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THE COURT OF APPEAL

Neutral Citation No [2021] IECA 3

Court of Appeal Record Number: 2020/220

High Court Record Number: 2018/7802 P

Whelan J.

Noonan J.

Haughton J.

BETWEEN/

SHEILA MURPHY

PLAINTIFF/RESPONDENT

- AND -

HEALTH SERVICE EXECUTIVE

DEFENDANT/APPELLANT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 15th day of January 2021

1. This is an appeal from the judgment of Cross J. delivered on 29 September 2020 refusing to set aside the order of Murphy J. dated 3 February 2020 made *ex parte* renewing the Personal Injuries Summons herein for a period of three months. The order appealed from is dated 16 October 2020

and was perfected on 19 October 2020. Cross J. made "no order as to costs", from which order there is a cross-appeal.

2. This appeal concerns the circumstances in which the court may renew a summons under O. 8, r.1 of the Rules of the Superior Courts 1986, as substituted by the Rules of the Superior Courts (Renewal of Summons) 2018 (S.I. no. 482 of 2018) ("the amended O. 8"), which came into operation on 11 January 2019. In particular it addresses the correct interpretation of the amended O. 8, and what may constitute "special circumstances which justify an extension" under sub-rule (4).

Background

3. The background to these proceedings appears from the affidavit of Paul Kelly solicitor sworn on 29 January 2020 on behalf of the respondent, the affidavit of Ruth Finnerty solicitor sworn on 29 April 2020 in support of the application of the defendant/appellant ("HSE") applying to set aside the renewal of the Summons, the replying affidavit of Mr. Kelly sworn on 3 July 2020, the supplemental affidavit of Ms. Finnerty sworn on 24 August 2020 and the third affidavit of Mr. Kelly sworn on 3 September 2020.

4. The proceedings relate to a claim for medical negligence, and as Mr. Kelly avers in his first affidavit arise in circumstances where the respondent was brought by ambulance to the Accident and Emergency Department of Mayo General Hospital at approximately 12.10pm on 19 March 2016, with weakness and loss of power in her left upper limb. The Registrar on duty directed that the respondent be admitted to the female medical ward. Over the course of 19 March 2016 the respondent's condition worsened and she experienced increased weakness and loss of power on her left side. On 20 March 2016 further deterioration in her condition was recorded and she was transferred to the stroke unit at the hospital where she underwent a CT brain scan which revealed a right parietal ischaemic infarct adjacent to the basal infarct. The respondent was an inpatient until 18

April 2016 when she was transferred to St. Joseph's Rehabilitation Unit of the Sacred Heart Hospital until around 1 September 2016.

5. The respondent, who was born on 15 June 1939, is now 81 years of age. It is averred by Mr. Kelly that she is a frail, elderly lady in poor health who lives alone in County Mayo.

6. The following is the chronology of events starting with the respondent's first contact with her solicitors: -

19/20 March 2018 – The basic period of 2 years provided for by the Statute of Limitations 1957 (as amended) for the issue of personal injury proceedings expired.

29 April 2018 – Website query from the respondent.

15 May 2018 – Telephone consultation between the respondent and her solicitors. Data access request issued to Mayo General Hospital.

11 July 2018 – Respondent's medical records received.

31 August 2018 – A Protective Personal Injuries Summons is issued in these proceedings. This states, under the heading "Particulars of Negligence and Breach of Duty" that such particulars "… may be adduced upon receipt of medical reports from expert medical practitioners in the relevant field either prior to or on the hearing of the action", and para. 10 pleads: -

"As of the date of issue of the Personal Injuries Summons herein the Plaintiff is unable to include therein full particulars of all acts of the defendants constituting the wrong, particulars of negligence, and breach of duty, particulars of personal injuries and particulars of special damage in circumstances where the plaintiff issues this Personal Injuries Summons in order to protect their position under the Statute of Limitations 1957 (as amended) and prior to having

received all her medical records and expert reports from medical practitioners in the relevant field. The plaintiff therefore reserves the right to adduce all details required by Order 1A of the Rules of the Superior Courts upon receipt of all expert reports and medical records in this regard. The plaintiff relies on this statement for the purposes of Order 1A, Rule 6 of the Rules of the Superior Courts."

13 September 2018 – request to respondent for payment of outlay sent by email, but missed by the respondent and only noted in January 2019.

21 March 2019 – medical records sent to Mr. M. Saab Consultant in Accident and Emergency Medicine, and a report sought on breach of duty.

19 May 2019 – an "initial report" obtained from Mr. Saab with factual inaccuracies in relation to events on 19 March 2019. Mr. Kelly requests statements from witnesses in relation to factual circumstances.

8 August 2019 – statement from the respondent and statements from two further witnesses obtained, and sent to Mr. Saab on 12 September 2019.

1 September 2019 – The Personal Injuries Summons which issued protectively on 31 August 2018 expired.

16 September 2019 – Mr. Saab's further report received identifying breaches of duty at Mayo General Hospital, but advising that a separate report be required from a stroke specialist in relation to causation.

16 September 2019 – Mr. Kelly sent an email to a consultant requesting that he prepare a causation report, but he did not receive any reply.

20 September 2019 – Mr. Kelly sends an email to Dr. G. Subramanian, Consultant in Stroke Medicine, enquiring whether he would be in a position to provide a report. He confirmed his availability, and confirmation to proceed with him was received from the respondent on 23 October 2019.

3 December 2019 – An initial report received from Dr. Subramanian. This was shared with Mr. Saab.

20 December 2019 – Mr. Saab furnishes a final report.

14 January 2020 – Final report received from Mr. Subramanian after inaccuracies and further clarification addressed.

29 January 2020 – Mr. Kelly wrote to the HSE, care of the State Claims Agency, advising, *inter alia*: -

> "We have received independent expert medical opinions that have concluded *inter alia* that there was a breach of duty by you, your servants or agents in failing to appropriately diagnose and treat the plaintiff's ischaemic stroke. The delay in aspirin prescription/administration *inter alia* materially contributed towards the stroke progression. Aforesaid alleged breaches of duty and care caused serious injury and damage to our client."

3 February 2020 – *ex parte* application made on the respondent's behalf to the High Court, and the following orders were made by Ms. Justice Murphy: -

> " And the Court being satisfied having regards to Order 8 Rule 1 (4) that the following special circumstances justify the making of an Order extending the time for leave to renew the Personal Injuries Summons herein

In circumstances where delays have occurred in obtaining medical reports

IT IS ORDERED pursuant to O.8, r. 1 of the Rules of the Superior Courts that the time for applying for renewal of the said Personal Injuries Summons be extended to the date hereof.

AND IT IS ORDERED that the said Personal Injuries Summons be renewed for a period of three months from the date hereof.

And the court doth make no order as to costs."

14 February 2020 – Mr. Kelly receives a letter dated 11 February 2020 from the State Claims Agency confirming that Messrs. Ronan Daly Jermyn had authority to accept service of proceedings.

19 February 2020 – the renewed protective Personal Injuries Summons was served on the appellant, together with a copy of the order of Murphy J.

1 April 2020 – the appellant's solicitors indicate that they have been instructed to issue a Notice of Motion to set aside the order of Murphy J., and that it is not therefore appropriate for them to endorse service of the Summons or enter an Appearance.

