**THE HIGH COURT**

**[2023] IEHC 609**

**[Record No. 2014/8634P]**

**BETWEEN**

**DAVID BYRNE**

**PLAINTIFF**

**AND**

**ADELAIDE AND MEATH HOSPITAL DUBLIN, ST. JAMES' HOSPITAL, RONAN RYAN AND THE HEALTH SERVICE EXECUTIVE**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Bolger delivered on the 7th day of November 2023**

**1.** This is the defendant's application to set aside the renewal of the summons. For the reasons set out below I am refusing this application.

**2.** The plaintiff's underlying proceedings are for damages for personal injuries he claims to have sustained as a result of the medical negligence of the defendants, their servants or agents arising from his care and treatment from when he first attended hospital as an outpatient on 10 October 2012 until he was discharged on 7 January 2013. The plaintiff's solicitors issued a Personal Injuries Summons on 10 October 2014 and, by application dated 9 March 2021, brought an application to renew that summons pursuant to O. 8, r. 1(3) which required the court, on an *ex parte* basis, to be satisfied that there are special circumstances justifying an extension. Twomey J., in an order dated 28 June 2021, ordered the renewal of the summons and identified the special circumstances as follows:-

> *"In circumstances where despite the inadvertence of the solicitors for the Plaintiff to serve the summons during its currency the delay was compounded by the failure of the hospital to provide the Plaintiffs medical records as requested and in an accessible format." (sic).*

By motion dated 14 April 2022, the defendants now seek an order setting aside the order of 28 June 2021 pursuant to O. 8, r.2 which provides:-

*"In any case where a summons has been renewed on an ex parte application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order."*

**3.** By the time the plaintiff applied to renew the summons, a delay of five years and eight months had passed since the expiry of the summons and six years and eight months from when the summons had originally issued. By any definition, these are significant periods of delay.

**4.** The parties agree that this is a *de novo* application rather than a review of the decision made by Twomey J. Nevertheless, the order made and the special circumstances as identified by Twomey J. in his order cannot be ignored by this court. In *Bingham v. Crowley* [2008] IEHC 453 , Feeney J. held that a defendant moving an O. 8, r. 2 application should *"demonstrate that facts exist which significantly alter the nature of the plaintiffs' application to the extent of satisfying the Court that, had those facts been known at the original hearing, the order would not have been made"*. No such claim is asserted by the defendants here and they have not put any additional evidence on affidavit in terms of correspondence, timeline, *etc.*, that was not before Twomey J. In fact, it is the plaintiff's solicitors who have exhibited additional correspondence that was not before Twomey J.

**5.** I have also had regard to the comments of Noonan J. in *Nolan v. Board of Management of St. Mary's Diocesan School* [2022] IECA 10, where he stated at para. 27**:-**

*"[T]he court's consideration of whether the special circumstances, once established, justify the extension, may be quite different at the ex parte stage from that arising when the matter is heard inter partes. Of course, at the ex parte stage, the court will generally not be aware of any specific matters of prejudice that might arise from the defendant's point of view, save that which may be presumed from the length of the delay in any given case. It is only at the latter stage that the court will have the benefit of evidence and argument from the defendant which, for example in the context of prejudice, may provide cogent reasons against renewal, not available to the court at the first hearing."*

**6.** Essentially the defendants here seek to make the case that on a proper application of the relevant legal principles, the order for renewal should not have been made. They have also set out the prejudice they will suffer in the event that they have to defend these proceedings after such a lapse of time. They do not assert any specific prejudice but they

do say they will suffer general prejudice from delay. In those circumstances, the focus of submissions to this court was primarily around the existence of special circumstances and whether, upon an application of the correct legal principles, such special circumstances do or do not exist.

**Special circumstances**

**7.** Special circumstances justifying an extension must be established before the court can look at where the balance of justice lies (*Murphy v. HSE* [2021] IECA 3, *Nolan v. Board of Management of St. Mary's Diocesan School* [2022] IECA 10). In reliance on that line of authority, Egan J., more recently in *Power v. CJSC Indigo Tadjikistan* [2022] IEHC 534, confirmed at para. 12 that:-

> *"a party seeking renewal of a summons must, as a 'gateway requirement' establish that special circumstances exist… presence or absence of material prejudice to either party is relevant in determining whether the special circumstances found to exist justify the renewal or whether, notwithstanding that special circumstances exist, a renewal ought not be granted."*

**Do special circumstances exist here?**

**8.** A very substantial period of time has been allowed to lapse from when the Personal Injuries Summons was originally issued to when the plaintiff's solicitors applied to renew it. Many of the authorities cited to this court involved periods of delay far less than the five years and eight months at issue here. Whilst the length of this delay might be more difficult to justify by the existence of special circumstances, it does not mean in and of itself that it cannot be justified.

