

THE HIGH COURT

[2021] IEHC 386

[Record No. 2017/9632 P]

BETWEEN

ORLA YOUNG

PLAINTIFF

AND

ST. VINCENT'S HEALTH CARE GROUP LIMITED AND ROBERT FLAVIN

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 4th day of June 2021

Introduction

1. The plaintiff is 59 years of age and is employed as an airhostess. On 29th October, 2015, she attended at St. Michael's Hospital, Dun Laoghaire for an operation on her left foot. The second defendant was the surgeon who carried out the operation.
2. It is the plaintiff's case that due to the negligence and breach of duty on the part of the defendants and each or either of them, or their respective servants or agents, she was caused to suffer severe injury to her foot. She has pleaded that she developed chronic regional pain syndrome in her foot. It is alleged that she has been severely disabled as a result of the injuries which she sustained as a result of receiving the operative treatment. She claims that she has suffered substantial losses as a result of her injuries and disablement.
3. The plaintiff consulted with her solicitor. A personal injury summons was issued on her behalf on 26th October, 2017.
4. The personal injury summons was not served on either of the defendants within the one-year time period provided for under the Rules of the Superior Courts. On 29th July, 2019, an application was made on behalf of the plaintiff for an order renewing the summons pursuant to O.8 of the Rules. That application was granted. The order renewing the summons was perfected on 1st August, 2019. Thereafter, the renewed summons was served on the second named defendant on 8th August, 2019. It was served on the solicitor acting for the first named defendant on 18th October, 2019.
5. The present application concerns motions brought by each of the defendants seeking to have the renewal of the personal injury summons set aside on the basis that the plaintiff had failed to establish that there were special circumstances which would justify the court in granting an extension of time within which to serve the summons.
6. While the reason stated in the order of Meenan J. of 29th July, 2019, which renewed the summons was "*in circumstances where delays have occurred in obtaining relevant medical reports*"; it was accepted by the parties that that was not in fact the reason that had been put forward by the plaintiff when making the *ex parte* application to renew the summons. It was accepted that, while the summons had been issued without receipt of a medical liability report from a suitably qualified expert, that had been done so as to prevent the plaintiff's claim against the defendants becoming statute barred. However, it was accepted that on 30th January, 2018, or in early February, 2018, the plaintiff's

solicitor had received a medical liability report from an expert which was supportive of the plaintiff's cause of action against the defendants.

7. In essence, the reason put forward for justifying the delay in serving the summons, was stated to be due to the fact that there was confusion in the correspondence as to the correct title for the entity to be named as St. Michael's Hospital. The plaintiff's solicitor has submitted that he had had telephone conversations with people in the office of the first defendant's solicitor, in relation to the issue of what person or entity should be named to represent the hospital and, while they had indicated that it would not be necessary to substitute the hospital manager in place of the entity named as the first named defendant in the proceedings that had issued, they did not issue written confirmation of that. Accordingly, the plaintiff's solicitor had had to write seeking written confirmation that he could proceed to serve the summons, without having to make an application to substitute a different person in place of the entity named as the first named defendant. It is submitted that it was only on receipt of the response to that letter, that the plaintiff's solicitor was in a position to proceed and that he did so by making the *ex parte* application seeking to renew the summons on 29th July, 2019.

8. It was submitted on behalf of the plaintiff that in circumstances where there was confusion in relation to the correct entity that should be named as representing St. Michael's Hospital and where there were ongoing discussions between the plaintiff's solicitor and the solicitor for the first named defendant in this regard, and where he had had to formally write seeking written confirmation of their oral agreement, that constituted "special circumstances" as required under the rules to justify an extension of time within which to serve the summons.

