

THE HIGH COURT

[2023] IEHC 751
[2022 No. 4182 P]

BETWEEN

CAROLINE O'BRIEN

PLAINTIFF

– AND –

WICKLOW COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr Justice Max Barrett delivered on 15th December 2023.

SUMMARY

In this judgment I explain why I will order the renewal of a summons under O.8 RSC.

1. By notice of motion of 18th September last, Ms O'Brien seeks, among other matters, renewal of her personal injuries summons. Her motion is accompanied by a grounding affidavit of Ms Costello, a solicitor acting for Ms O'Brien. Her application is grounded on O.8, r.1(4) RSC, Order 8 provides, among other matters, as follows:

“1 (1) No original summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons.

...

(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.”

2. Ms Costello outlines the underlying facts in these proceedings (as claimed by her client) at para. 3 of her grounding affidavit. Some of the ground traversed in that paragraph is quite personal and, though I have read it, I do not propose to recite it in this judgment. I note simply that the date of the incident in respect of which the claim is brought was 31st December 2019, and that thereafter the following events/correspondence ensued:

17.02.2020. Ms Costello instructed in relation to the workplace death of Ms O’Brien’s husband but not at that time instructed to commence PI proceedings.

14.01.2021. HSA investigation concludes and decision not to prosecute taken. Decision not to prosecute communicated to Ms Costello in letter of 14.01.2021.

01.02.2021. Ms Costello sends request for summary of reasons not to prosecute to the DPP.

16.03.2021. DPP confirms reasoning for decision in letter dated 16.03.2021.

15.10.2021.	Ms Costello seeks deceased's employment file from defendant.
25.11.2021.	Request for employment file decided upon and certain information released.
26.11.2021.	Coroner's inquest conducted and concludes on same day.
December 2021.	Ms Costello avers that " <i>Pending full investigation of the tragic circumstances of the deceased's demise the plaintiff was understandably reluctant to institute proceedings until such investigations were concluded</i> ", presumably (though this is not stated) so as to make an informed decision in this regard. In any event, sometime in December 2021 Ms Costello was instructed to commence the within proceedings.
04.02.2022.	PIAB authority to commence proceedings issues.
08.08.2022.	PI summons issues. Delays in service because of the plaintiff widow's concern about exposing herself and the statutory dependents to re-living the grief of the deceased's death.
12.05.2023.	Instructions received from the plaintiff widow to pursue the proceedings.
22.06.2022.	Outstanding information meant that firm instructions were not received until 22.06.2022.
06.07.2023.	Formal letter of claim completed and further instructions received.
August 2023.	<i>"Regretfully, due to an administrative error within my office, whilst on vacation from 1st August to 14th August 2023, the Personal Injury summons was not served within the 12 month period. Once I became aware of the error I contacted and instructed counsel over the vacation period to draft the application herein."</i>

3. In addition to the foregoing, there were various letters involving Ms Costello and Wicklow County Council between 18th February 2020 and 25th February 2021, and further contact in the summer of this year. I do not see that at any point Wicklow County Council has raised any

issue as to the pace or timing of the proceedings. It was on notice from an early period that a solicitor was acting and must have been aware of at least the potential for proceedings to issue (in truth, one would have thought them all but inevitable) from Ms Costello's statement in her letter of 18th February 2020 that "*We have been instructed both to protect and preserve the interests of our client*", albeit that Ms Costello was not instructed to commence proceedings until a later stage.

4. If I had one observation to make concerning the above chronology it is this. I fully appreciate that the unexpected death of the deceased must have come as a terrible shock to the plaintiff widow and the statutory dependents and they have my sincere sympathies for what has occurred. That said, the timing of PI proceedings is very tight, with the courts required to strike a balance, in the event of delay, between the interests of both sides. That places solicitors for plaintiffs in a most delicate, even invidious, position. They are of course sensitive to their clients's grief, and they do not want to be seen to be 'chasing business', especially in a context where someone has unexpectedly passed away. Yet they cannot assume that in the event of delay a court will necessarily rank a client's grief and a solicitor's related empathy higher than the interest of the defendant in proceedings being brought on-time and at a suitable pace.

5. Ms Costello moves on to aver as follows:

“18. *The defendant is not, it is submitted, significantly prejudiced, as is apparent from the correspondence and the nature and extent of subsequent investigations as herein before referred...should this...Court accede [to] the application herein. However, should this...Court not accede to the Application herein, the plaintiff's action will stand statute-barred not only on her behalf but also on behalf of the statutory dependents, who may in the circumstances thereof have recourse against the plaintiff...*

20. *The time within which the PI summons herein has not been served is marginal, and in the context thereof does not present the defendant with significant prejudice, and which delay in service was due entirely to an administrative error occasioned by my absence from the office for a two-week period for my summer vacation.*

21. *It is difficult to see how the defendant could not have been aware at all material times of the complaint set out in the personal injuries summons*

herein. It is submitted [that] the defendant cannot, in the circumstances thereof, be significantly prejudiced in any real sense should this...Court accede to the application herein.