**9.** Twomey J. was undoubtedly correct in his finding that there had been inadvertence on the part of the plaintiff's solicitors in serving the summons during its currency. However, this is not a case of the plaintiff or his solicitors sitting back and doing nothing at a time when they should have been focused on issuing the summons. This is a medical negligence claim, so the proceedings could not be served unless or until the plaintiff had secured an expert report. A vast amount of correspondence has been exhibited by both sides showing the extensive efforts that were being made by the plaintiff and his solicitors over many years in trying to secure the necessary expert report from the UK doctor whom they had selected as their expert. That went on from 2014 until a full report was eventually furnished in September 2020. During some of that time there was active correspondence between the

plaintiff's solicitors and their medical expert and the defendants' hospital from which the plaintiff's solicitors were trying to obtain medical records in an accessible format. The special circumstances asserted by the plaintiff are that his solicitors had to go back to the hospital on a number of occasions seeking copies of the medical records in an accessible format. The medical expert could not open one of the CDs that the hospital had provided because it was scratched, another version of that CD did not contain the plaintiff's coronary angiogram images and another version was also scratched and could not be opened. On each of the occasions the plaintiff's solicitors had to go back to the hospital seeking more medical records. The correspondence exhibited on affidavit shows the hospital responding expeditiously to those requests (apart from a period of time when they had to retrieve records from long term storage, on which I comment further below) but at no time did the defendants' correspondence dispute or challenge the *bona fides* of the assertions of the medical expert that he could not access the CDs that had been furnished to him.

**10.** There were also some periods during which there was simply no correspondence at all for lengthy periods of time. The defendants point to that as inadvertence by the plaintiff's solicitors constituting, in effect, a breach of the plaintiff and his solicitors' obligation to *"act with reasonable expedition"* (Haughton J., *Murphy v. HSE* [2021] IECA 3) or with *"appropriate expedition"* (Clarke J., *Moloney v. Lacey Building* [2010] IEHC 8). The plaintiff says those periods of delay must be considered in the light of what the hospitals did or did not do in furnishing the plaintiff's medical records.

**11.** The first significant period of delay was from May 2017 up to February 2018, a period of some nine months. On 15 May 2017 the plaintiff's solicitors sent a CD furnished by the hospital to the plaintiff's medical expert, who told the plaintiff's solicitors that there was no angiogram on it. In February 2018 the plaintiff's solicitors contacted the hospital seeking further documents including the angiogram, which the plaintiff's solicitor then furnished to the plaintiff's medical expert on 28 February 2018. That angiogram could not be opened by the plaintiff's expert, so another disc was procured by the plaintiff's solicitors and sent to the medical expert in April 2018.

**12.** The next correspondence exhibited is an email of 30 August 2019 from the plaintiff's solicitors to the medical expert's office, referring to their email of 29 August 2019 (*i.e.* the previous day) and confirming that they had requested a further copy of the CD with the angiogram and would provide the expert with same in due course. The correspondence

confirmed that the plaintiff's expert was still unable to access the angiogram at that point in time.

**13.** By December 2019, the correspondence refers to the plaintiff's expert still having problems opening the CD that had been furnished to him. The next correspondence was on 8 June 2020 when the plaintiff's solicitors emailed the plaintiff's expert stating that they had been advised that the CD had been sent to their office, that they were expecting to receive it that day or the next and that, upon receipt of same, they would immediately courier it to the expert. There was delay at that stage because the medical records were being retrieved from storage and had not yet been furnished to the plaintiff's solicitors.

**14.** In summary, the correspondence demonstrates the real and repeated difficulties for the medical expert in accessing the information from the CDs that were furnished by the hospitals.

**15.** The defendants said on affidavit and in their submissions that the precise nature of the expert's difficulties remain unclear and they referred to *"a lack of clarity and confusion"* which they summarise at para. 19 of their grounding affidavit:-

> *"a. On 10 May 2017, plaintiff's solicitor wrote to Tallaght Hospital requesting a new CD as the previously provided CD was scratched.*
>
> *b. On 28 February 2018, plaintiff's solicitor provides a further letter to Tallaght Hospital seeking a replacement CD as the previous one did not contain the plaintiff's coronary angiogram images.*
>
> *c. On 16 March 2018, plaintiff's solicitor provides a further letter to Tallaght Hospital seeking a replacement CD as the previous one was scratched.*
>
> *d. On 30 August 2019, plaintiff's solicitor provides a further letter to Tallaght Hospital seeking a further CD as the previous one could not be opened."*

**16.** I see no lack of clarity or confusion in the narrative presented in the correspondence. The plaintiff's expert clearly stated why he could not access the information, namely, that two of the CDs furnished to him on separate occasions had been scratched, that the angiogram had been missing from another CD and that a further CD furnished to him could not be opened. His version of events was never challenged in the correspondence and, despite the defendants' averments as to an alleged lack of clarity, it was acknowledged during submissions that the defendants were not suggesting that the CDs were not scratched but, rather, that no one knew where

they had been scratched. The expert repeatedly stated that he could not access the information on the CD. I have been given no reason to doubt that his account. The plaintiff says the inaccessible information was the defendants' fault and no alternative explanation has been furnished by the defendants other than to question where the CDs had been scratched.