Relevant chronology

9. The key dates in this case can be summarised as follows:-

29/10/2015	Operation at St. Michael's Hospital, Dun Laoghaire.
26/10/2017	Personal injury summons issued.
30/1/2018 (also described as "early February 2018")	Plaintiff's solicitor receives medical liability report supportive of the plaintiff's cause of action against the defendants.
28/5/2018	Initiating letter sent by plaintiff's solicitor to the defendants.
20/6/2018	Letter from St. Michael's Hospital indicating that they had passed the matter to their insurers.
10/7/2018	Letter from first defendant's solicitor stating that they had authority to accept service on behalf of St. Michael's Hospital and identified the person who should be named as representative of the hospital.
On dates unknown:- plaintiff's solicitor states that he had a number of conversations with a person or persons (possibly with Fiona Brassil) in the first defendant's solicitor's office concerning the correct identity of the first defendant. The plaintiff's solicitor states that he was assured that it would not be necessary for him to apply to the court to substitute Mr. Murtagh in place of the entity named as first defendant in the personal injury summons. However, no written confirmation was forthcoming from the first defendant's solicitor to this effect.	
25/10/2018	Time for service of summons expired.

15/2/2019	Plaintiff's solicitor writes to first defendant's solicitor indicating that they had named St. Vincent's Health Care Group Limited in the title to the proceedings. They further indicated that they would be happy to make application to the court to substitute Mr. Murtagh in place of that entity, upon the first defendant's solicitor confirming that no point under the statute of limitations would be taken against the plaintiff.
27/3/2019	First defendant's solicitor confirms that they do not require the plaintiff to make an application to substitute the entity already named as first defendant in the proceedings.
29/7/2019	Ex parte application made to the court to renew the summons. That application was granted. Order perfected on 1st August, 2019.
8/8/2019	Renewed summons served on second defendant's solicitor.
18/10/2019	Renewed summons served on first defendant's solicitor.
19th May, 2020	First defendant issues notice of motion seeking to set aside renewal of summons.
29/5/2020	Second defendant's solicitor issues notice of motion to set aside renewal of summons.

Submissions of the parties

10. It was submitted on behalf of the first defendant, that the reasons stated in the order of Meenan J. as to what constituted the special circumstances which justified the renewal of the summons for a further period of three months from that date being "*in circumstances where delays have occurred in obtaining relevant medical reports*", could not be correct, due to the fact that on the evidence of the plaintiff's solicitor he had in fact received a medical liability report on 30th January, 2018 (which in a later affidavit he stated to be "*early February 2018*"), it was clear that the necessary medical report was to hand some three months after the summons had issued and therefore there was still ample time to serve the summons within the time prescribed in the rules.
11. It was further pointed out that in the grounding affidavit which had been sworn by the plaintiff's solicitor, Mr. O'Reilly, on 24th July, 2019 for the purposes of the *ex parte* application to renew the summons, there had been no mention of any difficulty in obtaining a medical report, or to that being the reason why the summons had not been served within the appropriate period.
12. Instead, in that affidavit the plaintiff's solicitor had referred to the correspondence that he had received from the solicitor appointed to act on behalf of St. Michael's Hospital, dated 10th July, 2018. At para. 12 of that affidavit, Mr. O'Reilly stated that "*in the interim period I was in discussion*" with the first defendant's solicitor. He went on to state that by letter dated 15th February, 2019 he had written to the first defendant's solicitor stating that the plaintiff would be prepared to make an application to substitute Mr. Murtagh in place of the first named defendant, but on condition that the first defendant would not take any point under the statute of limitations against the plaintiff in that regard. He went on to state that by letter dated 27th March, 2019, the first defendant's solicitors indicated that they did not require an application to be made to substitute Mr. Murtagh for the entity named as first defendant in the proceedings.
13. It was submitted that the essence of his claim for renewal of the summons was set out in the following terms at para. 14 of the affidavit:-

"14. I say that by that stage the personal injury summons had not been served and accordingly it is now necessary that the summons be renewed. I therefore say that there are special circumstances why the summons should be renewed. I say and believe that there is no prejudice to either defendant arising out of the renewal of the summons in circumstances where the proceedings were issued in time and all the medical records relating to the treatment in question are available to enable their expert to provide them a report in relation to same."

14. In relation to his communication with the second named defendant, Mr. O'Reilly stated in his affidavit that on 28th May, 2018, he had sent an initial warning letter to the second defendant care of St. Vincent's Hospital. When he received no response thereto, he wrote a further letter to the second defendant on 11th July, 2018. He stated that by letter dated 20th September, 2018 he received a response thereto from Ms. Sarah Grewar, Solicitor and Claims Manager for Scotland, Northern Ireland and the Republic of Ireland for Medical Protection. In that letter Ms. Grewar stated that she understood that the summons issued in October, 2017. She nominated Matheson, Solicitors in Dublin to accept service of the proceedings on behalf of the second named defendant. Although not stated in Mr. O'Reilly's affidavit, that authority to accept service was acknowledged by Matheson, Solicitors, by letter dated 16th October, 2018.