6 May 2020 – the appellants issue their Notice of Motion, with a return date of 6 July 2020.

7. Ms. Finnerty in her first affidavit sets out an abbreviated Timeline, and points in particular to the failure to serve the Personal Injuries Summons in the twelve month period following its issue on 31 August 2018, and a period "in excess of 5 months after the expiration of the summons" before application was made to extend time to renew on 3 February 2020. She points out that Mr. Kelly's first affidavit contains no explanation as to why an application to renew the summons was not made prior to it expiring, and contains no explanation as to the delays that were incurred in obtaining

medical reports, and she asserts that a delay in obtaining medical evidence does not constitute a special circumstance sufficient to justify an extension of time for renewal of the summons.

8. Mr. Kelly in his second affidavit sets out the fuller chronology and asserts that until his office was in receipt of expert opinion confirming both breach of duty and causation it was inappropriate to serve the proceedings. He states that the procuring of the expert opinions proved to be "a time-consuming exercise and that the time that elapsed following the issuing of the protective Personal Injuries Summons is attributable to the efforts taken by this firm and this deponent in obtaining the necessary expert opinions to support allegations of both negligence against the Defendant and causation of material injuries to the Plaintiff." (Para. 8) In para. 9 he avers that –

> "… A consideration of the steps taken on behalf of the Plaintiff establishes that this firm has at all times acted with the utmost diligence and perseverance in the investigation of her claim and that it would not have been professionally appropriate to proceed to service of the protective Personal Injuries Summons until the receipt of final expert opinion which only occurred on 14 January 2020."

He also notes that because the appellants declined to endorse the personal injuries summons with service or enter an appearance he has been unable to serve updated Particulars of Negligence and updated Particulars of Personal Injuries. He relies on his letter of 29 January 2020 as notifying the appellant of the nature of the claim. In para. 13 he gives a commitment that the claim will "… proceed with all due expedition and that there shall be no [further] delay on the plaintiff's part in bringing the claim on for trial… [and] that this firm shall provide all reasonable co-operation in ensuring that the Defendant and its solicitors are in a position to fully and expeditiously prepare the defence of the claim upon such basis as the Defendant chooses"

At para. 14 of his second affidavit Mr. Kelly addresses the question of prejudice in the following terms: -

> "I say that, unlike the hardship that the elderly Plaintiff, who suffers ill health, lives alone and was admitted to hospital earlier this year for a lengthy period, will necessarily suffer if the Summons is not renewed, the Plaintiff is unaware of any prejudice that could accrue to the Defendant in the event that she is permitted to proceed with her claim. There is no suggestion in Ms. Finnerty's affidavit of any prejudice arising to the Defendant should the protective Personal Injuries Summons be renewed and yet the Defendant seeks to impose an unfair and unwarranted penalty on the Plaintiff."

To this Ms. Finnerty swore a replying affidavit in which she submits that the respondent should not be entitled to rely on the delay in obtaining expert medical opinion as the basis for failing to renew the summons, or serve the summons, *prior to expiry*. She relies by way of example on the fact that expert opinion was not sought until 8 months following receipt of the respondent's medical records, and 7 months following the issue of the protective writ. She also points to the fact that the respondent's statement was not sent to the expert until three months after the receipt of the initial report, and the fact that an expert to deal with causation was not approached until 20 September 2019. In suggesting that no "special circumstances" arise in the case she then avers: -

> "10. While it may not have been appropriate to serve the summons prior to obtaining the reports, it is respectfully submitted that the Plaintiff has failed to explain why it was not renewed prior to expiry. There are no special circumstances justifying why it took a period of in excess of five months following expiry of the summons for the Plaintiff's application to renew the summons.

11. Finally, I wish to highlight that a letter of claim was not sent to the Defendant until January 2020, three years and nine months following the alleged wrongdoing which it is submitted is a factor which should be given due consideration in assessing the interests of justice between the parties."

9. In his third affidavit Mr. Kelly clarifies that the respondent's statement was received by him on 8 August 2019 and sent on that date to Mr. Saab. He also contests that there was delay in procuring a report on causation, stating that on 23 September 2019 he received confirmation from Dr. Subramanian of his ability to prepare a report, and on the following day he sought instructions from the respondent to proceed with procuring such a report, and that he further corresponded with the respondent on 30 September 2019 and 4 October 2019 in relation to the cost of procuring such report and, on receiving confirmation from the respondent to proceed with obtaining that report on 23 October 2019 he assembled instructions and sent these to Dr. Subramanian on 31 October 2019.

Order 8

10. The original Order 8, rule 1 of the Rules of the Superior Courts, 1986 provided –

"1. (1) No original summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons. After the expiration of twelve months, an application to extend time for leave to renew the summons 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 so from time to time during the currency of the renewed summons…"

11. The amended O.8 r.1 as substituted by S.I. No. 482 now provides as follows: -

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

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

(3) After the expiration of twelve months, and notwithstanding that an order may have been made under sub-rule (2), application to extend time for leave to renew the summons shall be made to the Court.

(4) The Court on an application under sub-rule (3) may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive where satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order.

(5) The summons shall, where an order of renewal has been made, be renewed by being stamped with the date of the day, month and year of such renewal; such stamp to be provided and kept for that purpose in the Central Office and to be impressed upon the summons by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in the Form No. 4 in Appendix A, Part I; 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."

The new O.8, r. 2 now provides –

> "2. In any case where a summons has been renewed on an *ex parte* application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order."

Also relevant is that S.I.No. 482 made a consequential amendment of Order 122 r.7, which empowers the court to enlarge time, by substituting in the following rule:

> "7. (1) Subject to sub-rule (2) and to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement ma be order although the application for same is not made until after the expiration of the time appointed or allowed.
>
> (2) Sub-rule (1) does not apply to any application to which Order 8 applies."

The argument in the High Court

12. In bringing the application to set aside the *ex parte* order of Murphy J. the appellants argued that the new rule required the court to ask two questions: -

(1) At the time the application was made, were there special circumstances justifying an extension of time in order for the respondent to seek leave to renew the summons?, and

(2) were there good reasons that justified the renewal of the summons?

This argument was based on the approach adopted by O'Moore J. in *Ellahi v The Governor of Midlands Prison & Ors* [2019] IEHC 923, where at para. 17 of his judgment he stated: -

> "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."

13. The appellants argued that both these questions should be answered in the negative. It was contended that Mr. Kelly's explanations inadequately explained the delay in briefing medical experts with medical records and witness statements, failed to explain why an application to renew was not made before the Master prior to expiry of the summons, and failed to explain why, at no point during the process, was the HSE put on notice of the claim. It was argued that a medical negligence claim is no different to any other professional negligence claim. It was argued on the authority of Hyland J. in *Brereton v The Governors of the National Maternity Hospital & Ors* [2020] IEHC 172 that determination of "special circumstances" and "good reason" required consideration of the interests of justice and potential hardship to each party. In that case the application to renew the summons was brought ten weeks from the date upon which the summons expired, and Hyland J. stated –

> "I am of course conscious that with the change in the legal test to 'special circumstances', much shorter periods of delay are likely to be treated as sufficient to justify a refusal to renew a summons. Had the period of delay been longer, even by a month or two, my approach to this case would have been different." (para. 31)

Counsel argued that in the present case the respondent's solicitor appeared to ignore the expiry of the summons, never wrote to the HSE before the expiry of the twelve month period, and did not inform the HSE at all about the claim until 5 months after the summons had expired, and that 5 month period was significant and resulted in general prejudice to the HSE.

