

THE HIGH COURT

[2022] IEHC 438

RECORD NO. 2017/286/P

BETWEEN

ANTHONY MCGUINNESS

PLAINTIFF

AND

IMRAN SHARIF

AND

HERMITAGE MEDICAL CLINIC TRADING AS HERMITAGE CLINIC

LIMITED

DEFENDANTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 20 June 2022

Introduction

1. This is an application to set aside the Order of Murphy J. of 13 January 2020 renewing a personal injuries summons pursuant to Order 8, Rule 4 of the Rules of the Superior Courts (“RSC”). The plaintiff, a retired 63 year old carpenter, alleges medical negligence on the part of the defendants in the treatment of his left hip in 2014 and 2015 following a revision surgery in 2012.
2. The operation that the plaintiff complains of took place on 5 February 2015. The summons was issued on 12 January 2017, just before the expiry of the 2 year limitation period for personal injury claims as provided for by the Civil Liability and Courts Act

2004. The summons was not served within one year as required by Order 8 and it therefore lapsed on 13 January 2018, with the consequence that, after that date, it could not be served without an application being made to Court. An application to renew the summons was not made until 13 January 2020.

3. It is of some importance in the context of this decision to note that Order 8 was amended in 2018 by way of S.I. No. 482/2018 – Rules of the Superior Courts (Renewal of Summons) 2018 (“S.I. 482/18”) which altered the test applicable to an application for renewal of a summons from good reason to special circumstances. Relevant jurisprudence in the area has established that special circumstances is a higher bar for a plaintiff to surmount than good reason.
4. Order 8 also provides an application may be made to the Master of the High Court seeking an extension of 3 months for the summons provided the application is made before the expiry of that 12 month period. Prior to the amendment in 2018 to Order 8, that 3 month period was 6 months. There has been a significant amount of case law on the correct interpretation of the revised Order 8 in recent years, culminating in the decision of the Court of Appeal in *Murphy v HSE* [2021] IECA 3, applied below.
5. It is agreed between the parties that the onus is on the plaintiff to establish special circumstances and that each case must be looked at on its own facts when deciding whether special circumstances have been established. It is also agreed that, when determining whether the summons should be renewed, the question of the balance of justice must be considered once special circumstances have been established.

Factual background

6. The plaintiff was a patient of Mr. Sharif (the “first defendant”), a consultant orthopaedic surgeon who at the relevant time carried on practice in the second defendant’s private hospital. It is pleaded that in November 2014 the plaintiff experienced lower back pain

and a clicking sensation in the area of his left hip. Throughout November and December 2014, he contacted the first defendant. He was examined and treated by way of injections and medications in late 2014. He re-attended in January 2015 and after receiving an x-ray it was confirmed that the left femur bone was fractured. He was advised to undergo emergency surgery to repair the fracture and did so on 5 February 2015. Following that operation, his left hip and associated areas continued to be problematic and following an examination in December 2015 he was advised that there was a broken wire or ring in the left femur which required removal. That operation took place on 18 December 2015.

7. On 12 September 2016 an initial letter of claim was issued by the plaintiff's solicitor to the first defendant. On 13 January 2017 a summons was issued by the plaintiff's solicitor for damages arising out of what he alleged was negligent treatment.
8. Between February 2017 and September 2017 various letters were sent from the Medical Protection Society on behalf of the first defendant to the plaintiff's solicitors seeking further information on the claim. No responses were received to those letters and the MPS closed their file in September 2018 when a High Court search showed no application had been made to renew the summons.
9. Three years after the issue of the summons, an *ex parte* application was brought on 13 January 2020 by Tansey Solicitors to renew the personal injury summons. An Order was made extending the time for applying for renewal of the summons and ordering that the summons be renewed for three months by Murphy J. on that date. On the same day a notice of change of solicitor was filed and Tansey Solicitors came on record, replacing the solicitors who had filed the summons, McDonnell & Co.
10. In the affidavit of Ciaran Tansey sworn 9 January 2020 filed on behalf of the plaintiff seeking an extension of time, it was averred as follows:

“4. I say that the Plaintiff had initially instructed another firm of solicitors but the case was not progressed on his behalf and he was therefore required to instruct an alternative firm of solicitors. The Plaintiff first consulted with your deponent’s firm on 8 June 2018. There was an unavoidable delay in obtaining the Plaintiff’s file from the previous firm of solicitors, and thereafter your deponent was required to procure the requisite medical liability expert reporting in order to serve proceedings on the Defendants. Once the Plaintiff’s medical records were to hand your deponent instructed two UK-based experts in different disciplines, radiology and orthopaedic surgery, and these support a cause of action in medical negligence. The latest report was completed on 30 December 2019. As full and supportive reporting is now to hand, the proceedings are ready to be served on the Defendants.

11. In fact, as my description of events below makes clear, contact had been made with medical experts prior to receipt of the file and two medical reports had already been sent to them.
12. There was then correspondence on behalf of the first named defendant seeking to obtain more information about the reasons for the failure to serve the summons. This correspondence was not replied to by the plaintiff’s solicitors. Ultimately, after making extensive but fruitless efforts to obtain answers to their questions, the first named defendant issued a motion on 15 July 2020.
13. The plaintiff has argued that the first named defendant delayed in bring that motion. I do not accept that. When one looks at the train of correspondence over those 6 months, responsibility for the majority of the delay in bringing the motion to set aside renewal of the summons lay with the plaintiff’s solicitor and not the first named defendant. The plaintiff’s solicitor failed to answer correspondence in a timely fashion and when he

did answer, failed to respond to queries in a satisfactory fashion. That failure meant it was difficult for the first defendant to understand the basis upon which the summons had been renewed and in turn made it difficult for it to decide whether to bring the motion to set aside the renewal. It is vital that when an Order is made renewing a summons on an *ex parte* basis, particularly where a significant time period has elapsed since the expiry of the summons, solicitors serving the renewed summons respond fully and expeditiously to any requests for information about the circumstances of the renewal. Failure to do so will delay any application to set aside the renewal, which in turn will have knock on effects on the progress of the case if the application to set aside is not successful.

14. Three affidavits were sworn by Mr. Tansey in reply to the first defendant's motion to set aside, the first on 13 July 2020, the second on 4 January 2021 and the last on 16 July 2021.
15. Separately the second named defendant, who had also received a letter of claim in 2016, brought a motion seeking to set aside the leave. That was done in a very leisurely fashion, not being issued until 24 February 2021. I detail the relevant chronology of events in the context of the discussion below as to whether the balance of justice favours refusing the relief sought by the second defendant, having regard to the delay in bringing the motion.

Application to exclude evidence

16. A core part of the arguments of both defendants is that the plaintiff failed to tell them the basis for the extension of time and then, when the motions were brought, provided information in what is described as a drip feed fashion. They argue that the last affidavit of Ciaran Tansey of 16 July 2021, which is undoubtedly the most informative, and exhibits for the first time significant and relevant material, was only filed after the

written submissions had been provided by both defendants in readiness for the hearing due to take place some 3 days later. That objection served as the basis for an application that I should exclude the evidence produced by the plaintiff other than that which was relied upon in the affidavit grounding the original application to renew the summons.

17. It seems to me that there is a difference between a situation where a plaintiff seeks to raise new arguments in response to an application to set aside an extension of time and the situation where a plaintiff provides additional evidence in relation to arguments that have already been made. The former situation might well justify the exclusion of evidence. But what I am concerned with here is the latter situation. Each of the factual reasons for the necessity for an extension of time was set out in the affidavit of Mr. Tansey of 9 January 2020 grounding the *ex parte* application. It is quite true that they were not described as special circumstances and in fact the term good reason was used which was no longer the applicable term at the date the Order was made. It is equally true that, as argued by the defendants, those reasons were not captured in their entirety in the Order renewing the summons. Under Order 84, Rule 4, any judge renewing a summons is required to state the special circumstances justifying an extension of time in the Order. The reason given here was as follows: “*In circumstances where delays have occurred in obtaining expert medical reports and records*”. Those reasons do not capture all the reasons provided by Mr. Tansey and do not refer to the failings of the first solicitor retained by the plaintiff, to which I will come shortly.