15. At the hearing of the application herein, it was accepted by Mr. McGowan BL on behalf of the plaintiff, that it had never been proffered on behalf of the plaintiff that the absence of an appropriate medical expert's report was either the excuse for non-service of the summons, nor was it proffered as a special circumstance justifying the extension of time sought by the plaintiff. He could not explain how that was stated as being the special circumstance in the order of Meenan J. dated 29th July, 2019.

16. In the grounding affidavit sworn by Ms. Aileen Fleming, the solicitor acting on behalf of the first defendant sworn on 13th May, 2020, it was expressly denied that there had been any discussions of any kind between the plaintiff's solicitor and anyone in the office of Daniel Spring & Company. In this regard, Ms. Fleming stated as follows at para. 10 in reference to the statement which had been made to the telephone conversations allegedly passing between the plaintiff's solicitor and the firm of solicitors acting on behalf of the first defendant:-

"The statement above appears to be capable of numerous interpretations. However, I wish to confirm unequivocally that no discussions of any kind were ongoing between the plaintiff's solicitors and Daniel Spring & Company between 10th July, 2018 and 15th February, 2019".

17. Ms. Fleming went on in her affidavit to confirm that between the date of the initiating letter from the plaintiff's solicitor on 28th May, 2018 and the expiry of the summons on 24th October, 2018, the only contact between the parties' solicitors was the letter from Daniel Spring & Co. dated 10th July, 2018. She pointed out that while the plaintiff's solicitor had referred to certain "discussions", it was totally unclear when same were alleged to have taken place; the content of the alleged discussions was not stated and the

significance of the discussions in terms of the renewal of the summons was not stated. She confirmed that no discussions took place and absent any further information in the affidavit concerning those discussions, the discussions could not reasonably have been relied upon by the court as providing a good reason why the summons was not served within the twelve-month period.

18. In a replying affidavit sworn on 31st March, 2021, Mr. O'Reilly, stated as follows in relation to the telephone contact that he had had with the first defendant's solicitor:-

"I rang the offices of Daniel Spring & Co the solicitors acting for the hospital on a number of occasions in relation to their letter of July 2018. I wanted to confirm with them whether it was going to be necessary to make an application to substitute Seamus Murtagh as nominee of St. Michael's Hospital for the defendant named in the proceedings. I do know that I did talk to one or more people in that office. I believe I talked to Fiona Brassil about the issue although at this remove I cannot be sure. I know that I did talk to Fiona Brassil at a later stage when we were anxious that her office return the summons duly endorsed for service on the other defendant. In any event, I can confirm that the conversation solely related to the issue of the identity of their client's claim for the purposes of the proceedings. There were no discussions as such in relation to the case and I certainly did not mean to suggest that in my earlier affidavit. While at one stage I was told by someone in that office that it would not be necessary to make a court application substituting the plaintiff [sic], I did not receive any such confirmation in writing."

19. Mr. O'Reilly went on in his affidavit to explain that ultimately by letter dated 15th February, 2019 he wrote to the first defendant's solicitor indicating that he was prepared to make the necessary application to substitute the first defendant, on condition that no point would be taken against the plaintiff under the statute of limitations. Later in the affidavit at para. 11 he further elaborated upon the telephone discussions:-

"I beg to refer to para. 10 of the said affidavit. I wish to clarify in the first place that there were no discussions with the first named defendant's solicitors in relation to any possible compromise of the proceedings. The discussions were with a view to clarifying their position in addition to the identity of the first named defendant. It was with a view to obviating the necessity for an application to substitute the first named defendant that I had entered into those discussions with the first named defendant's solicitors and no other."

