THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 256

Record Number: 2018/497

Peart J.
Baker J.
Costello J.

BETWEEN:

LISA LAWLESS

PLAINTIFF/APPELLANT

AND

BEACON HOSPITAL, BEACON HOSPITAL SANDYFORD LIMITED

FIRST AND SECOND DEFENDANTS

AND

MO'IAD ALAZZAM, ROBERT HANNON AND ADNAN HAFEEZ

THIRD, FOURTH AND FIFTH DEFENDANTS/RESPONDENTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 15TH DAY OF OCTOBER 2019

1. This is an appeal from an order of the High Court (Binchy J.) dated 20th December 2018 whereby for the reasons contained in a written judgment delivered on the 14th day of December 2018 ([2018] IEHC 736) the appellant's application for an order under Order 8, rule 1 of the Rules of the Superior Courts for the renewal of her personal injury summons as against the third, fourth and fifth named defendants/respondents ("the respondents") was refused. This application was refused essentially because the trial judge was not satisfied that any "other good reason" had been established as to why service had not been effected during the period of twelve months from date of issue thereof.

2. Having heard oral argument from both sides on 22nd July 2019, the members of the Court were each agreed that the appeal should be allowed and therefore that an order should be made for the renewal of the personal injury summons, and so indicated to the parties at the conclusion of the hearing. The Court stated that it would give its reasons in a written judgment at a later date.

3. This appeal raises an important issue, namely how the court should approach the question of what may or may not constitute a "other good reason" in professional negligence proceedings, where on the authorities a plaintiff ought not to commence such proceedings, or at least not serve same upon the professional defendants named, until in possession of sufficient by way of expert opinion to enable the plaintiff and his/her advisers to be satisfied that there is at least a *bona fide* arguable case of negligence to be made out against the defendants – see *e.g. Cooke v. Cronin* (unreported, Supreme Court, 14 July 1999; *Moloney v. Lacey Building & Civil Engineering Ltd* [2010] 4 I.R. 417.

4. This appeal is important for the respondents for the very obvious reason that it is a serious matter for the respondents to have their professional reputations impugned by allegations of negligence in their treatment and care of the appellant, let alone to have a finding of negligence made following a full hearing of the case.

5. It is important to the appellant also because if the trial judge was correct to refuse her application for renewal of her personal injury summons, she will be forever precluded from pursuing her claims of negligence against these respondents and therefore, potentially, from recovering substantial damages. The refusal, of course, does not prevent her from proceeding against the first and second defendants who did not raise any issue in relation to service of the summons upon them, and who simply entered an appearance in the normal way.

6. There is no doubt from the details of the appellant's claim appearing from the pleadings, and from the description by the trial judge in his judgment of her having undergone "a torrid time" between December 2013 and May 2015 during and indeed following her treatment by the respondents, that she has suffered greatly, and has been left with significant adverse sequelae following her illness, treatment and care during that period. The refusal of her renewal application under O.8, r.1 RSC would have the most profound consequences for her, provided, of course, that her allegations of negligence are supported by expert evidence.

7. At para. 4 of his judgment the trial judge set out a concise description of the background to the appellant's claim, which provides a relevant factual context against which to consider the applicable legal principles. At para. 4 the trial judge stated;

> "4. It is claimed that the plaintiff was received into the care of the 1st/2nd named defendant's hospital initially on 3rd December, 2013, under the care of the third named defendant who performed a diagnostic laparoscopy and, thereafter, diagnosed the plaintiff with extensive endometriosis. He advised her to undergo a colonoscopy and referred her to the fourth named defendant for further assessment and/or advice. She was admitted to the same hospital for this purpose on 7th January, 2014. It is claimed that the plaintiff was admitted (for reward) by the first and second named defendants to hospital again on 1st April, 2014, where she underwent surgery performed by the third named defendant. Her appendix was removed and endometriosis was removed from the ovaries and pelvis and the bowel was resected in two places. Subsequently, the plaintiff became very unwell and was in considerable pain and discomfort. On 5th April, 2014, the plaintiff was attended by the third named defendant who diagnosed the plaintiff with a possible perforation and investigated and considered her for further surgery. She underwent an operative procedure on 5th/6th April, 2014, during which a perforation of the bowel was repaired. Thereafter, the plaintiff developed septicaemia and required treatment in intensive care for approximately a week. She convalesced for six months and was readmitted on 16th September, 2014, in order to conduct a reversal of previous procedures. Thereafter, she became very unwell again and developed pneumonia. She again developed septicaemia and her kidneys ceased to function. She required dialysis for five days and treatment in the intensive care unit for eight days and was treated as an inpatient for almost 4 weeks. She required further admission to hospital owing to dehydration and was subsequently referred to St. Vincent's Hospital owing to difficulties retaining fluids. It is apparent from all

of this that the plaintiff claims to have suffered very severe injuries at the hands of the defendants. Disregarding liability, assuming that all those events occurred, it is also apparent that the plaintiff had what can only be described as a torrid time between the beginning of December 2013 and May 2015, and perhaps even later."

