[2020] IEHC_483

THE HIGH COURT

[2018/7802 P.]

BETWEEN

SHEILA MURPHY

PLAINTIFF

AND

THE HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice Cross delivered on the 29th day of September, 2020

1. By notice of motion dated the 6th July, 2020 the defendant sought the following reliefs in this matter:

   (a) An O.8 r. 1 (2) pursuant to O. 8 r. 2 of the Superior Courts setting aside the order of the High Court made on 3rd February, 2020 on foot of an ex parte application renewing the personal injuries summons for a period of three months.

   (b) And for such further or other orders as may be deemed appropriate.

Background

2. By High Court personal injuries summons dated the 31st August, 2018 the plaintiff claimed damages for the alleged negligence and breach of duty of the defendants as a result of her treatment at a defendant's hospital in Mayo in March 2016. The plaintiff contends that the defendants failed to properly treat her for her symptoms and as a result she sustained a right parietal ischaemic infarct. The plaintiff is 81 and is still in very poor health.

3. The summons issued was in the form of a "precautionary" summons issued in order to prevent any further running of time given the provisions of the statutes of limitations without the benefit of expert opinions or particulars. This is a regular form of pleading that seems to have become more common after the period for the Statute of Limitations reduced from three to two years.

4. By order of Ms. Justice Murphy dated the third of February 2020 upon the ex parte application of the plaintiff the summons herein was renewed for a period of three months due to the specified special circumstances justifying the making of the order as being the delays that occurred in obtaining medical reports.

5. The defendant has brought the instant application for this order to be set aside.

Order 8

6. The relevant provisions of O. 8 r. 1 with effect from the 11th January, 2019, amending the previous O.8 provide:

   "(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.

(2) *The Master on an application made under sub-rule (1), if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent summons be renewed for three months from the date of such renewal inclusive.*

(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".*

7. Prior to January 2019 an order renewing the summons for a period of six months might be made where the court was satisfied that "reasonable efforts have been made to serve the defendant or where other good reason exists". Up up to twelve months after the issue of the summons the application is to the Master and after the expiration of twelve months to the Court. This is still the case under the amended rule. However, the basis for granting the application by the Court is different under the revised O.8. r. 1. Since January 2019 when application to the Court is made the Court must be satisfied that there are "special circumstances" justifying the extension.

8. The period of renewal now allowed under O.8 r. 1 is reduced from six months to three months and provisions that had previously existed to allowing a renewal "from time to time during the currency of the renewed summons" are not repeated in the amended order.

Timeline

9. An affidavit sworn on behalf of the plaintiff provide the following timeline which is not significantly in dispute. On the 28th April, 2018 the plaintiff made enquiries to her present solicitor and had a telephone consultation with the solicitor on the 15th May, 2018. The plaintiff delivered a written statement on the 29th May, 2018 and the data access request was sent to the defendant's hospital. Medical records were received from the defendant's hospital on the 11th July, 2018 and on the 30th August, 2018 instructions were given by the plaintiff to her solicitor to commence proceedings. The protective summons was then issued on the 31st August, 2018 and on the 13th September, 2018 a request for payment for outlay was sent by her solicitor to the plaintiff which request seems to have been mislaid by the plaintiff and it was only at the commencement of 2019 on the 23rd January that her solicitor received the payment. On the 21st March, 2019 the plaintiff's records were sent to Mr. M. Saab for an expert report on breach of duty and a report was received from him on the 19th May, 2019 which had certain factual inaccuracies that in relation to what occurred and a statement was sent from the plaintiff to Mr. Saab on the 8th August, 2019 and on the 12th September, 2019 two further witness statements were sent to Mr. Saab as the plaintiff required factual support for certain of the instructions that she had given and on the 16th September, 2019 a report