20. It was submitted on behalf of the first named defendant that the solicitor nominated to act on behalf of the first named defendant had responded in an entirely reasonable way to the initiating letter sent by the plaintiff's solicitor. They had confirmed that they had authority to accept service of the proceedings. They had also indicated the name of the person who should be named in the proceedings to represent St. Michael's Hospital. They heard nothing more in relation to the matter until they received the letter dated 15th February, 2019 from the plaintiff's solicitor indicating that he had already issued a summons naming a different entity as representing St. Michael's Hospital, but stating that

he was prepared to make an application to substitute Mr. Murtagh as the first defendant, as long as the first defendant would not take any point against the plaintiff under the statute of limitations. The first defendant's solicitor had responded by letter dated 27th March, 2019 stating that they did not require any such substitution application to be made. It was submitted that no credible explanation had been put forward by the plaintiff's solicitor for his failure to serve the summons within the twelve-month period provided for under the rules; nor had he given any explanation as to why the plaintiff had not moved the *ex parte* application until 29th July, 2019.

21. Mr. Binchy BL submitted on behalf of the first named defendant that the plaintiff had not established any reason which could be seen as a special circumstance as to why the summons had not been served within the twelve-month period provided for under the rules. He submitted that the relevant test had been set down by the Court of Appeal in *Murphy v. Health Service Executive* [2021] IECA 3 at paras. 69 – 78. It was submitted that the test of "*special circumstances*" provided for in O.8, meant that the plaintiff had to establish that there was something out of the normal or unusual which justified his failure to serve the summons within the requisite period and also justify the delay in seeking the renewal of the summons up to a date when the *ex parte* application was moved before the court. It was submitted that in this case the plaintiff had not established any special circumstances which justified his failure to serve the summons in time.
22. While it was accepted that the first defendant had not pointed to any specific prejudice, that would only come into the picture once the plaintiff had established that there were special circumstances why he had not served the summons within time. It was submitted that the plaintiff had not even crossed the threshold test of establishing some special circumstances justifying his failure to serve the summons, after which it was appropriate then to look at issues such as prejudice and the balance of hardship.
23. On behalf of the second named defendant, it was submitted that there was no reason why the summons was not served on the second named defendant within the time prescribed in the rules. There was no confusion at all in relation to the identity, or whereabouts of the second named defendant. While there had been some delay on the part of Ms. Grewar in replying to the correspondence from the plaintiff's solicitor, she had by letter dated 20th September, 2018 indicated that Messrs Matheson, Solicitors would accept service on behalf of the second defendant. Thus, the plaintiff still had one month within which to serve the summons on the nominated solicitors.
24. It was submitted that, even in the absence of such nomination, the plaintiff could always have served the proceedings directly on the second named defendant. The plaintiff's solicitor had not alleged that there was any confusion or difficulty in that regard. Instead, it appears that due to the issue in relation to the identity of the person, or entity, who should be named to represent St. Michael's Hospital, he had deferred taking any action to serve the personal injury summons on the second defendant.
25. It was submitted that any confusion that there may have been in relation to the correct identity of the first defendant, did not affect the ability of the plaintiff to serve the

summons on the second defendant, whose identity was at all times known to the plaintiff's solicitor. Furthermore, even if it did transpire that it was necessary to bring an application to substitute Mr. Murtagh in place of the company named as the first defendant, that did not affect the question of service of the summons on the second defendant. The position of the second named defendant was completely independent to that of the first defendant and any steps that may have had to be taken to regularise the matter in relation to the first named defendant, did not prevent the service of the summons on the second defendant.

26. Ms. Egan SC on behalf of the second defendant, adopted the arguments that had been made in relation to the lack of special circumstances on behalf of the first named defendant. However, in relation to the issue of prejudice, she stated that the issue of informed consent was a live issue in the proceedings and in particular in relation to the second defendant. Given that the plaintiff had waited to the very edge of the limitation period to issue the summons and a further period of almost two years had elapsed until the summons was served on the second defendant in August 2019, it was submitted that the second defendant would suffer prejudice by the delay that had been occasioned in bringing the matter on. This was not a case that would turn solely on medical records. The issue of informed consent would turn on the viva voce evidence of witnesses as to what was said in relation to the operation and its possible consequences. Therefore, given the lapse of time that had occurred, it could be said that the second defendant had in fact suffered a prejudice in his ability to defend himself, when the matter would ultimately come on for hearing.