22. *The consequences for the plaintiff and the deceased's family should this...court refuse to accede to the application herein, is one of irreparable prejudice where the plaintiff's action and those of the deceased's statutory dependents will go statute barred. It is respectively submitted [that] the interests of justice lean in favour of the acceding to the application herein, where the alternative consequence for the plaintiff and the deceased's dependents is to have a cause of action arising from a terrible tragedy compounded by her/their potential claim going statute barred as against the defendant."*
23. *I further...[submit that] no injustice is done to the defendant should this...Court deem it fit to grant the relief/s sought in the notice of motion."*

6. At the hearing of this matter I was referred to the judgment of the Court of Appeal in *Nolan v. Board of Management of St Mary's Diocesan School* [2022] IECA 10, a case of alleged workplace bullying and harassment in which the plaintiff unsuccessfully appealed against a decision of the High Court to refuse a renewal of the PI summons. The following points of relevance (in Bold text) can be, it seems to me, taken from the judgment for the court in that case:

- a. **A summons once issued remains valid for a period of one year before it expires unless it has been served. This is in effect an extension of the statutory limitation period as is, of course, any subsequent renewal. (§16).**

In this case the summons of August 2022 expired in August 2023 without being served. This inadvertent omission was quickly recognised and acted upon. The fact that (i) the inadvertent omission occurred while the solicitor in charge was on holidays coupled with (ii) the “*irreparable prejudice*” that will be done to a widow and the deceased's six statutory dependents if their claim goes statute barred, (iii) where the period of non-service is “*marginal*”, in circumstances where the defendant is not “*significantly*

prejudiced’ unless I accede to the within application are, I understand the special circumstances claimed. To my mind the inadvertent nature of the omission *coupled with* the extreme prejudice to which a failure to renew could leave the widow and dependents exposed *coupled with* the relatively slight period before this application was commenced (I am not sure that I would call that period “*marginal*” but it is not very great) suffice to amount to special circumstances.

- b. A tension therefore arises between the clear policy behind limitation periods to protect parties from stale claims and bring finality to litigation on the one hand, and the court’s jurisdiction to, in effect, extend that limitation period by renewing a summons that has expired on the other. (§16).**

Noted.

- c. At one time in the past, the bar was relatively low in terms of renewal applications which were frequently granted more or less for the asking. That culture has changed very significantly in recent years, not least by virtue of the State’s, and thus the court’s obligations under Art.6 ECHR. (§17).**

Noted. I cannot see that in the narrow timeframe presenting that an Art.6 risk presents in acceding to the within application.

- d. The new O. 8 seeks to address perceived laxity arising under the old rule where it was not too difficult to surmount the ‘good reason’ hurdle in cases not concerned with difficulties of effecting service. (§17).**

Noted. I do not see that in the circumstances presenting the word “*laxity*” falls properly to be applied in terms of how the plaintiff widow or her solicitor have proceeded.

- e. **Under O. 8, r. 1(4) RSC, after a summons has expired, an application for renewal must be made to the court and the court must be satisfied that there are “*special circumstances*” which justify an extension, such circumstances to be stated in the order. (§19).**

Noted.

- f. **In *Murphy v. HSE* [2021] IECA 3, Haughton J. considered the meaning of the expression “special circumstances” in the Rule, noting that (i) it was generally accepted to be a higher test than that of “*good reason*”, (ii) (a) the use of the word “*special*” did not raise the bar to “*extraordinary*”, but (b) it did suggest that some fact or circumstance that is beyond the ordinary or the usual needs to be present. (§20).**

I refer to my observations at (a). Again, to my mind the inadvertent nature of the omission *coupled with* the extreme prejudice to which a failure to renew could leave the widow and dependents exposed *coupled with* the relatively slight period before this application was commenced, suffice to amount to special circumstances, *i.e.* circumstances that go beyond the ordinary.

- g. **The word “*special*” necessarily imports a circumstance that is not normal or common. (§21).**

Again, to my mind the inadvertent nature of the omission *coupled with* the extreme prejudice to which a failure to renew could leave the widow and dependents exposed *coupled with* the relatively slight period before this application was commenced, suffice to amount to special circumstances, *i.e.* circumstances that go beyond the ordinary, yielding a circumstance that is neither normal nor common.

- h. **An applicant for an extension of time has to establish that there are special circumstances and that those special circumstances justify the extension. (§21).**

I reiterate the point at (g), save to note by way of additional observation that it seems to me that the special circumstances presenting justify the extension sought.

- i. **The prerequisite is that there is a special circumstance which, once established, requires the court to consider whether that circumstance justifies renewal. (§21).**

Noted.

- j. **In *Murphy*, Haughton J. referred with approval to *Brereton v. The Governors of the National Maternity Hospital* [2020] IEHC 172, holding that the deciding court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused. In *Murphy*, Haughton J. then expressly approved the approach taken in *Chambers v. Kenefick* [2005] IEHC 402. In its judgment in *Nolan* the Court of Appeal offered further illumination in this regard, stating:**

*“[The Court, in *Murphy*] recognised that special circumstances alone are not enough and placed emphasis on the requirement for those circumstances to justify extension. His reference to there not being a second tier or limb to the test refers to the fact that special circumstances and the justification for renewal are not two separate and distinct matters, but fall to be considered together in the analysis of whether it is in the interest of justice to renew the summons. Prejudice is a component of that analysis. However, before that analysis can be arrived at, it must be established that there are special circumstances.” (§§21-26).*

I have now repeatedly identified the special circumstances that I see to present. I see in those circumstances a justification for renewal that accord with justice. Conversely, were I not to grant the renewal in the special circumstances presenting, I consider that there would be every possibility of an injustice being wrought in the form of the extreme prejudice that could then arise for the plaintiff widow and the statutory dependents. Though my renewal of the summons undoubtedly causes some degree of prejudice to the Council in that it will be sued on an action that would otherwise be statute-barred, that arises in circumstances where (i) it must have anticipated that proceedings would almost certainly be forthcoming. (ii) the special circumstances that I have identified present, and (iii) a failure to accede to the within application could result in extreme prejudice to the plaintiff widow and the six dependants, all over a not great elapse of time before the solicitor's omission was identified and the within application brought. I consider that far the greater injustice would be done by my not acceding to the within application than such prejudice as is occasioned to the Council by my acceding to it.

7. For the reasons stated above, I will order the renewal sought.