[2019] IEHC 923

THE HIGH COURT

[2016/6845 P.]

BETWEEN

FAISAL ELLAHI

PLAINTIFF

AND

THE GOVERNOR OF MIDLANDS PRISON AND OTHERS

DEFENDANT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 20th day of December, 2019.

1. This is an application to set aside an order of Meenan J. of the 4th February 2018. That order, made on an *ex parte* basis as is the norm, specified that an order is made "pursuant to Order 8, rule 1 of the Rules of the Superior Courts that the Personal Injuries Summons in this case be extended and hence renewed for a period of three months from the date hereof in the circumstances where there was a delay caused by the Plaintiff changing solicitors justify an extension". That last clause is particularly significant because it sets out firstly the requirement of the rule as understood by Meenan J., that the order would reflect the reason why special circumstances were found by him to exist and secondly the special circumstances actually argued for, by and on behalf of the Plaintiff, in the application made in February of this year.

2. The affidavit before Meenan J. set out, not it has to be said in great depth, the reason why these special circumstances existed. In that regard I refer specifically to paragraph four, paragraph six and paragraph eight of the affidavit of Mr. Mathew Byrne sworn to ground the application in February. In paragraph four Mr. Byrne says that the Plaintiff originally instructed a different firm of solicitors (KOD Lyons Solicitors) and their address is given. Mr. Byrne goes on to say that the Plaintiff has now (and there is an emphasis in the application placed before me this week on the word "now") decided to instruct different legal representation in respect of the proceedings herein. Mr. Byrne goes on to depose that the Plaintiff has now instructed Burns Nowlan Solicitors (and their address is given) in respect of these proceedings. At paragraph six he says that as a result of the change in the Plaintiff's legal representation, the summons was not served on the Defendants within the required period of time. It is for that reason that the renewal of the Personal Injury Summons is required for a further period of six months from the date of the Order as the summons expired on the 27th of July 2017. At eight Mr. Byrne goes on to say "further I say that no injustice would be done in granting the application and it is the Plaintiff who could potentially suffer injustice should the application and/or renewal not be granted". That is, I think possibly a somewhat oblique reference to the circumstance which could arise in the event that the summons was not renewed, namely that the Statute of Limitations would be pleaded by the defendants. That issue however it is not made out in any great level of detail, it is not described as the reason for the application to renew or the justification for the application to renew and it is not, critically, the special circumstance recorded by the Registrar as justifying the order of Meenan J.

3. We now know somewhat more about the actual circumstances as far as the Plaintiff was concerned in respect of the service of the summons. In particular, if we look at it in

sequence, we now know that on the 14th of July 2017, the solicitors then on record for the Plaintiff wrote to him in the Midlands Prison, Portlaoise in respect of these proceedings and while all of the letter is of some interest, the relevant portion is as follows. KOD Lyons said in the second paragraph of the letter:-

> "Your summons is due to expire on the 26th of July and if it has not been served before that date an application will have to be made to renew same for a further period to allow it to be served. We note that you had instructed us not to take any further steps on your file and we are awaiting on you to revert to us with your instructions to either carry out further work on your behalf or to pass the file to another solicitor as nominated by you. If you have engaged another solicitor to look after this matter on your behalf, you might forward their details to us by return. On the other hand, you might confirm if you wish for us to serve the proceedings, a copy of which we enclose, or alternatively you might confirm if you wish us to make an application on your behalf to renew the summons for a further period. You might note that we are in the process of issuing our application to come off record on this matter and in the meantime you might confirm what you wish us to do."

4. Now, as I read that correspondence, the Plaintiff was informed directly and I must say very properly by his solicitors at the time that while they were in the process of preparing or issuing an application to remove themselves as the legal representative of the Plaintiff in these proceedings, they were nonetheless giving him very cautious advice about the need to serve the summons, they were offering to serve the proceedings themselves, and were alternately offering to make an application to renew the summons for a further period. It is not explained by Mr. Byrne in either of his affidavits why the Plaintiff did not take up that offer or indeed what his reaction to that offer was, though one can take it that he did not instruct KOD Lyons at that point in time either to serve the proceedings or to make an application to renew the summons for a further period to facilitate service at some time in the future.