As to "good reason" it was argued that Mr. Kelly made no reference to good reasons for justifying the renewal of the summons, other than suggesting that it was inappropriate to serve it until appropriate medical expert opinions had been obtained. It was argued that a party is not entitled to wait indefinitely for an expert report before issuing and serving a summons, and reliance was placed on the judgment of Clarke J. (as he then was) in *Moloney v Lacy Building and Civil Engineering Limited* [2010] 4 IR 417 where he held at para. 5.6 –

> "In *Bingham v. Crowley*, the plaintiffs, parents of a deceased person, sought to renew a summons in respect of a medical negligence claim. The plaintiffs claimed, *inter alia*, that the summons was not served as they were awaiting further expert medical opinion. Feeney J. noted that it was not averred that such opinion impacted on the ability to serve the summons and concluded as follows, at para. 34:-
>
> > 'The Court is satisfied that the opinion of the first named plaintiff that additional reports were required from further medical experts was not a good reason for the non service of the plenary summons.'"

Clarke J. held that the absence of an expert report would be good reason for not serving a plenary summons but only if the expert report was reasonably necessary in order to justify the decision to responsibly maintain the proceedings and if appropriate expedition was used in attempting to procure a report. Counsel for the HSE argued that on the facts the plaintiff's solicitors did not use appropriate

expedition in attempting to procure the reports. It was argued that this was compounded by the failure to notify of the claim while knowingly allowing the summons to expire.

14. As to the interests of justice and balance of hardship it was contended that the plaintiff had not made out a case of severe prejudice or hardship, or linked it to special circumstances or "good reason" for renewal; and in contrast the HSE had, through no fault of its own, now found itself notified of a claim in respect of care that occurred almost four years previously.

15. In the High Court counsel for Mrs. Murphy disagreed that there was a two stage test and argued that O. 8, r. 1 as amended only required the court to be satisfied "that there are special circumstances" which justify a renewal, and cited in support the decision of Meenan J. in *Murphy & anor v ARF Management Limited* & ors [2019] IEHC 802. Counsel emphasised the importance in medical negligence actions of obtaining expert medical opinion to justify bringing proceedings, and that delay in obtaining appropriate reports could, under the original O. 8, constitute "good reason" for a renewal of the summons where it was inappropriate to serve it before reports were to hand; in particular reliance was placed on Dunne J. in *Creevy v Barry – Kinsella and Ors* [2008] IEHC 100 and *Mangan v Dockery* [2014] IEHC 477 (Costello J.)

16. Counsel also referred to the Code of Conduct for barristers which provides that barristers ought not settle a pleading claiming professional negligence unless they have satisfied themselves that expert evidence is or will be available to support such claim, unless the time for issuing is about to expire in which case the barrister should advise that the proceedings be issued but not served until the expert evidence is available.

17. Counsel argued that the circumstances of the present case constituted both 'special circumstances' and 'good reason' within the meaning of the amended O. 8, r. 1. It was argued that it would have been inappropriate and professionally unethical to serve the summons until a valid and

sustainable cause of action had been identified, and that reasonable efforts were made to obtain appropriate expert reports and that there was no significant period of delay or inactivity in procuring those reports, and that no culpability should attach to Mrs. Murphy who was in poor health, elderly and living alone and inadvertently missed an email communication. In considering the interests of justice it was argued that no prejudice had been identified, and the balance of justice favoured the renewal of the summons.

Judgment of the High Court

18. Cross J. after referring to the decision of Moore J. in *Ellahi,* and differences in opinion in the High Court as to whether there was a two-tier test or just a test of "special circumstances" decided that it was not necessary to determine this issue: -

> "11. Apart from the stipulation in the passage quoted by O'Moore J. of *'other'* good reasons, I have little difficulty in accepting that special circumstances must exist to allow an extension of time and that there must be good reason to justify the renewal. I would not wish to be seen to be in any way going against decisions of my colleagues. Suffice it to say without those aforementioned decisions, it would not be my reading of O.8 that a court would first be obliged to consider "special circumstances" and then decide on "good reasons". Happily, I do not have to pronounce on that issue because I believe the point made by the defendants is a distinction without a difference because as was conceded by Mr. Buckley of the Inner Bar on behalf of the defendants there are no circumstances in which he could imagine a court would hold that there were special circumstances justifying the extension of time and not conclude that there were good reasons justifying the renewal of the summons. Certainly no such difference was advanced in this case and I shall treat this application on the basis as to whether the plaintiff has satisfied the court that there are special circumstances justifying the extension

because if there are special circumstances it defies logic that there should not be a good reason for doing so. The test of 'special circumstances' is more onerous than that of 'good reasons'."

In his "conclusions" the trial judge noted that it was not a case of inadvertence in failing to serve the summons, but rather a deliberate decision not to serve until the necessary medical reports were available. He then found –

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

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

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

Having quoted the relevant part of the Code of Conduct of a Barrister, Cross J then stated –

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

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

19. Cross J. went on to find that the special circumstances justifying the *ex parte* application were that Mrs. Murphy's solicitors chose to wait until they had obtained the medical reports sufficient to justify the claim, and that they and the doctors cannot be criticised for any particular delay "… and there has been absolutely no specific prejudice alleged." (para. 37) Cross J. then considered the balance of justice: -

"38. If and insofar as a balancing of justice is required I hold that the failure of the plaintiff to notify the defendants of the facts of the proceedings, ought to provide them with a courtesy copy thereof, in respect whereof no specific prejudice has been alleged, is outweighed by the prejudice to the plaintiff. If the defendant's application was granted as the defendants have already indicated they will be making a plea under the Statute of Limitations in any event

should their application be refused, it is clear that if the plaintiff is forced to issue new proceedings that the application under the Statute of Limitations would be significantly strengthened."

The trial judge therefore concluded that there was no culpable delay in obtaining the requisite reports, and that the failure to give the defendant advance warning of the proceedings was not acceptable but in the circumstances did not create any specific prejudice or injustice and did not impact upon the issue of "special circumstances". He noted that the case was different from the line of authority in dealing with inadvertence.

Grounds of appeal

20. In the Notice of Appeal there are twelve grounds, which may be grouped as follows –

- Grounds 1 and 2 raise the issue of the correct interpretation of O. 8 and whether it requires a two stage test or a single test of "special circumstances".

- Grounds 3 – 6 plead that the trial judge erred in his findings as to the extent of the professional obligation to obtain expert medical opinion before serving a Summons, the requirement of a reasonable expedition in obtaining such expert opinion, and whether and for how long a plaintiff can deliberately refrain from serving a Summons in the knowledge that the Summons will lapse.

- Ground 7 asserts that the trial judge erred in some four respects in finding "special circumstances" and/or "good reason" to renew the Summons.

- Grounds 8 and 9 plead that the trial judge erred in holding that the failure to serve a courtesy copy of the Summons did not create prejudice or injustice, or impact on "special

circumstances", particularly where the Summons could have been renewed before it expired or could have been served "on a protective basis".

- Grounds 10, 11 and 12 plead that the trial judge erred in finding that there was no culpable delay on the part of the respondent's solicitors, or the respondent herself, and in not considering the overall delay in the progress of the case.

Respondent's notice

21. This traverses each ground of appeal, and additionally pleads that the appellant has suffered no specific prejudice, and that the balance of justice favours the renewal in that the respondent would otherwise suffer prejudice.