18. Nonetheless it is quite clear in my view that what Mr. Tansey did was to expand upon those arguments in an incremental fashion, with each affidavit containing more evidence explaining why the reason given was a special circumstance by reference to additional exhibited material. It would undoubtedly have been far more desirable had that material been identified on affidavit and exhibited in the grounding affidavit

seeking to renew the summons. Indeed, the failure of the plaintiff to do that undoubtedly contributed to the costs incurred by the defendants in this case. Without that material, it was very difficult for them to decide whether to bring a motion and whether to maintain the motion, since information was arriving on a piecemeal basis. That may be very relevant to the question of where the costs of this motion should lie. However, in my view it cannot be the basis to exclude that affidavit evidence as there are no new arguments being made in the context of this motion which were not identified (albeit in a far more summary form) in the original application to renew the summons.

Special Circumstances

19. Before considering whether the facts identified give rise to special circumstances, it is important to recall the law applicable to renewal of a summons in the context of medical negligence actions. The test in this regard is clearly set out by Haughton J. in *Murphy v HSE* where he stated that:

“I agree with Cross J that a plaintiff cannot wait indefinitely for such opinion and then decide to apply to renew the summons. In Moloney, in the context of ‘good reason’, Clarke J., (as he then was) stated at para. 5.8:

“In summary, therefore, insofar as the absence of an appropriate expert report may be put forward as a good reason for not serving a plenary summons, it seems to me to follow that the expert report concerned must be reasonably necessary in order to justify the decision to responsibly maintain proceedings in the first place, rather than be necessary in order to take further steps in the proceedings (such as the drafting of a statement of claim or bringing the case to trial) and it must also be established that any delay occasioned by the

absence of the expert report concerned was reasonable in all the circumstances, such that appropriate expedition was used by the party placing reliance on the absence of the expert report concerned, in attempting to procure same.”

93. In my view this statement applies equally to cases where a plaintiff seeks to establish “special circumstances” under the amended O. 8 based on delay occasioned in obtaining expert medical opinion. It is important to emphasise the need to move with expedition, if not alacrity, in seeking and obtaining the expert medical opinion that is reasonably required to advise on and prosecute the claim, and this is particularly so where the basic two year period provided by the Statue of Limitations has expired and a protective summons has been issued.”

February 2018 – June 2018

20. When considering special circumstances, there are two distinct time periods requiring consideration. The first is that between 14 February 2018 (the summons having expired on 13 February 2018) and June 2018, where no steps at all were taken to advance the proceedings. It is well established that mere inadvertence by a solicitor may not form the basis for special circumstances. However, the situation is not as simple as it appears in the initial affidavit of Mr. Tansey.
21. Although McDonnell & Co. Solicitors were identified on the summons, they took the position that a different solicitor, Patrick Delany, at all times had responsibility for the matter. This only clearly emerges from Mr. Tansey’s last affidavit when he finally exhibits in full the correspondence between his office and the plaintiff’s original solicitors. On 13 June 2018 a letter was sent by Damien Tansey Solicitors to McDonnell

& Co. seeking a copy of the plaintiff's file. McDonnell & Co. wrote back to the plaintiff's solicitors on 20 June 2018 stating as follows:

"Dear Sirs,

We confirm receipt of your letter dated 13th inst. And return same herein.

We confirm that the file of Anthony McGuinness is held by his instructing solicitor, Patrick Delaney of Parkside House, Main Street, Castleknock, Dublin 15 (DX 140002 CASTLEKNOCK)."

22. It is quite irregular for a solicitor identified on a pleading to adopt the point of view that in fact a different solicitor is responsible for the matter, despite no notice of change of solicitor having been filed. Nor did the plaintiff appear to have any knowledge of this because, as explained in a letter of 15 January 2019 from Mr. Tansey to McDonnell & Co. (exhibited to the supplemental affidavit of Mr. Tansey of 16 July 2021) the last time the plaintiff had any dealings with his solicitor, he was in the offices of McDonnell & Co.