5. That correspondence is at odds with the stated reason given by Mr. Byrne in his affidavit seeking the renewal of the summons. That is a point that was made to me in argument. It is also a point that arises not by reference specifically to this letter but in general terms in the affidavit of Ms. Tuffy which grounds the current application. Again there are portions of that affidavit which are particularly relevant to this ruling. Firstly, at paragraph four of her affidavit, Ms. Tuffy sets out her chronology which is not disputed. The relevant five dates in the chronology are: firstly, that on the 23rd of March 2015 there was the alleged assault giving rise to the proceedings; secondly, that the summons issued on the 27th of July 2016; we are aware from the correspondence I have opened of the letter of the 14th of July 2017 offering to serve or seek an extension of time for the life of the summons and we are also aware from that correspondence that the 26th of July 2017 was the date by which the personal injury summons was to have been served. The next significant date as listed by Ms. Tuffy is the 12th of December 2017 where she indicates that Burns Nowlan, current solicitors for the Plaintiff, served a notice of change of solicitor "to be

filed in due course" as it is put and then finally there is an Order of Meenan J., made, as I said, on an ex parte basis in February of 2019.

6. A number of things arise from that selection of dates from the chronology but the one that is most striking perhaps is that – notwithstanding the fact that the current solicitors indicated in December 2017, over two years ago, that they would be coming on record and indeed did so later that month – nonetheless the current application for an extension or renewal of the summons was not made until about fourteen months later. Ms. Tuffy's affidavit goes on to make the comments, again stressed by counsel on behalf of the Defendants in making this application, that the affidavit sworn by Mr. Byrne for the purpose of obtaining the order from Meenan J. in February of this year was not full in its description and not accurate in its description of the relevant background facts.

7. At paragraph eleven of her affidavit Ms. Tuffy refers to paragraph four of the affidavit of Mr. Byrne which I have opened during the course of this ruling. Ms. Tuffy goes on to say about that evidence:-

> "Mr. Byrne swore his affidavit on 31 January 2019. KOD Lyons were permitted to come off record by Order dated 7 November 2017. Burns Nowlan filed a notice of appointment of solicitors on 20 December 2017 having presumably been instructed some weeks previously. It is therefore not correct to say that the Plaintiff has now decided to instruct different legal advisors in circumstances where that decision was clearly made thirteen months previously."

8. I will look, in due course at the second affidavit of Mr. Byrne which replies to Ms. Tuffy but I can say now that I agree with the criticism of Ms. Tuffy of Mr. Byrne's original affidavit; the use of the word now twice in the one paragraph gave an absolutely misleading impression of when the change of solicitors had occurred. It would have been open to Mr. Byrne to specify precise dates, it is regrettable and somewhat disconcerting that he did not do so. Ms. Tuffy goes on at paragraph twelve to say that at paragraph six of his affidavit, (that's the first affidavit of Mr. Byrne); Mr. Byrne says:-

> "[A]s a result of the change of the Plaintiff's legal representation, the Personal Injury Summons was not served […] within the requisite period of time."

Ms. Tuffy comments:-

> "The Personal Injury Summons expired on 26 July 2017, before the plaintiff's former Solicitors came off record and before his current Solicitors were appointed. This is the reason relied upon to renew the Personal Injury Summons and it is factually incorrect."

Again that does appear to be the case.

9. At paragraph thirteen, Ms. Tuffy goes on to say:-

> "I say that Mr. Byrne in his affidavit, makes no reference to the purported service of the expired Personal Injury Summons and, in particular, the letter from the State Claims Agency dated 7 February 2018 pointing out that the Summons had expired."

That is true but I do not put a huge amount of weight on that exchange of correspondence. What I do place weight on is paragraph fourteen of Ms. Tuffy's affidavit where she says the following:-

> "No explanation has been proffered as to why, given that the plaintiff's solicitors were aware since receipt of the letter dated 7 February 2018 that the summons had expired, no application was brought to renew the summons for almost 1 year until 4 February 2019. No information whatsoever has been put forward as to what impediment, if any, existed to regularising the proceedings at an earlier stage."

10. That last sentence was throwing down the gauntlet to Mr. Byrne in his reply to explain why it was that, even leaving aside the correspondence of February 2018 but particularly given the fact that correspondence had occurred, there was such a delay in applying to the court for leave to renew or extend the summons.

