter periods of delay are likely to be treated as sufficient to justify a refusal to renew a summons. Had the period of delay been longer, even by a month or two, my approach to this case would have been different. However, in the context of a 12 month period within which to issue a summons, in my view a 10 week delay in the context of this case is sufficient to persuade me that the balance of justice favours upholding the decision to renew the Summons.

- Given the period of delay, and the notification of the intention to issue proceedings by way of letter of 10 March 2019, there is unlikely to be any significant prejudice to the defendant and none has been identified.

- The plaintiff is likely to be at risk of having her case fall outside the Statute of Limitations should I accede to the defendant's application. I am conscious she might have a remedy against her solicitor if that is the case and I am also acutely conscious of the very clear line of case law to the effect that a plaintiff being statute barred is not in itself a sound basis for ordering renewal of a summons (see *Whelan v. H.S.E.*). Nonetheless, it is clear from *Chambers* that the likely consequences for the plaintiff of a refusal to renew from the point of view of the operation of the Statute of Limitations are at least potentially relevant. For that reason, I consider it appropriate to consider this issue in considering the potential hardship to the parties.

Good Reason for Renewal

32. The reasons I identify above in respect of the extension of time apply with equal force in respect of renewal and lead me to conclude there is good reason to renew the Summons.

Conclusion

33. For the reasons set out above, I consider there are special circumstances justifying an extension of time to seek to renew the Summons and good reason to renew the Summons. I therefore refuse the application of the defendants to set aside the Order of Barr J. permitting renewal of the Summons.