Submissions on behalf of the plaintiff

27. Mr. McGowan BL on behalf of the plaintiff accepted that this case did not turn on the date of receipt of the medical liability report from an expert on behalf of the plaintiff. He accepted that that report had been obtained either at the very end of January 2018, or in early February 2018. A consultation had been arranged with senior counsel, so that the plaintiff could discuss the matter with him and issue firm instructions to proceed with the action. However, he accepted that the necessary medical report had been in place. This was not a case in which the delay in serving the summons was due to a delay in obtaining the necessary medical liability reports.
28. It was submitted that the renewal of the summons in this case was justified having regard to the issue that had arisen in relation to what person or entity could be named as representing St. Michael's Hospital. That issue had arisen due to the content of the letter from the first defendant's solicitor dated 10th July, 2018.
29. Thereafter, there had been discussions between the plaintiff's solicitor and a member of the firm representing the first defendant. When written confirmation had not been forthcoming that it was not necessary for the plaintiff's solicitor to bring an application seeking to substitute Mr. Murtagh in place of the existing entity named as the first defendant, he had written a letter seeking confirmation in that regard on 15th February, 2019. It was stated that that had been done out of prudence, to ensure that there would be no possible confusion as to where the parties stood in relation to that matter. It was

submitted that that was a reasonable course of action for the plaintiff's solicitor to take in the circumstances.

30. Insofar as it had been denied by Ms. Fleming in her affidavit sworn on 13th May, 2020, that any such discussions had taken place, it was submitted that the plaintiff's solicitor had very fairly and fully set out his position in relation to such telephone discussions in his affidavit sworn on 31st March, 2021. Counsel submitted that it was noteworthy that the first defendant's solicitor had not put in any further affidavit dealing with his specific assertions in relation to those discussions. He pointed out that no replying affidavit had been sworn by Ms. Brassil.
31. On inquiry by the court, counsel accepted that the plaintiff's solicitor had not made any written memoranda of the telephone conversations which he had had with members of the first defendant's solicitor's firm.
32. It was submitted on behalf of the plaintiff that where the issue had arisen in relation to the identity of the person, or entity to be named as representative of St. Michael's Hospital, it had been reasonable and prudent for the plaintiff's solicitor to ensure that he got written confirmation in respect of that matter prior to proceeding to serve the summons. He stated that it was clear from the *Murphy v. HSE* case that the court had to look at all of the facts in a given case to decide whether there are special circumstances to justify an extension of time within which to serve the summons.
33. It was submitted that in this case, being a medical negligence action, liability would largely turn on the medical records in relation to the operation that was carried out to the plaintiff by the second defendant on 29th October, 2015 and her management thereafter by the servants or agents of the first named defendant. It was submitted that in these circumstances, it could not be argued that there was any prejudice to either defendant by the delay in serving the summons herein. It was pointed out that no specific, or even general, prejudice had been pleaded by either of the defendants.
34. The court was also urged to have regard to the fact that if the summons was not renewed, the plaintiff's action would be statute barred against the defendants. While it was accepted that that was not a special circumstance per se, it was something that was capable of being put into the balance when the court was considering the issue of hardship to the parties and the interests of justice. It was submitted that this factor weighed heavily in favour of the summons being renewed.
35. It was submitted that in all the circumstances of this case, there were special circumstances which justified the renewal of the summons. Accordingly, the plaintiff submitted that the defendants' applications to set aside the renewal should be refused.

Conclusions

36. The relevant provisions in relation to renewal of a summons are contained in O.8, r,1(3) and (4), which are in the following terms:-