11. Mr. Byrne in his replying affidavit, as I said, was effectively invited by Ms. Tuffy to address the omissions and errors in his earlier affidavit and he did not do so. At paragraph four in fact he repeated the form of words he had employed in his first affidavit which was challenged by Ms. Tuffy and he said the following:-

> "The Plaintiff had originally instructed a different firm of solicitors, KOD Lyons solicitors [and he gives their address], the Plaintiff has now decided to instruct different legal representation in respect of the proceedings herein. I say that the Plaintiff has now instructed Burns Nowlan Solicitors in respect of these proceedings."

12. That is, I think, very similar wording and in respect of the objectionable portion (the use of the word has *now* decided and the phrase has now instructed), identical wording to the language used by Mr. Byrne in his first affidavit. It is surprising that he both uses the same language again and secondly does not explain how it is that that language is appropriate given the comments of Ms. Tuffy in the grounding affidavit.

13. At paragraph six of the replying affidavit, a fresh reason is given either for the non-service of the original proceedings or I think more properly, the delay in seeking the extension of the order of the court renewing the summons. At paragraph six Mr. Byrne says:-

> "[T]here were delays in the proceedings in that different legal representation came on record for the Plaintiff in the intervening period. I say that due to a particular set of circumstances, it was necessary to brief different Counsel in respect of the matter which was through no fault of the Plaintiff. I say that, as an unfortunate

result, the necessary applications to renew the Personal Injury Summons were not applied for expediently to the court."

As I said, while that language is not crystal clear, I think on balance what it does do is to purport to explain the delay in making the application to the court to renew the summons. However, it is a wholly unsatisfactory explanation. When I asked counsel for the Plaintiff if there was any further knowledge that he had in respect of these particular set of circumstances he said fairly and candidly that there was not. It was really up to Mr. Byrne, given the nature of the application before this Court, to explain why it was that a period of fourteen months expired between his firm taking on the carriage of these proceedings and the application to this Court in February of this year. The need to brief different counsel is not explained but more obviously, there is no explanation as to why it took fourteen months or the best part of fourteen months to brief different counsel for the purposes of making an application to this court, which is hardly the most complicated application in the world.

14. Mr. Byrne goes on to say at paragraph seven that:-

> "[A]s a result of the change in the Plaintiff's legal representation, the Personal Injury Summons was not served on the main Defendants within the required period of time."

However, yet again, that does not address in any way shape or form the fact that the summons had yet to expire at the time that KOD Lyons sent that letter and; it also does not address what we now know to be the situation which is that on the 14th of July 2017 KOD Lyons offered to serve the summons. Presumably the letter from KOD Lyons and the application to come off record would have been included in the file provided to Mr. Byrne's firm (it would be surprising if it was not) but in any event the obligation lay on the Plaintiff, fully and properly, to instruct his solicitors in relation to the factual backdrop and the factual basis not only for making the original application in February but also for resisting the current application. The omission of any reference to the correspondence of the 14th of July is something that lies at the door of the Plaintiff; whether or not it also lies at the door of his solicitors is something that I do not need to decide. That is a particularly apposite issue when one looks at the conclusion of Mr. Byrne's second affidavit at paragraph nine where he says:-

> "I say and believe that the Plaintiff should not be denied his entitlement to pursue the above personal injuries case as a result of matters which were beyond his control."

I do not understand how it can be said it was beyond the control of the Plaintiff to accept the offer of his previous solicitors to serve the summons. That was a matter entirely within his control at least on the facts made available to this court. It is difficult to see why he did not give those instructions at the time or in default of doing so, give instructions that an application be made to extend the period of time for the service of the summons on the Defendants.

15. They therefore are the facts available to me. It is plain from those facts, I think, that when one looks at the order made by Meenan J. in February (and in particular at the statement that the special circumstances justifying the extension of time for seeking the order arose from the change in solicitors), this was based on an unsatisfactory account of the events giving rise to the application. The reason given to Meenan J. and accepted by him on the basis of the affidavit of Mr. Byrne sworn at the end of January of this year, simply does not hold water at all.

16. Now I want to set out, as there was some issue about them, the requirements of the Order in its revised form. Order 8 rule 1(2) provides that, where relevant, the Master on application and where satisfied that reasonable efforts have been made to serve the Defendant or for other good reason may order that the original concurrent summons be renewed for three months from the date of such renewal inclusive. That is the jurisdiction of the Master. As I read the rule in its current form the decision to authorise the renewal of the summons arises where there have been reasonable efforts made to serve (which does not arise here) or where there is another good reason which, as Ms. Justice Finlay-Geoghegan has pointed out in *Chambers v. Kenefick* [2007] 3 I.R. 526, may not in fact relate to issues of service. But a separate burden is imposed on an applicant for renewal of a summons in circumstances where they have not sought an extension or sought a renewal within the time specified in the earlier part of the order. It is stipulated in Order 8 rule 1(3) that after the expiration of twelve months, notwithstanding that an order may be made under sub-rule two, application to extend time for leave to renew the summons should be made to the court. At rule 1(4) it is stated, the court on application under sub-rule three 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 are to be stated in the order.