8. The personal injury summons was issued by the plaintiff's solicitor on 2nd December 2015 despite the fact that no expert opinion had by that date been obtained in order to support a claim of negligence against the defendants named. It was issued on a so-called "protective basis" in order to avoid the claim becoming statute barred. The proceedings were not served at that point. Neither were the named defendants notified of the existence of the proceedings, nor indeed that any proceedings were being contemplated. As noted by the trial judge (para 6) this is explained by the appellant on the basis that to have done so would have made it necessary for the respondents to notify their insurers of any such correspondence, and that it may have had an adverse consequence for them as a result.

9. I should add at this point that there may be cases where it is acceptable practice to issue a personal injury summons on a protective basis given the requirement in cases of professional negligence that the plaintiff should have a stateable basis for his/her claims of negligence which are supported by appropriate expert opinion, such as where, as in the present case, the first expert advises that the plaintiff's solicitor obtain a report from a different specialist.

10. I would add further that where such proceedings are not being served within the twelve-month period for service following the date of issue, it would be prudent for the plaintiff's solicitor to at least notify the named defendants that the proceedings have been issued and to explain why for the moment at least they are not being formally served, given that in all probability an application to renew the summons will be necessary under O. 8, r. 1 RSC. I should not be taken as stating that it is a requirement that the defendants be put on notice. I am merely stating that it may be considered to be prudent to do so.

11. As noted by the trial judge (para. 7) the appellant's solicitor stated in his grounding affidavit that following the issue of the personal injury summons he sought expert reports from a urogynecologist and a colorectal surgeon. Reports received from these experts were supportive of the appellant in terms of both liability and causation. In the light of those reports counsel was in a position to draft an amended personal injury summons. However, it appears that one of these experts advised the appellant's solicitor that a further report from a different expert should be sought in relation to aspects of the appellant's treatment which were outside his sphere of expertise. Accordingly, the appellant's solicitors sought such a report from a colorectal surgeon in the United Kingdom. There was apparently some delay in obtaining that report and it did not arrive until July 2017 despite the appellant's solicitors writing reminder letters to the expert in question.

12. Because of this delay in the receipt of that additional report (which did not arrive until July 2017), the appellant's solicitor decided that the personal injury summons should

nevertheless be served on the defendants rather than further delay service pending receipt of the advised report. Accordingly, the proceedings were served by him on all the named defendants on 4th May 2017. By letter of that date, a copy of the personal injury summons and a draft of the proposed amended personal injury summons were served. The date of service was however some six months outside the 12-month period from date of issue of the proceedings, namely 2nd December 2015. The personal injury summons had not been reviewed prior to this service by way of an application under O.8, r. 1 RSC.

13. The first and second defendants (the Beacon Hospital) entered an appearance in the normal way following service. However, solicitors acting for the present respondents (the surgeons) indicated that they were entering an appearance under protest, although I note that on the form of appearance the words "under protest" have been crossed out. I surmise that this is because the rules make no provision for an "appearance under protest" and that on presentation of the forms of appearance at the central office of the High Court the words "under protest" were accordingly crossed through on the form. There is no provision in the rules for the entry of an appearance "under protest" in order to preserve any entitlement to contest the validity of service at some later stage. It is clear from the rules that if a defendant claims that the service upon him of proceedings is in some way invalid, that defendant must before entering any appearance bring an application by way of notice of motion under O. 12, r. 26 RSC to have service set aside. If such a defendant enters an appearance, the effect thereof is to waive any objection to the manner in which service has been effected, and to cure any such defect (see *e.g.* Walsh J. in *Baulk v. Irish National Insurance Co. Ltd* [1969] I.R. 66 at p. 71 who stated "… if [the summons] had been served after that period and a non-conditional appearance had been entered, the appearance would have cured the defect in the service"). Entry of appearance by a defendant is an acknowledgement that the summons has been served and acts as a notification to the court that this is the case. That effect cannot be suspended or qualified in any way by entering an appearance under protest. There is no provision in the rules enabling that to be done. This has long been the position – see e.g. *Delaney & McGrath on Civil Procedure* 4th ed. Round Hall at para. 4-12 where the authors state:

> "4-12 An unconditional appearance also constitutes an acknowledgement that the defendant is on notice of the proceedings and, therefore, constitutes a waiver of the right to object to any defect in service such as the service of an expired summons..."