22. The respondent raises a cross-appeal in respect of the trial judge's finding that the respondent's solicitors should have notified the appellant of the fact of the proceedings at the time of issuing the summons, or have served a courtesy copy. It is pleaded that this is not required by the Rules of the Superior Courts and that such a requirement would be inconsistent with authorities which established that it is inappropriate to serve a summons in professional negligence cases without the necessary support of expert opinion, in this case not received until 14 January 2020, which was shortly followed by the issue of a warning letter on 29 January 2020. It is pleaded therefore that the trial judge erred in law in making no order as to costs.

The argument before this court

23. To a large extent the arguments pursued in the High Court were also raised before this court. The appellants argued for a two stage test and submitted that the trial judge failed to consider the second limb of the test, namely whether the plaintiff had demonstrated good reason to justify the renewal of the summons. It was submitted that the trial judge erred in his evaluation of what

constituted “special circumstances”. It was submitted that there was delay and a lack of expedition in a number of respects: -

(i) Firstly the respondent’s delay of four months in replying to her solicitor due to mislaying correspondence;

(ii) secondly a further delay of two months before records were sent to Mr. Saab;

(iii) thirdly a delay of three to four months before sending to that expert the additional statements;

(iv) and then a further delay of a month without explanation between September 2019 and October 2019 before the respondent gave instructions to proceed with the second expert.

Emphasis was placed on the failure to apply to the Master, prior to the expiry of the summons, and deliberately allowing the summons to expire while at no stage putting the appellant on notice of the claim.

24. More broadly it was submitted that delay in obtaining medical reports does not constitute a special circumstance to justify the extension of time for leave to renew a summons, and in this respect there was no difference between a medical negligence claim and other professional negligence claims. The concern to have a proper basis for instituting proceedings against a professional defendant had to be counterbalanced by a proportionate advertence to the policy underlying the Statute of Limitations so as to protect prospective professional defendants (*Allergen Pharmaceuticals (Ireland) Limited v Noel Deane Roofing and Cladding Limited & Ors* [2006] IEHC 215, per O’Sullivan J.). A party was not entitled to wait indefinitely for an expert report before issuing or serving a summons, and delay in obtaining an expert report reasonably necessary to justify a decision to responsibly maintain the proceedings could only be relied on if appropriate expedition was used in attempting to procure the report (*per* Clarke J. in *Moloney v Lacy Building and Civil Engineering Limited* [2010] 4 IR 417 at para. 18).

25. Counsel emphasised that this was not a case of inadvertence – a deliberate decision was taken not to serve the Summons, or to apply to the Master for renewal prior to expiry of the Summons. It was submitted that there could be no special circumstances where a deliberate decision was taken not to follow the opportunity afforded by O. 8, r. 1(2) to apply to the Master, and that such a deliberate approach should not be condoned by the court. It was suggested that the Summons could and should have been served within the twelve month period, and could have been accompanied by a letter indicating that expert medical opinion was still being sought, and with a request that no appearance be entered for the moment. Alternatively it was submitted that, before the expiry of the summons a report from Mr. Saab giving an opinion as to breach of duty had been obtained, and the respondent could and should have applied to the Master for a renewal of the summons.

26. Counsel argued that the purpose of the amended O. 8 process was to strip out delays that could occur under the operation of the former O. 8 under which any number of extension applications could be brought. Counsel argued that it was not necessary for the HSE to demonstrate a specific prejudice; rather it was necessary for the court to consider the interests of justice and where the balance of hardship lay, and any delay must be considered and may give rise to general prejudice.

27. Counsel also argued that it is not necessary for a case in professional negligence to be "oven ready" before proceedings are served; it is only necessary that there be a supportive report, and that more limited requirement is sufficient to protect professional reputation. In this regard counsel relied on the decision in *Mangan v Dockeray and Ors* [2020] IESC 67. And there McKechnie J. answered the question "is such a report essential?" with the following: -

> "97. It seems to me that the most appropriate way of expressing this requirement is to say that a reasonable basis must exist before any such proceedings are issued."

Counsel therefore argued that in seeking further clarification of the medical opinions and thus occasioning further delay the respondent/her solicitors acted unreasonably.

28. On the issue of whether the High Court can further renew a summons which has already been renewed by the Master under O. 8, r. 2, counsel referred the court to *O'Connor v HSE* [2020] IEHC 551 where Barr J. held that the court did not have jurisdiction to grant a further renewal of the summons where it has already been renewed by the Master. Counsel very properly informed the court that he had appeared in that case for the HSE and that his submission in this regard had been accepted by the learned High Court judge, but that it was not now a submission that he was standing over. Counsel indicated that this court could take a different view, namely that an application could be made to the Master to renew the Summons, and that, after the expiry of the three month extension granted by the Master, a further application could be made to the court under O. 8, r. 1(3).

Respondent's arguments

29. Counsel first emphasised the relevance of the personal circumstances of the respondent, now 81 years of age and living on her own in County Mayo and having a limited life expectancy. The court was also entitled to take into account her condition, as referred to in Mr. Kelly's first affidavit, being such that she is physically and mentally compromised, and deserving of the protection of the court.

30. Counsel argued that O. 8, r. 1(3)/(4) does not entail a two-tier test, but only one test, namely whether "special circumstances" exist which justify an extension.

31. In response to the submission that an application should have been made to the Master for an extension before the Summons lapsed, Counsel argued that this would have been problematic because at that point in time the law was uncertain following the introduction of the amended O. 8. He added that there was no requirement in the amended O. 8 that a plaintiff apply to the Master and obtain an

extension before being entitled to make an application to the Court under sub-rule (3). He argued that it would have been "dangerous" to have applied to the Master at a time when the respondent's legal advisers had no expert opinion on causation.

32. Accordingly, counsel argued that the respondent's legal advisors could not in accordance with their professional obligations "sign off" on the Summons, or more properly service of that summons, before 14 January 2020. Counsel accepted that this was not a case of inadvertence – it was a case of a deliberate, but ethical, decision not to serve the Summons until satisfied that there was a stateable case.

33. Counsel suggested that the question of delay was not in fact germane – that O. 8 is not concerned with any question of sanctioning for delay because there are other rules under which a party can move to have proceedings dismissed for want of prosecution. In any event it was argued that there was not unreasonable delay on the part of the respondent or her legal advisers in procuring expert opinions.

34. Counsel argued that there was no prejudice on the part of the HSE, but that there could be for the respondent if the summons is not renewed and she is forced to institute fresh proceedings. Whether this action continues or if she is forced to institute fresh proceedings there will be a Statute of Limitations issue, and it will be argued on her behalf that the cause of action did not accrue until the respondent's date of knowledge, which it was suggested was 14 January 2020 on receipt of Dr. Subramanian's report. The respondent, it was suggested, would be at a greater disadvantage contesting this issue in fresh proceedings than in the present proceedings.

35. Counsel sought to distinguish the circumstances of *Mangan* from the present case, and argued that in the present case, and in the vast majority of medical negligence cases, the respondent required expert medical opinion to justify the service of proceedings.