23. That correspondence continued between Tansey Solicitors and McDonnell & Co. for some time with McDonnell & Co. stoutly maintaining they had nothing to do with the file until Tansey Solicitors threatened to report them to the Law Society. Eventually McDonnell & Co. indicated in a letter of 22 January 2019 as follows;

"We confirm receipt of your most recent correspondence.

Having considered your most recent letter and the information contained therein, setting out the inaction of my colleague in this matter, I was left with no alternative but to attend at the offices of Patrick Delaney Solicitor, on behalf your client and I retrieved your clients file.

Your clients file is enclosed herewith and I wish your client all the best in this matter."

24. Again, it was unusual for the file to be procured in this way. In any case it was apparently delivered to Tansey Solicitors on 24 January 2019. However, that was not the only unusual circumstance. When Tansey Solicitors investigated Patrick Delaney, it became clear that he no longer held a practising certificate, as indicated in a letter of 26 July 2018 from Tansey Solicitors to Patrick Delaney. I was informed at the hearing that Mr. Delaney was suspended from practice by an Order of the High Court in 2019.
25. In the circumstances, Patrick Delaney could not have been practising in 2018 and therefore would never have been able to serve the summons or take any steps advancing the matter. It is common case that, because this is a medical negligence case, it was necessary that the plaintiff had a firm basis upon which to serve the proceedings, and that counsel could not put their name to the proceedings unless medical evidence was available supporting the claim. Given that Patrick Delaney does not appear to have been practising during 2018, the requisite evidence could not have been procured.
26. In those highly unusual circumstances, it seems to me that there were indeed special circumstances explaining the delay from February to June 2018 as follows:
- 1) the solicitor on the summons, McDonnell & Co. adopted the position that they were not acting for the plaintiff,
 - 2) the solicitor that McDonnell & Co identified as acting for the plaintiff, i.e. Patrick Delaney, did not have a practising certificate during the relevant period of delay, and
 - 3) the plaintiff himself did not appear to understand that Patrick Delaney rather than McDonnell & Co. was apparently acting for him.

June 2018 – December 2019

27. The next period is from June 2018 to December 2019. The plaintiff went in to meet Tansey Solicitors on 8 June 2018 and on 13 June thereafter, as noted above, a letter was

sent to McDonnell & Co. seeking a copy of the plaintiff's file. Tansey Solicitors made efforts to communicate with both sets of solicitors between July and September. On 5 September Tansey Solicitors wrote to both McDonnell & Co. and Patrick Delaney and on 17 September McDonnell & Co. responded indicating Tansey Solicitors ought to speak to Patrick Delaney. No response was forthcoming from Patrick Delaney. No further steps were taken by Tansey Solicitors until January 2019.

28. At that stage Tansey Solicitors finally sprang into action. Even before they received the file on 24 January 2019, they had contacted two different medical experts, Mr. Pearse, a consultant orthopaedic surgeon on 16 January 2019, and Mr. Wilson, a consultant radiologist on 21 January 2019. Tansey Solicitors sent them the medical reports from Dr. Hassan Al Bayyari, the plaintiff's GP, and from Mr. Paddy Kenny, a consultant orthopaedic surgeon. Tansey Solicitors also provided the attendance of the consultation with the plaintiff and on that basis asked whether both medical practitioners would be willing to act. The defendants have rightly criticised Mr. Tansey for not explaining how he obtained those reports and not identifying the date upon which they came into his possession. It is unsatisfactory to give detailed information about the reasons that one is unable to proceed but not be equally open about the factors that might have assisted in proceeding earlier.

29. Mr. Wilson replied first confirming he would act and in February 2019 Tansey Solicitors sent him medical reports from the Hermitage Clinic and Connolly Hospital but did not send him those from Cappagh National Orthopaedic Hospital as they were not available. A request for those records was made on 12 February 2019. No additional reports appear to have been sent to Mr. Pearse and on 5 March 2019 he wrote back saying that, based on the report of Mr. Kenny, he could see no negligence.