was received from the expert identifying breach of duty and advising of report and causation from a stroke specialist which resulted in the requests being sent to Dr. Starke but no response was received and on the 20th September, 2019 an inquiry was sent to Dr. Subramanin about his availability which was confirmed on the 23rd September, 2019 and on the 24th September, 2019 instructions were sought from the plaintiff correspondence was entered into with the plaintiff in relation to costs on the 30th September and the 2nd October, 2019 and on the 23rd October, 2019 instructions were received from the plaintiff to proceed with Dr. Subramanin and he was furnished with medical reports and instructions from the plaintiff's solicitors on the 31st October and he provided an initial report on the 3rd December. A final report was received from Mr. Saab after review of Dr. Subramanin's report on the 20th December, 2019 and a final report from Dr. Subraminin on the 14th January, 2020 and on the 29th January, 2020 a letter of claim was sent to the defendants care of the State Claims Agency and on the 3rd February, 2020 the application was made to Ms. Justice Murphy and on the 14th February, 2020 a letter was received from State Claims Agency nominating solicitors for service and on the 19th February, 2020 a renewed summons was served on the defendant.

The test

10. There was some disagreement between the parties as to the appropriate test for an application to extend pursuant to O. 8 r. 1 (3). It was submitted on behalf of the defendant that judicial interpretation confirms that the appropriate approach is to consider two distinct aspects of the application. First that the court must be satisfied before renewal of the summons that special circumstances exist which justify an extension of time in order for the plaintiff to seek leave to renew and second of all that the plaintiff must also demonstrate that there are good reasons to justify the renewal of the summons. In this regard the defendant relied upon the decision of O'Moore J. in *Ellahi v. Governor of Midlands Prison and Others* [2019] IEHC 923 at para. 17:

> *"The position taken on behalf of the Defendants is that there were two hurdles for the Plaintiff to overcome in front of Meenan J. Firstly, given the time at which the application was made, they had to show that there were special circumstances justifying an extension of time in order to seek leave to renew the summons and that requires, as I said, the special circumstances stipulated in Order 8 rule 1(4). Secondly, what had not gone away or disappeared as a requirement (and it's difficult to see why it should), was the separate obligation to show that on the facts of this case that there were other good reasons which justified the renewal of the summons. I agree with that analysis."*

This position was also confirmed by Hyland J. in *Brereton v. Governor of National Maternity Hospital and Others* [2020] IEHC 172. Meenan J. in his original allowing of the extension in *Ellahi* concentrated on these "special circumstances" alone.

11. Apart from the stipulation in the passage quoted by O'Moore J. of "*other* "good reasons, I have little difficulty in accepting that special circumstances must exist to allow an extension of time and that there must be good reason to justify the renewal. I would not

wish to be seen to be in any way going against decisions of my colleagues. Suffice it to say without those aforementioned decisions, it would not be my reading of O. 8. that a court would first be obliged to consider "special circumstances" and then decide on "good reasons". Happily, I do not have to pronounce on that issue because I believe the point made by the defendants is a distinction without a difference because as was conceded by Mr. Buckley of the Inner Bar on behalf of the defendants they are no circumstances in which he could imagine a court would hold that their special circumstances justifying the extension of time and not conclude that there were good reasons justifying the renewal of the summons. Certainly no such difference was advanced in this case and I shall treat this application on the basis as to whether the plaintiff has satisfied the court that there are special circumstances justifying the extension because if there are special circumstances it defies logic that there should not be a good reason for doing so. The test of "special circumstances is a more onerous one than that of "good reasons".

Defendant's submissions

12. Mr. Buckley stated that there were three courses available to the plaintiff:

(a) They could have issued and served the summons within time in the usual way;

(b) They could have within twelve months have renewed the summons before the Master and then serve it, presumably within time;

Counsel did not dispute that had the application been made to the Master within twelve months that he would not have had any difficulty and would not have brought the instant or any application.

(c) They could have as they decided to let the summons lapse and apply as they did but as the plaintiff took the third course it was submitted that there were no special circumstances justifying the renewal of the summons.

And that the order of Murphy J. should be set aside.

13. It was submitted on behalf of the defendant that the plaintiff's original application made no reference to special circumstances. It is clear however that from the original affidavit Ms. Justice Murphy was able to adduce that the reason for the delay was the delay in obtaining medical reports which were "special circumstances" justifying the application and this was so stated in accordance with the provisions of O. 8 r. 1 on the Order.