36. In relation to the cross-appeal counsel argued that the criticism of the trial judge for failing to serve a courtesy copy of the summons was unjustified. Had such a copy been sent then the hospital and doctors concerned would have been in the firing line, and there would have been a requirement of notification to the State Claims Agency and possibly by the individual doctors to their indemnifiers. Counsel submitted that it would have been irresponsible to serve the Summons naming potentially innocent professional parties, and thus in creating a "notifiable event", and it was submitted that this would contradict the notion of the issue of a protective writ. Counsel referred to s. 8 of the Civil Liability and Courts Act, 2004 which requires the service of a letter of claim "before the expiration of two months from the date of the cause of action", in default of which there may be consequences as to costs. Section 8(2) defines "date of the cause of action" to mean the date of accrual of the cause of action or the date of knowledge, whichever occurs later. On this basis counsel argued that the letter of claim sent on 29 January 2020 complied with s. 8. This was an argument which counsel informed the court had been made to the trial judge but had been rejected.

37. In response to the court counsel accepted that there is often some delay in obtaining expert medical opinion before issuing medical negligence proceedings. That combined with the professional obligation not to settle proceedings for professional negligence absent expert opinion meant that personal injury proceedings for medical negligence did come into a special category for the purpose of considering renewal of summonses.

The meaning of amended Order 8

38. The meaning of the new Order 8, and in particular whether there is a two-tier test, has been the subject of divergent opinion in the High Court since it came into operation on 19 January 2019.

39. In *Murphy and Cullen v ARF Management Limited and Ors* [2019] IEHC 802 Meenan J. held that it was no longer permissible for the High Court, having already renewed a summons, to order a

further renewal. The judgment does not expressly consider whether there should be a two-tier test, but at para. 10 Meenan J. stated: -

> "10. In interpreting Order 8 RSC, as amended, two issues have to be considered. Firstly, the circumstances under which a court can renew a summons and, secondly, how often a court can renew a summons. As to the first issue, the amended Order 8 has brought about a change in that under the original Order 8 the court may order a summons be renewed *"if satisfied that reasonable efforts have been made to serve … but for other good reason"* whereas now a court has to be satisfied "*that there are special circumstances*" which justify a renewal. Assuming that the court is satisfied that special circumstances exist to order a renewal, this raises the second issue as to whether such an order can be made by a court on more than one occasion. This requires an interpretation of the wording of the amended rule."

40. Turning to the second issue Meenan J. found to be of significance the fact that the words "*... and so from time to time during the currency of the renewed summons*" had been deleted from the amended O.8. He stated –

> "11. … It was these words that enabled multiple renewals by the court, provided that the application was made during the currency of the renewed summons. The absence of these words clearly indicates that more than one renewal is no longer permissible.
>
> …
>
> 12. Further, the original Order 8 referred to *"… may order that the original … summons be renewed …"*. The amended Order 8 refers to *"a renewal of the … summons"* as opposed to *"renewal"* which could be both in the singular and the plural (see s. 18 of the Interpretation Act, 2005). To my mind, this interpretation is consistent with the effects of the deletion of the

words in the original rule, which I have already referred to, which permitted renewals on more than one occasion."

In so finding Meenan J. rejected the counter argument that if it was intended that the amended O. 8 would allow only one renewal this would have been clearly stated.

41. In *Ellahi v The Governor of Midlands Prison and Ors* [2019] IEHC 923, O'Moore J. considered that a two-tier test applied. The factual background was that an assault took place on 23 March 2015 and led to the issue of a Summons on 27 July 2016, and it expired on 26 July 2017. On an *ex parte* application Meenan J. granted a renewal of the summons on 4 February 2019, citing as the special circumstance justifying an extension a delay caused by the plaintiff changing solicitors. It is notable that there was a 14 month delay between the expiry of the Summons and the making of the *ex parte* application.

42. O'Moore J. at para. 16, after referring to the jurisdiction of the Master under the amended O. 8, r.1(2), then addresses the requirements where application has to be made to the court, in the following terms: -

> "16. … 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 it's difficult to see why it should), was the separate obligation to show that on the facts of this case that there were other good reasons which justified the renewal of the summons. I agree with that analysis. 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."

O'Moore J. went on to find that he could find no special circumstances were made out, and it followed on that basis that the *ex parte* order was set aside.

43. The next decision was that of Hyland J. in *Brereton v The Governors of the National Maternity Hospital, HSE and Ors* [2020] IEHC 172, delivered on 9 April 2020. This was a medical negligence case, arising from the birth of the plaintiff's child on 27 February 2016. A Personal Injuries Summons was issued on 13 March 2018, but was not served within the twelve month period. A medical report from a gynaecologist obtained in late 2018 recommended obtaining a further report from a consultant microbiologist, and that was obtained on 15 February 2019. Thereafter some queries arose and were answered in March 2019. On 10 March 2019 letters of claim were sent to the second and third defendants (HSE and St. James' Hospital Board) only. On 28 May 2019 an order was made *ex parte* by Barr J. granting renewal of the Summons, and the served defendants in due course applied to have this order set aside.

44. Hyland J. considered the decisions in *Murphy* and *Ellahi* but held that on the facts of the case before her the question whether there was a two-tier test or a single test of special circumstances was academic, because both parties agreed that "the special circumstances test imposes a higher bar than the good reason test…" and "I have come to the view that there are special circumstances justifying the extension of time to bring the application for renewal." (para. 8). She nonetheless expressed a view, which must be treated as *obiter*, as follows: -

"9. As to which is the applicable test for renewal, one could certainly argue coherently that the special circumstances test applies. The reference to "renewal" in the rule suggests that

Order 8, Rule 1(4) provides for the substantive renewal of the summons and requires the court to be satisfied of special circumstances. Moreover, there is the obligation to identify the special circumstances in the order, a most unusual requirement in the architecture of the RSC. It seems improbable that the drafters of the amended Rule would require only the special circumstances mandating the extension of time to be identified in the order, but not the good reason for the renewal of the summons to be similarly identified. Finally, it seems somewhat unlikely that the drafters of Order 8, Rule 1(4) would have imposed a two-tiered test for renewing a summons – special circumstances in respect of the extension of time for the application and good reason for the renewal of the summons – without making it explicit.

10. On the other hand, there is a distinct ambiguity in the wording of the new rule. The reference to the Court ordering a renewal where satisfied there are special circumstances which justify an *"extension"* suggests that the special circumstances test only applies to the extension of time application for leave to renew the summons and not to the renewal of the summons. Had the word *"renewal"* been used rather than *"extension,"* the situation would have been far clearer. Nor is there any explicit disapplication of the good reason test.

11. In all the circumstances, given that the matter was explicitly argued in *Ellahi*, but not, it appears, in *Murphy*, I will follow *Ellahi* and apply the good reason test to the renewal of the Summons here."

45. This decision is also helpful in the context of what may constitute 'special circumstances'. At para. 31 of her judgment Hyland J. sets out the factors which led her to conclude that there were special circumstances justifying renewal. She was satisfied that there was an intention to serve the summons before the expiry of the twelve month period, and that the failure to do so was inadvertent, but that within the twelve month period a letter was written on 10 March 2019 informing the

defendants of the intended proceedings. Further, the application for renewals made on 28 May 2019, is a relatively short period of some 10 weeks from the date of expiry of the Summons. She stated –

> "However, in the context of a 12 month period within which to issue a summons, in my view a 10 week delay in the context of this case is sufficient to persuade me that the balance of justice favours upholding the decision to renew the Summons."