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 its 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. I am conscious that this reading of the revised version of the Order is not one that is immediately consistent with the judgment or the ruling given by Meenan J. in the case of *Murphy v. A. R. F. Manufacturing* [2019] IEHC 802 in which the new version of the rules were the subject of determination. Having said that, I am aware that in that case, Meenan J. was not involved in deciding this particular issue; rather the issue before Meenan J. at that point in time was the question of whether or not there could be a series of renewals, which was the point which he decided. In as much as he has summarised the requirements of the new version of the Order, I am satisfied that that was not the ratio of his decision, it was not the centrepiece or focus of his attention at that time. I am also

supported in my analysis of the new Order by reference to the judgment of Kelly J. in *Catherine Whelan v. H.S.E*. (Kelly J. Unreported, High Court, 31st May 2017) at paragraph thirty where he stated:-

> "If an application to renew is made within twelve months of the issue of the summons then the application is made to the Master of this court. However, if that period has expired, the application must be made to a judge. Such an application being made to a judge really requires two orders to be sought. They are first, an order extending time for the making of the application for leave to renew the summons and second, an order granting leave to renew the summons."

That does reflect the analysis that I have also adopted in relation to Order 8 in its new form.

18. Since, on that view of Order 8 as it currently stands, I find that no special circumstances were properly or correctly made out or cannot be properly or correctly made out, it follows that the basis of the order made by Meenan J. falls away. This is essentially because of the failure to provide to the court at that time a full account of matters. Had that been done, I do not believe that Meenan J. would have made the order. But now that I am armed with those factual pieces of information, it seems to me that the order cannot stand.

19. There has been a series of submissions made to me on behalf of the Plaintiff which I will deal with now. The first is that there has been no material change between the old version of the Order and the new. I have already set out what I believe is the correct meaning of Order 8 in its current form.

20. The second is that there is in fact another good reason which is the possible expiry of the statute. In that regard, I rely upon the *Whelan* judgment at paragraphs 37 to 44 as follows:-

> "37. At one time it was thought that the mere fact of a plaintiff's claim being statute-barred constituted 'other good reason' to justify the renewal of a summons. The high point of that judicial thinking is to be found in the decisions of the Supreme Court in *Baulk v. Irish National Insurance Co. Ltd*. [1969] I.R. 66 and in *McCooey v. Minister for Finance* [1971] I.R. 159. In the latter case Ó Dalaigh C.J. identified the ratio of Baulk's case to be that the plaintiff's claim would be statute-barred if renewal of a summons was refused and that that in itself constituted a good reason for granting a renewal.
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> 38. The effect of these decisions was, of course, to entirely undermine the policy underpinning the Statute of Limitations. A plaintiff might make no effort to serve a summons for a very long time and then rely on the expiration of the limitation period in order to obtain its renewal. Such an approach would defeat the whole thrust of the Statute of Limitations.

39. Subsequent decisions of the Superior Courts have substantially departed from the line of reasoning underpinning *Baulk and McCooeys'* cases. By 1997 the Supreme Court in *O'Brien v. Fahy* (21st March, 1997) distanced itself considerably from these two cases with Barrington J. stipulating that the fact that a plaintiff's cause of action would be statute-barred if renewal was not granted was not the only matter to which the court had to pay attention. The following year in *Roche v. Clayton* [1998] 1 I.R. 596 O'Flaherty J. stated that whilst a judge has a discretion whether to renew a summons it was not a good reason to do so simply to prevent the defendant availing of the Statute of Limitations. Thus, the mere fact that a plaintiff's claim would be statute-barred is not of itself 'other good reason' for renewing a summons.

40. It is common case that in the present case the plaintiff's claim will indeed be statute-barred if the summons is not renewed.

41. As that of itself is not a sound basis for ordering renewal of the summons, are there other circumstances which would justify the order?