Authority cited for this statement includes the judgment of Walsh J. in *Baulk*, and those of Singleton LJ and of Denning LJ in the Court of Appeal in *Sheldon v. Brown Bayley's Steelworks Ltd* [1953] 2 QB 894. Those judgments make it pellucidly clear that an unconditional appearance acts as a waiver of any entitlement to contest the validity of service and cures any defect in service. They make clear also that a summons not served within twelve months does not become a nullity but remains a summons duly issued which is capable of being renewed, and in so far as previous authority such as the

judgment of Lord Goddard in *Battersby v. Anglo-American Oil Co. Ltd* [1944] 2 All ER 389 had expressed the contrary view, albeit on an obiter basis, it was incorrect.

I will return to this question later in this judgment.

14. Having said that, the rules do make specific provision for the entry of a conditional appearance in certain circumstances where a defendant who has been served with proceedings wishes to contest the jurisdiction of the court to determine the proceedings. A conditional appearance is entered for that purpose alone and does not signify any submission by the defendant to the court's jurisdiction. Where the respondents' solicitor was raising in correspondence the validity of the service effected on the respondents in the absence of any renewal order having been obtained, they ought to have not entered an appearance, and instead moved under O.12, r. 26 RSC to set aside service. I accept that the respondents' solicitor asked the appellant's solicitors in correspondence if an order of renewal had been obtained prior to service, and received no information in response.

15. Nevertheless, despite indicating that the validity of service upon the respondents was being contested on the basis that the summons had expired prior to service, an appearance was entered as explained above, and further the respondent's solicitors served a notice seeking further and better particulars of the plaintiff's claim on 5th September 2017, as did the solicitors for the first and second named defendants. The further and better particulars sought by the respondents were provided by the appellant's solicitors in their two letters dated respectively 15th January 2018 and 16th February 2018.

16. In addition to entering an appearance, and furnishing a notice for particulars, the respondents' solicitors provided, as had been requested, a consent (albeit on certain terms) to the amendment of the personal injury summons as proposed in the draft amended summons which had been sent with the personal injury summons on 4th May 2017.

17. Despite considering that an application to renew the summons under O. 8, r. 1 RSC was unnecessary once the respondents had entered an appearance, and had taken the step in the proceedings of seeking further and better particulars, the appellant's solicitors proceeded to bring an application to renew the personal injury summons under O.8, r.1 RSC and in that regard issued a notice of motion on the 22nd February 2018 returnable in the High Court on 3rd July 2018, being the first available return date.

18. The appellant's solicitor acknowledged in his grounding affidavit that he ought to have obtained an order for renewal of the personal injury summons under O.8, r.1 RSC prior to the expiry of 12 months from the date of issue, or even thereafter and prior to service of the proceedings upon the defendants. Nonetheless, the appellant submitted that there was "good reason" for the Court to exercise the jurisdiction to renew this personal injury summons having regard to all the circumstances in the case. In so submitting, it was pointed out that service had been affected only five months after the expiration of 12

months from the date of issue of the proceedings, and also that not only was an appearance entered by the respondents, but that the respondents had also fully engaged with the proceedings following service by delivering a notice seeking further and better particulars, and which had been promptly responded to by the appellant. The appellant also referred to the fact that the respondents had not sought to set aside service by making an application in that regard under O. 12, r. 26 RSC, as they would have been entitled to do.

19. On the application to renew the proceedings, the appellant relied also on the fact that the respondents' solicitors had in fact provided a consent to the proposed amended personal injury summons (albeit on certain terms) although it was accepted that the respondents were maintaining their objection that a renewal order should have been obtained prior to service of the proceedings. The appellant relied also on the fact that one of the expert reports obtained by her solicitor prior to service of the proceedings had advised obtaining a report another expert in relation to aspects of the appellant's claim which were outside that author's area of expertise.

20. The respondents opposed the application to renew the summons. In doing so, they pointed to the fact that service had in fact been effected on the respondents prior to receipt by the appellant's solicitor of the additional report which had been advised should be obtained. This, in their submission, demonstrated that it had not been necessary to await the arrival of that a prior to serving the defendants named in the proceedings, and therefore that service could and should have been effected prior to the expiry of the 12-month period following commencement of the proceedings. In those circumstances it was submitted that there was no "other good reason" for the court to exercise its discretion to renew the personal injury summons. They submitted also that the granting of an order to renew the proceedings would have the prejudicial effect of precluding them from relying on the Statute of Limitations 1957, as amended, by way of defence to the appellant's claims.