She was also influenced by the absence of any significant prejudice given the letter of notification of 10 March 2019. She also took the view that the plaintiff would be at risk of having her case fall outside the Statute of Limitations, if the renewal of the Summons was set aside. While "acutely conscious" of the case law to the effect that a plaintiff being statute barred is not in itself a sound basis for ordering renewal of the Summons she observed: -

> " Nonetheless, it is clear from *Chambers* that the likely consequences for the plaintiff of a refusal to renew from the point of view of the operation of the Statute of Limitations are at least potentially relevant. For that reason, I consider it appropriate to consider this issue in considering the potential hardship to the parties."

46. The amended Order 8 was considered in two further High Court decisions both of which were delivered on 30 October 2020. In *O'Connor v. The HSE* [2020] IEHC 551 Barr J. was concerned with a medical negligence case which had its origins in a caesarean section carried out on the plaintiff on the 15 August 2013. A personal injuries summons issued on 25 November 2015, but without the benefit of medical records or an expert's report in relation to a liability, and it was not served. Medical records were then taken up and expert opinions sought. By order of the Master of 22 November 2016 the summons was renewed for a period of six months, until 22 May 2017. The plaintiff's solicitor candidly admitted that he was of the mistaken belief that that order extended the summons for a period of twelve months. On 7 November 2017 a report was received from the expert and on 13 November

2017 the personal injuries summons was served. On 22 December 2017 solicitors on behalf of the defendant requested proof of service of the summons within the original twelve month period from date of issue, and declined to enter an appearance. No response was received and they sent reminder letters in February, May and August 2018, but again without response. It appeared that the plaintiff's solicitors received advices from counsel in 2018 that a further report was required, and this was sought from Dr. Clements in the UK who saw the plaintiff in November 2018 and furnished a report on 12 December 2018. On 15 July 2019 the plaintiff obtained an order *ex parte* from the High Court (MacGrath J.) renewing the summons, and sought to have that renewal set aside.

47. Barr J. held that the court did not have jurisdiction to grant a further renewal of the summons, as it already had been renewed by order of the Master on 22 November 2016. Barr J. went on to find that even if he was wrong in the finding on jurisdiction, he was not satisfied that the plaintiff had established that there were special circumstances justifying the renewal of the summons in July 2019. In coming to that conclusion Barr J. preferred the view of Meenan J. in *Murphy* that there was a single test of special circumstances rather than a two-tier test. He based this on the wording of revised O. 8. He also reasoned –

> "56. Secondly, if it were necessary to have an extension of time to make the application to renew the summons, that extension would have to be granted under O. 122 of the rules. However S. I. 482/2018 specifically precludes the application of O. 122 to the new O. 8. It should be noted that that was not the position at the time of the decision of Kelly J. in *Whelan v. HSE*."

48. Barr J. considered that there had been inordinate delay in effecting a formal service of the summons, which issued in November 2015, and was not served within the 6 month period provided for under the renewal order of the Master. He rejected the plaintiff's solicitors plea made in that he had mistaken the legal position, holding that he could not plead his lack of knowledge as a means of

resisting the defendant's application. He also found the attempted service on 13 November 2017 following receipt of the report of Professor Lees as being inconsistent with the averment that that report was inconclusive and not sufficient to warrant service of proceedings. He also found that there was inordinate delay in obtaining the further report from Dr. Clements, and making the application to the High Court in July, 2019. In the present appeal counsel for the appellant indicated that he had (successfully) argued the case before Barr J. that the court did not have jurisdiction to grant a further renewal of the summons, a first renewal having been ordered by the Master. Counsel accepted that this court might take a different view on that point, having regard to the wording of the revised O. 8.

49. The last decision in the High Court is that of Simons J. in *Downes v TLC Nursing Home Limited* [2020] IEHC 465, another case concerning negligence alleged in the provision of health services. The facts were that the plaintiff's father Joseph Downes had resided in the defendant's nursing home for some three months until shortly before his death on 10 July 2015. A personal injury summons claiming firstly damages for nervous shock and secondly bringing a fatal injuries claim pursuant to Part IV of the Civil Liability Act, 1961 (as amended) was issued on 7 July 2017 (following PIAB authorisation, although PIAB took the view that the claim was outside its statutory remit by virtue of s. 3(d) of the Personal Injuries Assessment Board Act, 2003). The summons was expressed to be "precautionary", and it was not served. Shortly before it elapsed, by order dated 5 July 2018 it was renewed for six months under the original Order 8. It therefore lapsed on 4 January 2019. On 17 June 2019 there was a notice of change of solicitor served, and on the same date an affidavit was sworn to ground an application for renewal. On 1 July, 2019 on foot of an *ex parte* application Murphy J. renewed the summons for three months, the reason being "unwillingness of the defendant to provide reports and issues around the transfer of files between solicitors" as justifying the extension.

50. Simons J. followed the two-fold test confirmed by O'Moore J. in *Ellahi*, which he considered had been approved in *Brereton*, and by Cross J. in the present case (although in my view Cross J. appeared to have a preference for a single test of 'special circumstances'). Simons J. made the following observations at para. 28: -

> "The revised version of Order 8 does, however, differ from the earlier version in a number of significant respects. First, the time periods for which a summons may be renewed have been reduced from six to three months. The three-month limit is relevant to applications before the Master and a Judge of the High Court, respectively. Secondly, the threshold for an extension of time to make an application for leave to renew has been increased to "special circumstances". These "special circumstances" must be stated in the order of the court. Thirdly, the provisions of the general rule governing the enlargement of time, i.e. Order 122, have been expressly disapplied in the case of Order 8. … Finally, the High Court can only renew a summons on one occasion. It is no longer permissible for the High Court, having already renewed a summons, to order a further renewal. (*Murphy v. A.R.F. Management Ltd.* [2019] IEHC 802). The maximum period for which a summons can now be *renewed* is six months, i.e. the Master and a Judge of the High Court can each renew a summons for a three-month period. The fact that the High Court can extend time for the making of an application to renew has the consequence that the aggregate period of time between the date of the issuance of the summons and its being served may actually be greater than eighteen months. The aggregate period may include not only periods when the summons is effective for service but also periods when it had stood lapsed."

Noting the debate in recent case law as to the practical significance of the two-fold test, Simons J. proceeded –

"30. Strictly speaking, however, the two tests are directed to separate and distinct questions. The "special circumstances" test is directed to the need for an extension of time within which to apply to renew a summons which has lapsed. The default position under Order 8 is that any application to renew should be made *within* the initial twelve-month period. If the application is made outside this period, then there must be "special circumstances" justifying the extension of time. The focus is on the period of time as between (i) the expiration of the initial twelve-month period, and (ii) the date of the making of the application for an extension of time within which to make the application to renew.

31. This is so even where the summons has been renewed by the Master (*'notwithstanding that an order may have been made under sub-rule (2)'*).

32. By contrast, the 'good reason' test allows a far greater range of considerations to be taken into account. This is because the test requires that there be 'good reason' to renew the summons, rather than there necessarily being a 'good reason' for the *delay* in the service of the summons."

51. Simons J. was not satisfied that adequate explanations had been given on affidavit as to the "issues" around the transfer of files between solicitors, or to explain the delay or "inadvertence" in service of the summons. He considered that inadvertence of a plaintiff's legal advisers "will rarely, if ever, constitute 'special circumstances' for the purposes of O. 8, r. 1. The default position is that a summons should be served within twelve months of the date of the issuance of the proceedings. This time limit has to be seen in the context of a legislative intent to ensure expedition in legal proceedings. The limitation period generally applicable to personal injuries proceedings has been reduced to two years." Also, the summons expressly stated that –

> "It will be necessary to serve this precautionary summons purely for the purposes of applying to this Honourable Court for discovery of the records because, without them, the claim cannot proceed".