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

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

37. The law in relation to the test which the court must apply when considering whether there are special circumstances which would justify an extension of the time within which to serve the summons, was stated by the Court of Appeal in *Murphy v. HSE* [2021] IECA 3. The relevant principles are set out at paras. 69 – 78 of the judgment of Haughton J. The court has had regard to these principles in reaching its decision herein.
38. The key issue in this case, turns on whether it was reasonable for the plaintiff's solicitor not to serve the summons in light of the response that he had received from the solicitors nominated to represent the first defendant by letter dated 10th July, 2018. When one reads the letters of 28th May, 2018 and 10th July, 2018 side by side, it appears that there may have been a misunderstanding in the office of Daniel Spring & Co.
39. In their letter dated 10th July, 2018, they confirmed that they had been instructed by the State Claims Agency on behalf of St. Michael's Hospital. They confirmed that they had authority to accept service of these proceedings on behalf of the hospital. However, they went on to state "*You might please note that the correct identity of St. Michael's Hospital for the purpose of proceedings is, Seamus Murtagh as nominee of St. Michael's Hospital*". Thus, it appears that they may have been under the mistaken impression that the summons had not issued at that time. However, the content of the letter from the plaintiff's solicitor dated 28th May, 2018, made it clear that a summons had been issued, so as to protect the plaintiff's interests having regard to the provisions of the Statute of Limitations.
40. Be that as it may, what happened after that is entirely unclear. The plaintiff's solicitor has alleged that he had a number of telephone conversations with either one or more members of the firm representing the first defendant. The recurrence of any such discussions, was flatly contradicted by Ms. Fleming in her affidavit. The plaintiff's solicitor in response to that denial did not shed much light on these discussions. All he could state was that he had had a number of telephone conversations with people in the 1st defendant's solicitor's office. He thinks that one of them may have been with Ms. Fiona Brassil. However, he is not even certain in that regard, all he can state is that he definitely had a conversation with her on a different aspect at a later stage when they were anxious that her office should return the summons duly endorsed.
41. The position in relation to the telephone conversations is somewhat opaque to say the least. Mr. O'Reilly does not state how many conversations there were; nor when the conversations took place; nor can he state with whom he had the conversations.

42. The position is further confused due to the fact that Mr. O'Reilly swore two affidavits on 31st March, 2021 in response to the motions brought by the first and second named defendants, in which he dealt with the content of the telephone discussions. However, the two affidavits are not identical. The excerpt quoted earlier in the judgment from the affidavit sworn by Mr. O'Reilly on 31st March, 2021, related to the affidavit that he swore in answer to the first defendant's motion. In his affidavit sworn in response to the second defendant's motion, he stated as follows at para. 8:-

"I beg to refer to paragraphs 7 to 11 of the said affidavit. In that regard it would have been necessary to bring an application to substitute the proposed nominee for the defendant named in the proceedings rather than simply amending the summons. To that end I did have a telephone conversation with some person in the firm acting for the hospital with a view to clarifying whether any such application was necessary. While I was told by someone in that office that such an application would not be necessary, that was never forthcoming in writing."

43. Later at para. 13 of the same affidavit he stated as follows:-

"I say that I did telephone Daniel Spring & Co Solicitors on a number of occasions and in fact spoke to some person in that office who I believe to be Fiona Brassil although at this remove I cannot be sure. I say however that those discussions were solely with a view to trying to avoid the necessity to make the substitute application in relation to the nominee of St. Michael's Hospital. While I was told by someone in that office that no such application would be necessary, that was not forthcoming in writing."

44. Thus, it is clear that the plaintiff's solicitor is making the case that as a result of these unspecified telephone conversations, he was given an assurance by the first defendant's solicitor that it would not be necessary for him to make any application to substitute Mr. Murtagh for the existing first defendant. He states that it was when written confirmation of that state of affairs was not forthcoming from the first defendant's solicitor, that he wrote the letter of 15th February, 2019, offering to make the necessary substitution application, if the first defendant so required. There is no reference in that letter to any assurances or representations having been made by any members of the first defendant's solicitor's firm in telephone conversations prior to the date of that letter.
45. Indeed, if he had received such verbal assurances, in the weeks after he received the letter from the first defendant's solicitor dated 10th July, 2018, it is difficult to understand why he did not just proceed to serve the summons on them as per their verbal agreement. One must note that the absence of any memorandum on the part of the plaintiff's solicitor in relation to these discussions on a very important topic, is hard to understand.
46. It is noteworthy that the plaintiff's solicitor has not alleged that the first defendant's solicitor asked him to hold off serving the summons, either for any particular period, or while they were taking instructions on the matter. Had such a request been made and

had the plaintiff's solicitor acted on it, a case may have been made that the first defendant was estopped from raising the time point. However, that does not arise. The plaintiff's solicitor does not allege that he was requested to hold off serving the summons.