The trial judge's judgment

21. The trial judge set out with admirable clarity the background to the application to renew the personal injury summons, and he referred to the relevant correspondence between the parties. He concluded his reference to correspondence by stating the following at para. 15 of the judgment:

> "15. On 15th September 2017 the solicitors for the plaintiff wrote to [the respondents' solicitors] again inviting them to accept service of the amended personal injury summons, and to enter an appearance (by implication, an unconditional appearance) on behalf of those defendants. They went on to state that failing such a response, it would be necessary to apply to renew the summons and to effect service thereafter. In the same letter they stated that they would be relying upon the fact that it was necessary to go to the extent of obtaining an independent medical opinion on liability and thereafter to amend the proceedings, as a substantial reason grounding the application to renew the summons. They refer specifically to the difficulties in obtaining records and expert reports for the

purposes of medical negligence actions. [the respondent's solicitors] replied to this correspondence on 12th October, 2017, repeating what they had said in earlier correspondence, and stating that they had not been provided with any details in relation to any application to renew the personal injury summons. There was a further exchange of letters in December, which is not of any consequence to this application. The solicitors for the plaintiff sent "O'Byrne" letters to the 3rd to 5th named defendants on 16th February, 2018, and on 22nd of February, 2018 they caused the issue of this motion."

22. Having concluded his summary of the factual background to the renewal application the trial judge set forth the provisions of O.8, r. 1 RSC which provides as relevant:

> "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. After the expiration of twelve months, an application to extend time for leave to renew the summon shall be made to the Court. The Court or the Master, as the case may be, 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 six months from the date of such renewal inclusive, … and a summons so renewed shall remain in force and be available to prevent the operation of any statute whereby a time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original summons."

23. Having set forth the rule the trial judge stated:

> "It is not contended by the plaintiff or her solicitors that any efforts were made to serve the defendants until the 4th May 2017. Accordingly, this application depends upon the plaintiff establishing *that there was "other good reason" for not serving the summons before that date*" [emphasis provided].

24. I do not agree with the trial judge's statement that the application "depends upon the plaintiff establishing that there was "other good reason" for not serving the summons before that date". It is not consistent with the words used in the rule. The rule in my view enables the court to order renewal either where reasonable efforts to serve have been made within the time, or for other good reason. The words "other good reason" are not linked to the failure to serve the summons as the trial judge states. Rather, the court must consider whether there is some other good reason for exercising the discretion to order that the summons be renewed. The emphasis is not on establishing some other good reason why the summons was not served. The phrase "other good reason" is free-standing and separate from the first limb or satisfying the Court that reasonable efforts to serve have been made within the 12-month period, and is not confined to establishing a reason why the summons could not have been served within the specified time. The requirement is to establish other good reason why the summons should be renewed. That is a different and indeed a wider focus which allows the Court to take account of all the

circumstances of any particular case in the exercise of its discretion. In my view the trial judge fell into error by construing the rule as he did, leading him ultimately to refuse to grant the order sought.

25. I should add that this position was made clear by the majority of the Supreme Court in *Baulk v. Irish National Insurance Co. Ltd* [supra] where Walsh J. (with whom O Dálaigh C.J. agreed) stated at p. 71:

> "In my view, on the facts of the present case, it could not be said that reasonable efforts had been made to serve the defendants because in fact no effort at all was made to serve the defendants within the period of 12 months. The question then remains whether there was any other good reason for which the Court ought to renew the summons. While the phrase "other good reason" may refer to the circumstances or factors which throw light on the failure to serve the summons within the 12 months, in my view it is not exclusively referable to the question of service but refers also to any other reason which might move the Court, in the interests of doing justice between the parties, to grant the renewal… ."

It can be noted also that in the same case McLoughlin J. took a different view of the phrase "or for other good reason" in O.8, r.1 RSC stating at p. 7373, as did the trial judge, that "this phrase must, in my view, be interpreted as meaning good reason for not serving the summons within the 12 months during which the summons was in force". But that was a view with which the majority was not in agreement.

26. This question was more recently addressed by Finlay Geoghegan J. in her judgment in the High Court in *Chambers v. Kenefick* [2007] 3 I.R. 526 where in a passage with which I am respectfully in full agreement at p. 530 she stated:

> "… the submissions made on behalf of the defendant lead me to the conclusion that the proper approach of this court to determining whether or not it should exercise its discretion under O.8, r. 1, where the application is based upon what is referred to therein as "other good reason", is the following. Firstly, the court should consider is there a good reason to renew the summons. That good reason need not be referrable [sic] to the service of the summons. Secondly, if the court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Thirdly, in considering the question of whether it is in the interests of justice as between the parties to renew the summons because of the identified good reason, the court will consider the balance of hardship for each of the parties if the order for renewal is or is not made."