30. In April, records were received from Cappagh and were sent to Mr. Wilson. In May 2019 Mr. Wilson provided a report which, according to the plaintiff, concluded that there had been negligence in relation to the plaintiff's treatment but did not establish causation.
31. At that point Tansey Solicitors took the view they still required assistance from Mr. Pearse and on 22 July 2019 medical records were sent to him, along with the May report of Mr. Wilson, and he was asked to provide an opinion. Thereafter a considerable period of delay ensued because Mr. Pearse was taken up with other matters. The plaintiff's solicitors were assiduous in their attempts to obtain the medical report, writing, *inter alia*, on the following occasions:
- 21 August 2019
 - 23 September 2019
 - 22 October 2019
 - 14 November 2019
 - 05 December 2019
 - 12 December 2019
 - 20 December 2019
32. Eventually, on 30 December 2019 a report was completed, and an application was made on 13 January 2020 seeking to renew the summons. The plaintiff's solicitor was obviously concerned about delay since in the communications with Mr. Pearse he referred on various occasions to the statute expiring in December. Of course, the proceedings had already been issued but the gist of what he was trying to communicate was clear i.e. there was urgency in moving the matter along.
33. Therefore, between January 2019 and December 2019 there appears to me to have been reasonable expedition by Tansey Solicitors. There was a long period of delay from the

time Mr. Pearse was contacted again in July and the time he reported on 30 December 2019. However, the correspondence that was exhibited – again only in the last affidavit of Mr. Tansey – demonstrates that the responsibility for the delay in that regard cannot be attributed to Tansey Solicitors. Accordingly, applying the test identified above in *Murphy* i.e. whether the solicitors have moved with expedition in seeking and obtaining the expert medical opinion that is reasonably required to advise on and prosecute the claim, it seems to me that Tansey Solicitors did move with adequate expedition, if not alacrity. In those circumstances I am satisfied the plaintiff has established special circumstances in respect of 2019.

34. I have some considerable doubts about the period from September to December 2018 given that, by June 2018, Tansey Solicitors knew that the solicitor allegedly in charge of the file, Patrick Delaney, was not a practising solicitor during the relevant time, and therefore it must have been anticipated that there would be difficulties in obtaining the file and that alternative steps would likely have to be taken. Specifically, Tansey Solicitors must have been aware that it was possible that they would have to contact experts without having obtained the file. Indeed, that was exactly what happened. Prior to receipt of the file, as noted above, in January 2019, Tansey Solicitors wrote to the experts enclosing certain reports that were in their possession. No reason is given as to why those actions could not have been taken much earlier than January 2019.
35. In those circumstances, I must decide whether special circumstances existed warranting the delay by Tansey Solicitors in instructing experts between September and December 2018. In this regard I am conscious that by this point the summons had expired in February 2018, and the proceedings had been issued very close to the expiry of the limitation period, so moving with expedition was vital.

36. Had the amended Order 8 been in force at the relevant time, it is hard to see how the test of establishing special circumstances would have been met. However, S.I 482/2018 only came into force on 11 January 2019. Therefore, the onus to move with expedition was not as pronounced as it now is under the special circumstances test. It is possible that waiting for an extended period for a file to be delivered might have met the good reason test that was applicable at the time. In *Murphy*, Haughton J. considered it relevant in the context of an argument about a renewal application to the Master that in August 2019, the amended Order 8 was “*new to practitioners*”. At the relevant time here, it was not even in force. To apply the special circumstances test at a time period where it had not yet come into force runs the risk of offending against the principle of non-retrospective application of legislation.

37. In those circumstances, albeit with some hesitation, I have concluded that the delay in moving matters up to January 2019 cannot be treated as precluding the plaintiff from being considered as having established special circumstances in respect of the period from June 2018 to December 2019.