14. The defendants submit the delays in obtaining medical reports cannot constitute a special circumstance to justify the extension of time for leave to renew a summons. The defendant of course accepts that in a professional negligence claim the claim must be supported by an expert report.

15. In learned submissions made by Mr. Buckley and prepared by Ms. Sarah Corcoran, of Counsel, the defendants referred to a number of cases commencing with the decision of Hyland J. in *Brereton* (above) in which she identified the special circumstances as follows –

That the plaintiff's solicitor intended to serve the Summons before the expiry of the twelve month period, that plaintiff's solicitor intended to serve the summons before the expiry of the twelve month period, that he inadvertently failed to do so, that the plaintiff's solicitor wrote to the defendant before the expiry of the twelve months informing the defendant of the intended proceedings prior to the expiry of the twelve months, that the application to renew was made on 28th May, 2019, being a relatively short one, of ten weeks from the date upon which the Summons expired and Hyland J. identified a spectrum of delay ranging from the extreme of five years and four months to shorter periods. And she held that given the delay and the notification of the intention to issue proceedings that there was unlikely to be any significant prejudice to the defendant and none was identified. Hyland J. indicated in *Brereton* that if the delay had been even a month more than ten weeks her approach would have been different.

16. In the instant case the defendant objects that they were given no notice of the intention of the plaintiff to issue the proceedings and whereas no specific prejudice is pleaded the general prejudice was identified by Mr. Buckley.

17. The defendant takes issue with the submissions and averments on behalf of the plaintiff that it was in the circumstances inappropriate to serve the summons prior to the receipt of the expert opinions.

18. The defendant relied upon the decision of O'Sullivan J. in *Allergan Pharmaceuticals (Ireland) Ltd v. Noel Deane Roofing and Cladding Ltd and Others* [2006] IEHC 215 which held that a legal advisor is correct concern to have a proper basis for initiating proceedings against a professional defendant had to be counter balanced by a proportionate advertence to the policy underlying the statute of limitations so as to protect patients or to protect prospective professional defendants and the defendant submitted that a party is not entitled to wait indefinitely for an expert report before issuing or serving a summons litigants should only be forwarded such time as is reasonably necessary and in this regard reliance was also made upon the decision of Clarke J., as he was in *Maloney v. Lacey Building and Civil Engineering Ltd* [2010] 4 I.R. p. 417 and in that case Clarke J. adopted the judgment of Feeney J. in *Bingham v. Crowley* [2008] IEHC 453 in which Feeney J. stated:

> *"The Court is satisfied that the opinion of the first named plaintiff that additional reports were required from further medical experts was not a good reason for the non-service of the plenary summons".*

It should be noted of course, as Clarke J. stated, that in that case there was no averment on behalf of the plaintiff that the opinion or lack of it impacted on the ability to serve the summons. In Maloney (above), Clarke J. held that the absence of an expert report could be a good reason for not serving a plenary summons but only if the expert report was reasonably necessary in order to justify the decision to responsibly maintain the proceedings and if appropriate expedition was used in attempting to prepare the report.

19. Accordingly, the defendant submitted that appropriate expedition was not used in attempting to procure the reports and the defendant submits that the delay was not that of the medical advisors but that of the plaintiff's solicitor.

20. The defendant further submits that the delay was compounded by the plaintiff's solicitor failure to notify the defendant of the claim and that they made no effort to apply to the Master to renew the summons before the expiry of same. In *Chambers v. Kenefick* [2007] 3 I.R. p. 526 Finlay Geoghegan J. in a case of inadvertence stated:

> *"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."*

20. The defendants forcefully make the case that in the instant matter the plaintiff's chose to not issue the proceedings deliberately and that there was no inadvertence and that there was no notification.

The plaintiff's submissions

21. The plaintiff accepts that it is incumbent upon him to show that there were special circumstances. As I have previously indicated I am of the view that if the plaintiff can demonstrate "special circumstances" then certainly in this case no issue of "good reason" would apply.

22. The plaintiff disputes the defendant's suggestion that they allowed "eight months to pass before sending the plaintiff's medical reports to an expert. Shortly after the protective summons was issued a request for payment for the outlay and in particular for the costs of the expert report from Mr. Saab was made to the plaintiff and unfortunately apparently the plaintiff lost or mislaid the request and had to be reminded. I can understand that to be the situation given the plaintiff's age and infirmity.