27. That judgment is not referred to in the trial judge's judgment. Given that he went into some detail in relation to the legal submissions made to him by both parties, it seems probable that neither *Baulk* nor *Chambers v. Kenefick* may not have been opened to him.

28. In his judgment much of the trial judge's focus was on when the expert medical opinions had been sought by the appellant's solicitor. He noted that a report which was supportive of the appellant's case had been received by her solicitor on the 4th July 2016 (just seven months from date of issue of the proceedings). That is the report which advised that another report from a colorectal surgeon should be obtained, but the trial judge notes also that no details were given as to when that additional report was sought. However, he noted that counsel had drafted an amended personal injury summons in October 2016 being still within the 12-month period for serving the summons already issued. The trial judge went on to state that "it has not been suggested that the amended summons received from counsel at that time was any different to that eventually served". Having so stated, the trial judge stated at para. 27:

> "27. In any case, the plaintiff could have applied at that time or within 12 months from the date of issue of the original summons, to renew the summons, and no explanation has been given as to why she did not do so. Nor has any explanation given as to why it took as long as it did, either to serve the proceedings (on 4th May, 2017) or to issue this motion (on 22nd February, 2018)".

29. At para. 35 of his judgment the trial judge acknowledged that the proceedings had been issued against three different hospital consultants, each with different areas of expertise, and went on to state that "inevitably, this raises certain complexities, and it is not difficult to see how this could give rise to delay in the issue or progression of proceedings". He then considered the explanations given by the appellant's solicitor for the delay in serving the proceedings, namely that it had been necessary to obtain medical reports in relation to liability and causation from different experts. However, the trial judge remarked upon the fact that no details or dates had been given as to when those reports were available to the solicitor. The trial judge remarked also that the solicitor was "somewhat vague as to what happened after October 2016". That is a period of time when, according to the appellant's solicitor, he was trying to get the additional expert report that had been advised in one of the reports originally obtained. The further advised report was apparently not received by the solicitor until July 2017, and the trial judge stated in that regard that two issues arose, which he described as follows:

> "1. Firstly, the plaintiff had already obtained a report from a colorectal surgeon that was sufficient to enable the plaintiff to ask counsel to draft an amended personal injury summons which was available from 24th of October, 2016. It is unclear why a further report from a colorectal surgeon was required. But assuming that it was so required in order to clarify certain issues, it remains the fact that there was sufficient evidence available to the plaintiff to plead a case in relation to the matters covered by this area of expertise as of October, 2016. If more detail became available at a later date, which required to be pleaded, it would have been possible to make an application to amend the pleadings at that point in time.
>
> 2. Secondly, in the event, it has not been suggested that the report commissioned from the colorectal surgeon, and received in July, 2017, made any difference or

provided the plaintiff with vital evidence that had hitherto been unavailable. That does not mean of course that the plaintiff was not justified in seeking this report, especially if it had been recommended by the urogynecologist. But it seems very clear that this report was not required in order to serve the proceedings, and this has not been asserted on behalf of the plaintiff."

30. Having stated thus, the trial judge at para. 37 of his judgment stated:

> "37. There is, therefore, an unexplained delay between the period of 24th October, 2016 and 4th May, 2017, and it was during this period that the personal injuries summon expired, on 1st December, 2016. It follows therefore that there has been no good reason (nor, indeed, any reason at all) advanced for the delay in the service of the proceedings in that period."

31. The trial judge then proceeded to consider other arguments made by the appellant in support of the contention that there was "other good reason" to renew the summons. The appellant relied upon the delivery by the respondents of a notice for further and better particulars to which replies were provided promptly by the appellant. It was contended that thereby the respondents had "acceded to the jurisdiction of the court", and that it would be unjust to permit the respondents to "escape liability for their alleged substandard care in circumstances where the case will proceed against the hospital in which they worked, and that the [first] and second named defendants may wish to claim indemnity and contribution from the 3rd to 5th named defendants". Without going into the trial judge's conclusion in any detail in this regard, as in my view it is perhaps unnecessary to do so, it is sufficient to say that the trial judge did not consider this ground to constitute a good reason for granting the renewal application.

32. The appellant also argued that the respondents ought to have brought a motion to set aside service of the summons under O. 12, r. 26 RSC if they wished to maintain their objection to the validity of service of the proceedings. However, the trial judge considered that a party who has been served with an expired summons could not be under any obligation to bring such an application. He was satisfied that once the party served had raised its objection in this regard with the other party "the onus is on that [other] party to take whatever action is necessary to regularise matters because he or she can hardly be entitled to progress the proceedings on the basis of an expired summons".