47. In his affidavit sworn on 31st March, 2021 in response to the second defendant's motion, the plaintiff's solicitor stated that he was taken by surprise by the letter dated 10th July, 2018 from the first defendant's solicitor. If that was the case, one would have expected him to write to the defendant's solicitor as a matter of urgency seeking to clarify the matter, given that he would have known that the time for service of the summons was due to expire on 25th October, 2018. At the very least, one might have expected him to have made an application to the Master of the High Court within the twelve-month period for an extension of the time within which to serve the summons, so as to give him some breathing space to attempt to resolve the issue that had arisen. However, that did not happen.
48. Even if one is to take the plaintiff's solicitor's assertions at their high water mark, to the effect that he did receive oral representations from somebody within the firm acting on behalf of the first defendant that it would not be necessary for him to make a substitution application to the court and to have the summons amended, but he had not received such confirmation in writing, it is difficult to see why he waited until February 2019 to obtain such written confirmation. He received such written confirmation from the first defendant's solicitor on 27th March, 2019, but did nothing until the *ex parte* application was moved some four months later on 29th July, 2019. There is no explanation given for that further four-month period of delay.
49. In all the circumstances of the case, the court is not satisfied that the plaintiff has established special circumstances which would justify the extension of time which was granted by Order of the High Court on 29th July, 2019. The plaintiff's solicitor has not given a good reason why the summons was not served on the first named defendant prior to the expiry of the summons, nor why he had to delay until the end of July 2019 to bring an application to renew the summons. While the plaintiff will undoubtedly suffer a prejudice by virtue of the summons not being renewed, the fact that her claim will be statute barred cannot be seen as being a special circumstance in itself. Accordingly, the court will set aside the renewal of the summons ordered against the first named defendant.
50. The case in relation to renewal of the summons against the second named defendant is even weaker. The plaintiff's solicitor was aware of the existence of the second named defendant and knew of his whereabouts. While there was a delay in responding to the initiating letter that had been sent by the plaintiff's solicitor to the second named defendant, a response thereto had been received prior to the expiry of the period within which the summons could be served. The Medical Protection Society had nominated a firm of solicitors in Dublin to accept service on behalf of the second defendant. That was done by letter dated 20th September, 2018. That still left one month within which to serve the summons on that firm of solicitors.

51. However, the plaintiff's solicitor had not in fact been obliged to wait for a response from the Medical Protection Society on behalf of the second defendant. He could always have served the summons directly on the second defendant at any time he chose.
52. While there was some correspondence between the parties in relation to providing a mandate to enable the release of medical records, that was not relevant to the issue of service of the summons on the second defendant; much less did it provide a special circumstance or a reason for the failure to serve it on him.
53. The court is satisfied that there was no special circumstance justifying the failure to serve the summons on the second named defendant within the time prescribed by the rules, nor was there any adequate explanation for the delay in failing to seek the renewal of the summons until 29th July, 2019. The fact that there may have been confusion in relation to the correct identity of the entity to be named as representative of St. Michael's Hospital, that had no bearing on the ability of the plaintiff to serve the summons on the second defendant.
54. Furthermore, the court is satisfied that the second defendant will in fact suffer prejudice due to the delay in serving the proceedings on him and the resultant delay that that will ensue in relation to the hearing of the action, given that one of the issues between the plaintiff and the second named defendant will relate to the issue of informed consent on which the *viva voce* evidence of the second defendant and his memory of events leading up to the operation on 29th October, 2015 will be relevant. There is an undoubted prejudice to parties who are called upon to remember events many years later. Their ability to defend themselves adequately diminishes with time. Accordingly, the court holds that there is a discernible prejudice to the second defendant in the failure of the plaintiff's solicitor to serve the summons on him in a timely manner.
55. For the reasons set out herein, the court will set aside the renewal of the summons as against the second defendant.
56. As this judgment will be delivered electronically, the parties will have two weeks within which to make written submissions on the terms of the final order and on the issue of costs and on any other matters that may arise.