Simons J. found it entirely contradictory for the plaintiff to now argue that the nursing home's refusal to provide copies of the medical reports could constitute a good reason for not having served the summons within the initial twelve month period as he did not consider that there were special circumstances which justified an extension of time within which to apply for leave to renew the summons, he did not consider it necessary to consider the question of whether there was "good reason" to renew the summons.

Interpretation of amended Order 8

52. How then is the amended O. 8 to be interpreted? The proper approach to interpretation of the statutory instrument is that recently summarised in the judgment of Finlay Geoghegan J. in *O'Sullivan v. Ireland and others and the Bons Secour* [2019] IESC 33, at paragraph 19:

> "19. The proper approach to the interpretation of statues of the Oireachtas is now well established. I only need refer briefly to those principles relevant to the interpretation of the 1991 Act, as amended. The starting point is the ordinary and natural meaning of the words used by the Oireachtas: *Howard v Commissioners of Public Works* [1994] 1 I.R 101. In aid of construction or interpretation of the particular words used by the Oireachtas, the courts may look to the scheme and purpose of the provisions in issue as disclosed by the statue or a relevant part: *McCann Limited v O Culacháin (Inspector of Taxes)* [1986] 1 I.R 196 per McCarthy J. at p.201. The purpose and policy of the Act may be informed, inter alia, by the pre-Act law, but reliance upon same is limited by the words used by the Oireachtas in the provision under consideration: *B v Governor of the Training Unit Glengarriff Parade Dublin* [2002] IESC 16 and *A.B. v Minister for Justice Equality and Law Reform and ors* [2002] 1

I.R 296. Finally, it is to be presumed that words are not used in a statue without a meaning and, accordingly, effect must be given, if possible, to all the words used : *Goulding Chemicals Limited v Bolger* [1977] I.R 211 per O'Higgins C.J at p.226 "

53. Adopting this approach, and with the greatest to those judges in the High Court who found otherwise, the wording in O. 8 does not in my view justify a two-tier approach.

54. Sub-rules (1) and (2) now segregate off and govern the application to renew that is made to the Master within the original twelve month period that the summons is in force. The application is for "leave to renew". The Master must be satisfied that "reasonable efforts have been made to serve such defendant, or for other good reason" may order renewal – now for the shorter period of 3 months. The test before the Master is the same as it was under the original O. 8, and it is safe to say that the same jurisprudence applies.

55. It is clear from the ensuing sub-rules, which require application to the court after the twelve month period, that there can be only one such application to the Master, and only one renewal order can be made by the Master. The Master is not required to state the reason for renewal in the order.

56. Sub-rules (3) and (4) now govern the process that applies if renewal is sought more than twelve months after the issuance of the summons. As under the old O. 8, the application must be made to the court, but there the comparison ends.

Sub-rule (3) states that –

"(3) After the expiration of twelve months, and notwithstanding that an order may have been made under sub-rule (2), application to extend time for leave to renew the summons shall be made to the Court."

57. The first point to make concerns is the phrase "and notwithstanding that an order may have been made under sub-rule (2)". Sub-rule (3) clearly contemplates an application being made to the court notwithstanding that the Master has already made an order within the twelve month period

renewing the summons for a three month period. Sub-rule (3) must therefore mean that the court has jurisdiction to grant leave for a *further* three month renewal. If the legislature intended that there could be no further application for renewal then these words would not have been inserted. Effect must be given, if possible to these words. As they can be ascribed a meaning they cannot be treated as surplusage.

58. It follows that insofar as the first basis for refusing relief in *O'Connor v HSE* was that the High Court did not have jurisdiction to grant a further renewal after the Master has renewed a summons, that decision was wrongly decided.

59. The second point is that sub-rule (3) refers to an "application to extend time for leave to renew the summons". It does not refer to an application *seeking an extension of time to bring an application* for leave to renew, or *seeking leave to bring an application* for leave to renew. To read these words into sub-rule (3) is to introduce words that simply are not there. Had the legislature intended to impose a two-tiered test for renewing the summons – special circumstances in respect of the extension of time for the application and 'good reason' for renewal of the summons – it would have done so explicitly. Nowhere in either sub-rule (3) or (4) is there mention of a twofold test, and nowhere is the term "good reason" used in connection with the court application.

60. Nor can the wider phrase "application to extend time for leave to renew" cast doubt on this. The term "leave to renew" is also used in sub-rule (1) in respect of the application to the Master, and refers to the permission of the Master or the court, as the case may be, that leads to renewal of the summons in the Central Office by stamping in accordance with sub-rule (5).

61. Accordingly sub-rule (3) entitles a plaintiff to bring an application for renewal, and does not impose a preliminary hurdle of persuading the court to extend time for making such an application, whether on showing 'special circumstances' or on satisfying any other test.

62. This is reinforced by the wording in sub-rule (4) –

> "(4) The Court on an application under sub-rule (3) may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive where satisfied that there are special circumstances with justify an extension, such circumstances to be stated in the order."

This deals with the substantive application for renewal. The first phrase references "an application under sub-rule (3)" and therefore refers back to the "application to extend time for leave to renew". The legislature has clearly applied a single test to this substantive application – the court must be "satisfied that there are special circumstances which justify an extension". There is no reference to a second test, or any requirement to satisfy the court of "good reason".

63. Further rationale for this, with which I respectfully agree, is suggested by Hyland J. in *Brereton* –

> "9. …Moreover, there is the obligation to identify the special circumstances in the order, a most unusual requirement in the architecture of the RSC. It seems improbable that the drafters of the amended Rule would require only the special circumstances mandating the extension of time to be identified in the order, but not the good reason for the renewal of the summons to be similarly identified."

64. This interpretation is also supported by the consequential amendment in S.I. 482 of 2018, quoted earlier in this judgment, which substitutes for the old rule 7 of O.122, which empowers the court to enlarge or abridge time for the doing of any act an identical provision but with a rider, which is now O.122 r.7(2), that provides -

> "(2) Sub-rule (1) does not apply to any application to which Order 8 applies."

This indicates that O. 8 is a stand-alone provision dealing with the circumstances in which the Master or the court, as the case may be, can grant leave to renew a summons. It would lead to contradiction if, independently of O. 122 and absent any explicit wording in the revised O. 8, it was a preliminary

requirement of the O. 8 r. (3)/(4) that the court be satisfied of "special circumstance" to extend time for a renewal application.

65. Indeed I believe this points to why the two-tier approach was erroneously adopted by O'Moore J in *Ellahi*. He relied for his rationale on the statement of Kelly P in *Whelan v HSE* at paragraph 30 –

> "30. If 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. Such extension of time was not actually sought in the present case as is clear from the term of the *ex parte* docket utilised to ground the application before O'Connor J. However, the fact that he made the order sought necessarily implies that he also granted the extension of time for the making of the application."

When Kelly P. expressed this to be the case the old O. 122 r. 7 applied. The amendment effected by S.I. No. 482 of 2018 disapplying O. 122 r. 7 in respect of summons renewal applications in my view rendered inappropriate reliance on this particular statement of Kelly P. *Whelan*.