33. Again, I would take a different view to that expressed by the trial judge. Firstly, a summons which has "expired", to use the trial judge's phrase, is not a nullity. This matter is addressed also in *Baulk* by Walsh J. where at p. 71 he stated:

> "In my view Order 8, r.1 of the Rules of the Superior Courts, in speaking of "no original summons shall be in force for more than 12 months from the day of the date thereof", does not mean that the summons becomes a nullity after that date but that it shall not be in force for the purpose of service after that date, unless renewed by leave of the court."

Walsh J went on to refer to the court's power to renew the summons, and I have already referred to this statement, again at p. 71 to the effect that where service is affected after the period of 12 months but without renewal, the entry of an appearance would cure the defect in the service.

34. I cannot therefore agree that the defendants were not under any obligation to bring an application under O. 12, r. 26 RSC where they wished to question the validity of the service of these proceedings outside the period of 12 months from date of service absent a renewal order. They ought to have done so, as stated already, and prior to the entry of an appearance as specified by the rule.

35. The trial judge was satisfied that the respondents had not sought to argue that they would suffer any particular prejudice if the personal injury summons was renewed by order of the court, save that they would be deprived of making an argument by way of defence under the Statute of Limitations, 1957, as amended, if same is renewed. I will consider the question of prejudice to either party when considering in due course the balance of justice.

36. In para. 43 of his judgment the trial judge summed up his conclusions by stating as follows:

> "43. While it is clear from the summary of the plaintiff's injuries that I have set out earlier in this judgment that the injuries alleged by the plaintiff in these proceedings are very serious, the plaintiff has not advanced any good reason as to why the personal injury summons was not served during the lifetime of the summons. No notice of the proceedings was given to the defendants in advance of service of the same on 4th May, 2017. No reason was given as to why an application to renew the summons was not made before it expired. The fact of its expiration was raised implicitly by the solicitors for the 3rd to 5th named defendants on 30th May, 2017 and again expressly on 21st June, 2017 but the application to renew was not made until 22nd February, 2018. The lapse in time between the date of expiration of the summons (1st December, 2016) and the date of the application to renew the summons (22nd February, 2018) was almost fifteen months. While it is true to say, as the applicant has argued, that there are many cases in the authorities where the delay in serving/applying to renew the summons was much greater than in this case, and that the length of the delay is a factor to be taken into account in determining where the interests of justice lies, this is so only if the applicant can first establish a good reason for failing to serve the summons. That this is so is clear from the decision of Peart J. in Moynihan which has been repeatedly approved."

37. I should say something arising from the reference to my judgment in *Moynihan v. Dairygold Cooperative Society Ltd* [2006] IEHC 318. That was a case where I considered what was meant by the phrase "other good reason". The trial judge noted that subsequent to *Moynihan*, Kelly P. in *Whelan v. Health Service Executive & anor* [2017]

IEHC 349 had quoted extensively from my said judgment in *Moynihan*, and in particular had referred to my following paragraph therein:

> "The court is required in my view to reach the conclusion not only as to what is the true reason why the summons was not served within the proper time, but also to conclude that the reason justifies the failure to serve. It is in that sense that the word 'good' must be read. Even if the court is satisfied that the reason is a good reason, it must then proceed, where prejudice is alleged, to consider matters such as the length of the delay, the conduct of the proceedings generally to date, whether this defendant was alerted in any timely manner or at all by the plaintiff that a claim might be made, and whether in all the circumstances the prejudice to the defendant in having to defend the proceedings after the length of time involved is such as to outweigh the undoubted prejudice to the plaintiff in being in effect debarred from proceeding with the claim at all, or whether, on the other hand, the prejudice to the plaintiff is in all the circumstances such as to justify depriving the defendant to his/her right to avail of the Statute of Limitations. In a general sense the court is engaged in determining where the interests of justice between the parties lies."

38. The trial judge came to the view that because the summons could as easily have been served prior to the expiry of the 12-month period as it was on the 4th May 2017 (since by that date the additional report advised and sought had not been received) the explanation for not having served the proceedings was not "a good reason" because it did not justify the delay in service, as I expressed it in Moynihan. I did, of course, state in *Moynihan* that a good reason is a reason that justifies the delay in service. However, in my view the trial judge took too narrow a view of the concept of justification. He considered that if the summons could have been served within the time provided, then the failure to do so was not justified by waiting for a report that in fact did not arrive before service was actually affected. In my view that is too strict or narrow an application or construction of what I expressed to be a "good reason" in *Moynihan*, and in any event fails to adhere to the construction of the rule appearing in *Baulk* and in *Chambers v. Kenefick* as already described.