23. The personal injuries summons was issued on the 31st August, 2018 to protect the plaintiff's position pursuant to the Statute of Limitations 1957 as amended. The plaintiff submits that it was not until 14th January, 2020 that they received the necessary expert opinions to permit service of the summons upon the defendant.

24. The plaintiff submits that the position in this case as a medical negligence case should be distinguished from other cases not involving medical negligence. I do not accept that submission. Obviously each case must be considered on its own merits and on its own

grounds but there is no particular basis for distinguishing the timelines in relation to medical negligence as a category rather than other cases.

25. This is a case involving allegations of professional negligence. The plaintiff relies upon the Code of Conduct of the Bar of Ireland which provides at 5.1.16:

> "Barristers shall not settle a pleading claiming fraud or professional negligence without express instructions. Save in a case of alleged professional negligence on the part of a Barrister or solicitor, Barristers ought not to settle a pleading claiming professional negligence unless they have satisfied themselves that expert evidence is or will be available to support such claim. In certain circumstances, such as when the time for issuing proceedings is in danger of expiring, Barristers may settle pleadings without such expert evidence, but should advise that proceedings should issue without being served until the required expert evidence is available."

This provision mirrors the law as it is understood in relation to professional negligence which prohibits proceedings against alleging professional negligence in the absence of expert opinions.

26. Especially since the reduction in the statute of limitations period the practice has grown of issuing what are described as "protective summonses" in the style as in the instant case awaiting particulars both of negligence and indeed of injuries in absence of professional opinion supporting the claim in order to prevent the running of the statute of limitations.

27. The plaintiff submits through Mr. Patrick Treacy, of the Inner Bar and the excellent written submissions of Ms. Ciara McGoldrick, of Counsel, that there was no culpable delay in the obtaining of the opinions of experts, once the plaintiff had done the necessary and put her solicitor in funds.

28. The plaintiff submitted that had the application been made within the year before the Master, as suggested by the defendant, that the summons could not have been served in the time allowed as the required experts' reports were not available and that an application would have been necessary before the Court as an extension of time granted by the Master would have lapsed. Accordingly, given that the defendant would have had no objection had the application being made to the Master such application would in effect have been useless because the experts report was not furnished until the 14th January, 2020 which resulted in, it was submitted, rapid application before the High Court.

29. The plaintiff relies upon the decision of Costello J. *Mangan v. Dockery* [2014] IEHC 477 which was a medical negligence claim issued in 2008 arising from respiratory distress in the post-natal period in 1995 and the summons was renewed in 2013 which renewal was granted on the grounds that expert evidence was not available to proceed until 2013 and Costello J. stated in at para. 14:

> *"This is clearly different to the situation in Bingham v. Crowley where Feeney J. noted that while the plaintiff desired to obtain further expert medical opinion it was*

> *not averred that such expert opinion was required to enable the statement of claim to be completed, nor was it averred that such opinion impacted on the ability to serve the summons. In this case, senior counsel clearly was not prepared to give the proceedings his imprimatur until he was in possession of such medical evidence as, in his opinion, was required in the light of the plaintiff's legal team's existing state of knowledge. It seems to me that this was an entirely appropriate and indeed professional way to proceed, particularly in a case of such factual and legal complexity. I am thus of the view that Bingham v. Crowley should be distinguished and that there exists a good reason to renew the summons, or, in the alternative, there exists a potentially good reason to do so in this case."*

Costello J. who was only considering the "good reason" test, then considered the balance of hardship notwithstanding the elapse of 20 years in the absence of any specific prejudice given the severity of the plaintiff's condition and the fact that a fresh claim might well be statute barred held that the hardship to the plaintiff outweighed the hardship to the defendant.

Conclusions

30. This is not a case of inadvertence in failing to serve the summons. The decisions relating to inadvertence are of limited assistance. This is a case of the deliberate decision not to serve the summons until the necessary medical reports were available.