**17.** I conclude that the significant periods of delay which the defendants blame on the solicitors' inadvertence, were also (though not solely) due to the difficulties encountered by the plaintiff's expert as a result of the inadequacies in the CDs furnished by the defendants.

**18.** The defendants blame the plaintiff's solicitors for not having taken more proactive steps to move things along. Certainly, the plaintiff's solicitors could have chased the expert more, but the correspondence does show some chasing and it is not difficult to detect a concern the plaintiff's solicitor had about having to do that, including, for example, his letter of 12 December 2019 to the plaintiff in which he encloses a copy of the letter he had sent to the expert with attachments, his statement that he was going to phone the expert early in the new year if he did not respond and that he did try and get him on the phone a couple of weeks prior to that but had failed.

**19.** I do not accept the defendants' submission that the plaintiff's solicitors could or should have instructed a new expert. Not only might that have suggested doctor shopping which the plaintiff's solicitor fairly said would have been of concern to him, but it would have been unlikely to have improved the difficulties encountered by the current expert in accessing the material provided by the hospital which any medical expert would have needed to prepare a report.

**20.** The final period of delay that causes me concern is from June 2020, when the plaintiff's solicitors eventually received the expert's report, up to March 2021, when the motion to renew the summons was issued, *i.e.* nine months later. The only explanation furnished was the fact of the COVID-19 pandemic that was going on at that time, a situation that was undoubtedly challenging, unusual and unprecedented. The plaintiff's solicitor does not push that hard, but I do think he is entitled to highlight the difficult situations that existed in the country at that time.

**21.** In all of the circumstances, it seems to me that Twomey J.'s description of *"circumstances where despite the inadvertence of the solicitors for the Plaintiff to serve the summons during its currency the delay was compounded by the failure of the hospital to*

*provide the Plaintiffs medical records as requested and in an accessible format" (sic)* is a fair representation of what had been going on. Whilst the periods of delay and inaction are far from satisfactory, the very unusual, particular circumstances for which the defendants clearly share responsibility, are such that I am satisfied that special circumstances, as analysed in the case law, were in place such as to justify the renewal of the summons.

**Balance of Justice**

**22.** This case does represent a very lengthy period of delay which was significantly greater than that applied in many of the cases cited to the court. Whether such a delay has prejudiced a defendant must be considered in the second limb of the established test for the granting of an order allowing a summons to be renewed under O. 8, r. 2 *i.e.* a consideration of the balance of justice.

**23.** The defendants do not assert specific prejudice but rely on the general prejudice that the passage of time may cause for witnesses' recollection of what took place. It is generally acknowledged that cases involving medical records are less likely to suffer from impaired memory due to the central role of those medical records. The defendants do not strenuously contend that they will suffer a prejudice outweighing that of the plaintiff who will be denied his entitlement to bring his claim for damages for the personal injuries he claims to have suffered due to the negligence of the defendants, its servants or agents.

**Conclusion**

**24.** The plaintiff has delayed considerably in applying to renew his summons but I accept that there were special circumstances justifying the extension of time arising from the difficulties encountered by the plaintiff's solicitors in securing an expert medical report which were significant contributed to by to the expert's inability to access the information furnished by the defendants because of the condition of a number of CDs and the absence of necessary information from others. Thus, despite the inadvertence of the plaintiff's solicitors to serve the summons during its currency, the delay was compounded by the failure of the hospital to provide the plaintiff's medical records as requested in an accessible format.

**25.** The balance of justice is in favour of allowing the plaintiff to renew his summons given the prejudice he would suffer in not being permitted to pursue his claim as compared with the general prejudice for the defendants in having to defend proceedings after so many years.

**Indicative view on costs**

**26.** As the plaintiff has succeeded in resisting the defendants' application to set aside the order previously granted renewing the summons, my indicative view on costs is that the plaintiff is entitled to his costs to be adjudicated upon in default of agreement in accordance with s. 169 of the Legal Services Regulation Act 2015 but that a stay should be put on the execution of those costs pending the resolution of the entire proceedings. I will put the matter in for mention before me at 10.30am on 30 November 2023 to allow the parties to make whatever submissions they may wish to make in relation to the orders to be made at this point in the proceedings.

**Counsel for the plaintiff:** Richard N. Keane SC and Francis McGagh BL

**Counsel for the defendants:** Conor Bourke SC and Paul McGinn BL