39. In professional negligence cases, and perhaps particularly in medical negligence cases, the authorities make clear that a plaintiff ought not to serve proceedings on professional defendants without there being expert evidence which supports the claims of negligence being made on a *prima facie* basis at least. In the present case the opinion of experts in three different areas of expertise were required and were sought. It is true that two reports were received well within the period of 12 months from the date of issue of the proceedings. One of those reports recommended that an additional report be obtained from a specialist in a different area of expertise. That report was sought by the solicitor for the appellant, but there appears to be no doubt but that there was some delay in obtaining same. In my view, if a prudent solicitor, acting responsibly and in a *bona fide* manner, decides that he/she should obtain the additional report from another expert as advised by an existing expert, prior to serving the professional defendants, his client

should not be prejudiced by any delay in so doing, provided of course that the delay was not unreasonable, and particularly where that delay is not caused by any inaction on the part of the solicitor. Medical negligence proceedings by their very nature are complex, and have very serious consequences for an unsuccessful plaintiff, and indeed very serious consequences for the professional defendant who may be found to have acted negligently. They are cases in which the plaintiff's solicitor is obliged to act professionally and with reasonable prudence, so that professional defendants are not irresponsibly vexed by proceedings based on allegations of negligence for which there is not a sufficient *prima facie* evidential basis. If a solicitor, acting responsibly and in a bona fide manner decides to withhold service of such proceedings until advised reports are in his/her possession, that in my view is a good reason justifying the renewal of the summons under O.8, r. 1 RSC., subject always to the proviso already referred to, namely that the delay involved is not found to have been unreasonable. In such circumstances the plaintiff ought not to suffer the very serious prejudice of having her claim terminated because her solicitor acted in his/her view prudently, or even with an excess of caution, though there must be limits to the latter. Each case must be considered on its own merits and in the light of all its particular facts and circumstances.

40. In the present case, while the trial judge was perhaps somewhat critical of the lack of detailed information as to when the third report had first been sought, there is no suggestion that the appellant's solicitor was acting other than in a responsible and *bona fide* manner in seeking that report. It is also clear that when he experienced a delay in obtaining that report, despite writing to the expert on more than one occasion, he decided that the prudent course was to then proceed to nevertheless serve the proceedings on the defendants despite the absence of that additional report. I would take the view that the solicitor in question was acting prudently, perhaps overly so, given that he was already in possession of two reports which were supportive. But I would decline to visit upon him and his client the dire consequence of refusing to renew the personal injury summons because he may have acted with excessive prudence. In my view the facts and circumstances constitute a good reason to renew the summons. I emphasise the fact that, as already stated, the "other good reason" referred to in the rule is one which justifies the court in exercising its discretion to renew the summons, and not the failure to serve the proceedings within the permitted period, as the trial judge stated.

41. Having said that, there is no doubt that the appellant's solicitor could, and perhaps should,have, acted differently. It would have been preferable in my view for him to have, prior to the expiration of the 12 month period for service, made an application to the Master for an order renewing the summons for a period of six months as provided, explaining on such application that the proceedings themselves were issued on a precautionary basis to prevent the statute running against the appellant, and so that the necessary medical reports could be obtained prior to the proceedings being served as mandated by the case law in relation to professional negligence proceedings, such as Cooke v. Cronin & ors [1999] IESC 54. It would be prudent also to have at least put the defendants on notice of a potential claim being made, notwithstanding any consequence such notification may have for the professional defendants themselves.

42. Prior to serving the proceedings on the defendants on 4th May 2017 the appellant's solicitor ought to have realised that the time for service had expired and therefore that an order of renewal was required. He ought also to have responded more clearly and positively to the respondents' solicitors' perfectly reasonable enquiry as to whether an order for renewal had been obtained. While I would fault him in these respects, I would not however consider that in all the circumstances it should render bad an otherwise "good reason" to order that the summons be renewed.

43. Having concluded that the explanation for the delay given by the appellant's solicitor constitutes a good reason to renew the summons, it is necessary in accordance with the principles identified by Finlay Geoghegan J. in *Chambers v. Kenefick* to consider whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons, and in considering that question, to consider the balance of hardship for each of the parties.

44. In this regard, the hardship to the appellant in refusing an order for renewal is very clear and obvious. Her claims against these respondents will be at an end, albeit that she may continue to pursue her claims against the hospital. As for the respondents, there is no similar hardship, save that if the summons is renewed they will not be freed of the burden of defending the proceedings should they choose to do so. They have not sought to claim a particular prejudice save the inability to plead the statute. In fact, their solicitors had already set about addressing their defence of the claims before this renewal application was brought, in so far as they had sought, in the usual way, further and better particulars of the appellant's claims, the replies to which would have enabled their solicitors to deliver a defence to the claims. On the question of prejudice to the respondents, it must be remarked that in contrast to many cases where a renewal of a summons is sought the period of time which elapsed after the expiration of the summons and before the application was brought is, relatively-speaking, short. No doubt the application ought to have been brought in a more timely fashion but balancing the interests of the parties in a fair manner, I am satisfied that the balance of justice tilts easily in favour of ordering renewal of the summons in this case. I am satisfied that my decision is consistent with what was stated by Clarke J. (as he then was) in the High Court in *Moloney v. Lacey Building and Civil Engineering Ltd* [2010] 4 I.R. 417 at pp. 424-425 as relevant:

> "19. On the basis of the judgment of Feeney J. in Bingham v. Crowley [2008] IEHC 453, (unreported, High Court, Feeney J. 17th December, 2008), it seems clear that the absence of an appropriate expert report may provide, in certain circumstances, a "good reason" for not serving a plenary summons pending the receipt of such a report. However, it is clear that the absence of an appropriate expert report will only justify a failure to serve a plenary summons where the existence of the report concerned would be reasonably necessary in order to justify the commencement of proceedings in the first place. There is ample authority for the proposition that it is appropriate for a party considering suing for professional negligence to have obtained a sufficient expert report in advance of commencing such proceedings

such as would warrant forming the view that there was a prima facie case of negligence against the person concerned … .

20. 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."

45. It seems clear that the availability of the awaited report was in fact considered reasonably necessary in order to justify the decision to maintain the proceedings in the first place notwithstanding the fact that the appellant's solicitor served the summons prior to the receipt of the report. On the question of the balance of justice, the respondents relied heavily on the judgment of Feeney J. in *Bingham v. Crowley* [2008] IEHC 453 where, in relation to delay, Feeney J. stated: "The requirement to serve a summons without delay is all the greater not only where there has been no warning letter but also where the period provided for in the Statute of Limitations has already expired". However, that was a case where the good reason for renewing the summons was put forward as being that the claim would otherwise be statute-barred. This is not such a case. While it is the case that if the summons is not renewed the appellant's case against the respondents will be statute barred, the "good reason" advanced is not that. It is that the solicitor considered that a further medical report, as advised to him, should be obtained prior to service taking place. I would distinguish *Bingham v. Crowley* on that basis. I do not disagree at all with what is stated in that judgment about the need for expedition in relation to service of proceedings and in relation to bringing the application to renew. Indeed, I emphasised that need in what I stated at para. 15 of my judgment in *Moynihan*.

46. For the above reasons, I would allow the appeal against the order refusing to renew the personal injury summons, and order that it be renewed for the period of six months provided for under the rule.

47. I have addressed the appeal on its merits and on the basis of the grounds argued, but I wish to add some further remarks since for the reasons I will come to, it is my view that no application to renew the personal injury summons in this case needed to be brought in the first place once the respondents had entered what can only be regarded as an unconditional appearance. The fact that the respondents' solicitor intended to reserve their position so as to contest the validity of service by intimating in correspondence that they were entering an appearance "under protest" does not mean that the appearance in fact entered was in any way conditioned. It was not. The only appearance that could have been entered, and in fact was entered, was an unconditional appearance, and one

accordingly that cured any defect in service occasioned by the failure to have obtained an order renewing the summons under O. 8, r.1 RSC.

48. The argument made by the respondents that once the summons was not served within the period of twelve months provided for in the rules the summons became a nullity, is not correct. Neither was the trial judge correct when he stated that once the respondents' solicitor brought it to the appellant's solicitor's attention that there was an objection to service there was an obligation on the plaintiff to regularise the situation "because he or she can hardly be entitled to progress the proceedings on the basis of the expired summons". It has long been held that where a summons has not been served within the twelve-month period laid down for service, it does not become a nullity. It has not expired in that sense. It is simply that the summons is not in force for service until a renewal order is obtained as provided for in the rules. The rules specifically provide for renewal even outside the twelve-month period, as is clear from Order 8. R. 1 RSC itself. In this regard I again refer to the passage from the judgment of Walsh J. in *Baulk* which I have set forth at para. 32 above.

49. From what I have stated a number of matters are in my view clear. Firstly, the personal injury summons did not expire in the sense of becoming a nullity upon the expiration of the twelve-month period for service. Secondly, if the respondents, once served, wished to raise an objection to the validity to service the way to do that was to bring an application under O. 12, r. 26 RSC *prior to entering an appearance*. Thirdly, the entry of their appearance to the summons had the effect of curing any defect that may otherwise have been found in the validity of the service effected outside the twelve-month period absent a renewal order. Fourthly therefore, on the facts of this case no application to renew the summons was necessary. The controversy that arose has simply served to add unnecessarily to the costs of the proceedings and the needless exhaustion of a good deal of court time and resources.