31. The fact that the plaintiff failed to notify the defendants of their case and indeed deliver a courtesy copy of the summons at all until they had received the medical reports of the proceedings was in my view wrong and clearly counts in favour of the defendant in this application. I note however that no specific prejudice has been alleged on behalf of the defendant in this case.

32. I do not accept that a plaintiff is entitled in the absence of satisfactory expert opinion to await indefinitely such opinion and then deciding to apply to the court under O. 8 r. 1 (3). I accept that if a plaintiff delays unreasonably in the issuing of the summons or does not reasonably proceed to obtain the necessary reports that would be good grounds to set aside an order granting an extension of time.

33. In this case I do not believe that there has been any significant delay on behalf of the plaintiff especially given her age and infirmity in obtaining the reports. The defendants accept that there has been no delay on behalf of the medical advisors. I do not believe that her solicitor can be in any way criticised for waiting for payment of outlay in order to obtain the report and in the particular circumstances the elderly and infirm plaintiff mislaid the letter requesting funds (and I accept that that is the case) and I do not believe that there is any fault therefore on behalf of the plaintiff.

34. I accept the requirement in the Code of Conduct of a barrister and also the law and practice in this jurisdiction that in professional negligence cases they ought not to be settled until the expert report is or is likely to be available to support the claim. And whereas Costello J.'s decision in *Mangan v. Dockery* and indeed in a number of other

decisions referred to by both parties relate to "good reasons" I accept that the absence of the necessary expert opinions to ground the case was a special circumstance justifying, in the absence of any culpable delay, the renewal and extension of time. The prohibition on serving professional negligence proceedings until the receipt of verifying reports creates a conflict with the obligations to serve the proceedings within the time specified in the Rules. The issue as to whether the time for serving a summons should be extended will hinge upon whether the plaintiff and his/her advisors have been reasonably prompt in obtaining the necessary reports.

35. The failure of the plaintiff solicitor to notify the defendants at all of the fact of the proceedings and in this case even furnish a courtesy copy of the intended summons, (and I do not think that the request for the plaintiff's medical records to the hospital in May 2018 could in any way constitute a notification of the proceedings to the defendants), is not alone regrettable but is not acceptable. No reason was advanced for the failure to notify the defendant solicitors or indeed to furnish a curtesy copy of the proceedings.

36. I have come to the conclusion, in the absence of Specific Prejudice, that this failure does not significantly touch upon the issue of the "special circumstances". The special circumstances justifying this application before Murphy J. are that a plaintiff solicitors chose to wait until they had obtained the medical reports sufficient to justify the claim. The law discourages at the very least service of any proceedings claiming professional negligence without the expert evidence and accordingly best practice required the plaintiff solicitors to wait to serve the proceedings until they had obtained the reports. Good professional conduct prevents any counsel settling any proceedings alleging professional negligence in the absence of the requisite reports.

37. Given the fact that the plaintiff cannot be criticised, the plaintiff solicitors cannot be criticised and the doctors cannot be criticised in respect of any particular delay and there has been absolutely no specific prejudice alleged I have come to the decision that there were special circumstances justifying the application and the order made.

38. If and insofar as a balancing of justice is required I hold that the failure of the plaintiff to notify the defendants of the facts of the proceedings, or to provide them with a curtesy copy thereof, in respect whereof no specific prejudice has been alleged, is outweighed by the prejudice to the plaintiff. If the defendant's application was granted as the defendants have already indicated that they will be making a plea under the statute of limitations in any event should their application be refused, it is clear that if the plaintiff is forced to issue new proceedings that the application under the statute of limitations would be significantly strengthened.

39. Therefore, I hold that there was no culpable delay in the obtaining of the requisite reports. The failure to give the defendant any advance warning of the proceedings was not acceptable but in the present circumstances did not create any specific prejudice or injustice and does not impact upon the issue of "special circumstances". This case is different from the line of authority dealing with inadvertence and results from a deliberate decision by the plaintiff's solicitors which in the circumstances was justified and

reasonable, notwithstanding the failure to notify the defendant and I find that the special circumstances necessary to comply with O.8, r.3 did exist and accordingly the defendant's application must fail.

40. For the above reasons I will dismiss the application.

Signed

Kevin Cross

29th September, 2020

No further redactions necessary