42. Since the decision in *Roche v. Clayton* there have been many judgments delivered on this topic by different High Court judges. They include *Chambers v. Kenefick* [2007] 3 I.R. 526; *Allergan Pharmaceuticals (Ireland) Ltd. v. Noel Deane Roofing* [2009] 4 I.R. 438; and *Moloney v. Lacey Building & Civil Engineering Ltd*. [2010] 4 I.R. 417, all of which are reported in the Irish Reports. There have been many decisions not so reported such as *Moynihan v. Dairygold CoOperative Society Ltd*. [2006] IEHC 318; *O'Grady v. Southern Health Board* [2007] IEHC 38; and *Bingham v. Crowley* [2008] IEHC 453.

43 Finally, there is the decision of the Court of Appeal in *Crowe & Ors. v. Kiltara Ltd. & Ors*. [2016] IECA 62.

44. These cases indicate that the courts have moved from the sort of indulgence demonstrated towards plaintiffs in the *Baulk and McCooey* cases to a position which takes account of the injustice which may be visited on a defendant in having to defend a stale claim, the underlying policy of the Statute of Limitations and the obligation on courts to ensure that proceedings progress with reasonable speed."

21. I will make the two following points in relation to the above as follows. Firstly, during the course of that section Kelly J. refers expressly to two of the authorities relied upon by the Plaintiff in this application – *O'Brien v. Fahy* (21st March, 1997) and *Allergan Pharmaceuticals (Ireland) Ltd. v. Noel Deane Roofing* [2009] 4 I.R. 438. Secondly, the reference of Kelly J. at paragraph 44 deals with injustice to the Defendant in such circumstances and further in his general conclusion at paragraph 50 he states:-

"50. I am conscious of the fact that the defendant has not alleged specific prejudice to it were the order of O'Connor J. to be allowed to stand. That, of itself, would not

justify acceding to this application. The onus on the plaintiff on an application of this sort has not been discharged."

22. That decision certainly relates to the old version of the rule but then so do many of the cases relied upon on behalf of the Plaintiff. In summary, on the authority of *Whelan*, the following two propositions are established. Firstly, the question of prejudice on the part of the Defendants does not in itself decide the fate of this application. Secondly, the argument made before me by Counsel for the Plaintiff that the summons should be renewed because of the possibility that the claim will otherwise potentially be statute barred is not one that should succeed.

23. In argument, Counsel for the Plaintiff relied upon a range of authorities. There are two of those that I want to refer to specifically.

24. The first of those is the judgment of the High Court in *Allergen*; the second significant authority referred to by the Plaintiff is *Crowe v. Kitara Ltd*. [2016] IECA 62. What must be taken into account when considering the current application is the following. Firstly, both of those cases, both *Allergen* and *Crowe*, relate to a situation where the issue being addressed was the good reason for renewing the summons not the special circumstance for the extension of time to make the application. Secondly, in this case as I have said the application was made before Meenan J., on the basis that there was a special circumstance which was the difficulty caused, allegedly, by the change in legal representation. They were not factors in either *Allergen* or in *Crowe*. Thirdly, it is the case (unlike *Allergen* and *Crowe*), that a second reason was then canvassed in the current application which was the specific issue with regard to Counsel, a reason which I have found not fully or properly made out and profoundly unconvincing in as much as it has been described.

25. In *Allergen* and *Crowe* the argument put up in each of those cases was that the statute would be pleaded successfully in relation to any fresh summons and that therefore there would be issues of prejudice. But of course issues of prejudice are not at the heart of the current application. I do not think it is open to the Plaintiff having made an application, particularly on an *ex parte* basis, on a certain ground (which is that the special circumstance is shown by the change in legal representation) then to shift their ground when that Order is challenged and to argue that there is a completely different good reason for justifying the extension of time. That is the case even if one telescopes the two tests for special circumstances or good reason into the one. However, as I have said, my view of the Order in its current form is that you do not so telescope the two tests and if I am right about that, then *Allergen* and *Crowe* do not really carry the argument very far from the perspective of the Plaintiff because both of those are expressly focused on the question of whether or not there is a good reason to renew the summons, not on the fundamental issue on this application which is whether or not special circumstances justifying the extension of time to make the application are to be so found.

26. For those reasons, I will make an order in terms of paragraph one of the notice of motion, relief under paragraph two of the notice of motion was not in fact pressed upon me therefore I do not intend to make an order in those terms.

27. I will reserve the issue of costs.