Balance of Justice

38. Here there is no real detriment to the defendants as is fairly admitted by them, since the records are likely to determine the case as opposed to any individual recollection of a doctor. On the other hand, there is likely to be very significant prejudice to the plaintiff who will be almost certainly statute barred if I refuse to renew the summons.

39. Neither the absence of prejudice nor a claim being statute barred necessarily tilt the balance of justice in favour of a summons being renewed. However, there is one factor insofar as the second named defendant is concerned that in my view renders it unjust to set aside the renewal of the summons. That is the delay on the part of the second defendant in bringing the application to set aside.

40. The Order of Murphy J. of 14 January 2020 was sent to the second defendant on 17 January 2020 along with the summons and updated particulars of negligence. No response was received. On 2 March 2020 a warning letter from the plaintiff's solicitor was sent to the second defendant in respect of a motion for judgment in default of appearance. On 17 April 2020 Eversheds Sutherland wrote to the plaintiff's solicitor identifying they had been nominated to act on behalf of the second defendant and sought a copy of the papers grounding a renewal of the summons. On 19 June 2020 those papers were sent to the second defendant's solicitors. There was then correspondence between the defendants with a view to ensuring that any motions by them would be heard at the same time. Nonetheless, it was not until 6 December 2020 that the affidavit of Stephanie Kidney grounding the second defendant's application was sworn and it was not until 24 February 2021 that the notice of motion was issued. That motion and grounding affidavit do not appear to have been sent to the plaintiff's solicitor until 24 May 2021. In total, the time from the date the second defendant's solicitors received a copy of the Order of Murphy J. to the date of issue of the motion was 13 months. It was 16 months until the motion was served on the plaintiff. No explanation is given by the second defendant for this extraordinary delay, either in the affidavit of Ms. Kidney or in its legal submissions.

41. It would be quite unfair in my view if an applicant seeking to set aside renewal of a summons because of delay could have its own delay ignored. Where a decision is made to seek to set aside the renewal of summons this must be done quickly. Any delay in bringing the application will contribute to delay in getting the case on. It is incumbent upon both plaintiffs and defendants to move matters along with expedition at every step in the life of proceedings, particularly where actions have a short limitation period such

as the matter before me. That is because, as Clarke J. as he then was, identified in *Moloney v Lacy Building & Anor* [2010] 4 IR 417:

“It seems to me that an application for the renewal of a summons in this Court needs to be viewed against the background of the statutory policy that proceedings must be commenced within the relevant limitation period. The purpose behind that policy is to prevent claims being brought outside what has been determined to be a reasonable period for the category of case concerned. It seems to me that a renewal of a summons outside the limitation period so as to further extend the time (by reference to the limitation period) within which service can be effected amounts at least to a stretching of the principles behind the existence of a statute of limitations in the first place.”

42. This means that, just as an application for renewing a summons will be closely scrutinised to see if special circumstances exist to justify a renewal where the summons had not been served within the (generous) one-year period permitted, equally parties seeking to set aside a renewal Order must move promptly. Far from moving promptly, the second defendant took an inordinate amount of time to bring this application and has given no substantive reason for same.

43. In those circumstances, it seems to me the balance of justice favours refusing the application of the second named defendant in this regard. I should emphasise that similar considerations do not apply to the application by the first defendant who, as I identify above, was prevented from issuing the motion quickly because of the failure by the plaintiff’s solicitors to provide the necessary information. Indeed, a characteristic of these motions has been the last-minute nature of the information put before the Court by Tansey Solicitors. Had that information been provided to both defendants at an early stage it is quite possible that they may not have brought the motions and the delay that

has been occasioned by the bringing of these motions would have been avoided. Nonetheless, although the first defendant cannot be criticised for delay, in my view the balance of justice still favours a renewal of the summons in the particular circumstances of this case, including the absence of any specific prejudice to the defendants occasioned by the delay.

Conclusion

44. In all the circumstances I am satisfied that the plaintiff has established special circumstances as required by Order 8 of the RSC, and that the balance of justice favours a renewal of the summons. In the premises, I reject the application of both defendants to set aside the Order of Murphy J. of 13 January 2020.