66. Two further points of interpretation of the amended O. 8 should be mentioned, so far as the process is concerned. Firstly, I did not take the HSE to argue that, absent an application to the Master for renewal within the twelve months, an application *could not* be made to the court under sub-rule (3), or that the court lacked jurisdiction to order renewal. In any event, I am satisfied that such an argument could not be sustained because there is nothing in the amended O. 8 that requires an applicant under sub-rule (3) to have made a prior application to the Master. It is open to a court to find that special circumstances justify granting leave to renew notwithstanding that no application

was made to the Master. However this did not preclude the HSE from arguing, as they did, that the respondent should have applied to the Master, and that failure to do so, and deliberately allowing the original summons to lapse, undermined the application to court for renewal, and the assertion of 'special circumstances'.

67. Secondly Meenan J. decided in *Murphy* that multiple renewals by the court are no longer permitted. He based this –

> (i) on the fact that the words "…and so from time to time during the currency of the summons" which appeared in the original O. 8 do not appear in the amended O. 8, and
>
> (ii) on the change of wording in the original O. 8 from "…may order that the original…summons be renewed…" (which under s. 18 of the Interpretaton Act, 2005 could embrace both singular and plural renewals) to "..a renewal of the…summons" in the amended O. 8 r. 1(4), which he considered limited the court to one renewal only.

68. This issue does not arise in the present appeal, but I would make two observations. Firstly, it can be argued – as counsel did before Meenan J. - that the amended O. 8 r. 1(3) and (4) does not contain any clear or express provision limiting the number of renewals, and that this would have been set out explicitly if it was indeed the intention of the rule makers. Secondly, it is conceivable that if a summons was renewed on the basis of special circumstances such special circumstances might persist beyond the 3 month period of renewal, or further special circumstance might arise. To give a simple example, during the period of renewal the plaintiff might overcome the special circumstance relied on to obtain the court's renewal order e.g. delay in obtaining medical opinion, but the defendant might, despite the plaintiff's reasonable efforts to serve, deliberately evade service of the summons. I would therefore leave to an appropriate case further consideration of whether there may be more than one renewal by the court under the amended O. 8.

"Special Circumstances"

69. Order 8 r. 1(4) does not assist in identifying what may amount to "special circumstances which justify an extension". However, some general observations may be made.

70. Firstly, whether special circumstances arise must be decided on the facts of a particular case, and it would be unwise to lay down any hard and fast rule.

71. Secondly it is generally accepted that it is a higher test than that of "good reason". This would seem to follow from the fact that the application to the Master is made before the summons lapses, and O. 8 does not require the Master to state the "good reason" in the order.

72. It also follows from the use of the word "special". While this does not raise the bar to "extraordinary", it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present.

73. Hyland J. in *Brereton* usefully points by way of analogy to the test of "special circumstances" as it applies resisting a claim for security for costs. Although O. 29 RSC, which concerns the provision of security for costs, does not use the phrase "special circumstances", caselaw has long held that once a defendant establishes that there is a *prima facie* entitlement to security for costs the onus shifts to the plaintiff to show special circumstances as to why security should not be granted. At para. 21 Hyland J. stated –

> "In *West Donegal Land League v Udaras Na Gaeltachta* [2006] IESC 29 Denham J., as she then was, noted that in considering the concept of special circumstances it should be remembered that the essence of the order for security for costs is to advance the interests of justice and not hinder them, and that it is for a court on such an application to consider and balance the interests of the plaintiff company and those of the defendant in a fair and proportionate manner."

74. I agree with Hyland J. that this applies by analogy to a court deciding whether "special circumstances …justify an extension". The court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or

hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused.

75. This reflects the principle enunciated by Finlay Geoghehan J. in in *Chambers v Kenefick* [2005] IEHC 526, in describing the approach the court should take under the original O. 8 to deciding "other good reason":

> "[8] …Firstly, the court should consider is there good reason to renew 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 interest 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."

That decision has been followed on many occasions – see for example Clarke J., as he then was, in *Moloney v Lacy Building and Civil Engineering Ltd* [2010] 4 I.R. 417.

76. In my view this is not a second tier or limb to the test. The need for the court to consider under sub-rule (4) the interests of justice, prejudice and the balancing of hardship is in my view encompassed by the phrase "special circumstances [which] *justify* extension". Thus there may be special circumstances which might normally justify a renewal, but there may be countervailing circumstances, such as material prejudice in defending proceedings, that when weighed in the balance would lead a court to decide not to renew. The High Court should consider and weigh in the balance all such matters in coming to a just decision.

77. At the level of principle a question also arises as to whether inadvertence on the part of a plaintiff or their solicitors can ever amount to or be relied upon as a special circumstance. As far as

a plaintiff is concerned this is very fact dependant and it is probably not helpful to speculate in a vacuum. As far as legal advisors are concerned in my view inadvertence or inattention, for example in effecting service of the summons, will rarely constitute "special circumstances". Legal advisors must be taken to be aware of the twelve month time limit for service of the original summons, and the consequences of allowing it to lapse. Peart J., in the context of "good reason", in *Moynihan v Dairygold Co-operative Society Limited* [2006] IEHC 318, said –

> "38…This is an opportunity to give a timely warning to practitioners that proper attention must be given to the question of service of proceedings after issue, especially where there is a likelihood that after expiration of one year from the date of issue, the Statute will have expired."

If inadvertence of this nature would not reach the threshold of "good reason" it is even more unlikely to amount to "special circumstance".

78. Finally, provided the trial judge is satisfied that "special circumstances" exist, the jurisdiction to grant leave to renew is discretionary. It follows from that that this court, in reviewing a decision to renew a summons, should afford the trial judge a margin of appreciation and should not interfere with the decision unless the trial judge has erred in principle or there is a clear error of fact or breach of the rules of natural justice.

Application of the Special Circumstances test

79. The trial judge found that 'special circumstances' did exist, and his finding is best set out in paragraph 34 which bears repeating:

> "34. I accept the requirement in the Code of Conduct of a barrister and also the law and practice in this jurisdiction that in professional negligence cases they ought not to be settled until the expert report is or is likely to be available to support the claim…I accept that the absence of the necessary expert opinions to ground the case was a special circumstance justifying, in the absence of any culpable delay, the renewal and extension of time. The

prohibition on serving professional negligence proceedings until the receipt of verifying reports creates a conflict with the obligations to serve the proceedings with the time specified in the Rules. The issue as to whether the time for serving a summons should be extended will hinge upon whether the plaintiff and his/her advisors have been reasonably prompt in obtaining the necessary reports."

80. In my view the trial judge did not err in fact or law in making this finding.

81. Counsel for the HSE argued that sufficient expert opinion had been obtained before the summons lapsed for the proceedings to be served, or at least notified to the HSE, and sought to rely on the dictum of McKechnie J in *Mangan* that the requirement was only that "…a reasonable basis must exist before [medical negligence] proceedings are issued", arguing the it was not necessary for the respondent to have an "oven ready" case before serving the proceedings.

82. I cannot accept that submission in the circumstances of this case. Firstly, the Code of Conduct of the Bar of Ireland is very clear on the prohibition on barristers settling professional negligence pleadings unless satisfied that the expert evidence is or will be available to support such a claim:

> "5.1.16 Barristers shall not settle a pleading claiming fraud or professional negligence without express instructions. Save in a case of alleged professional negligence on the part of a Barrister or solicitor, Barristers ought not to settle a pleading claiming professional negligence unless they have satisfied themselves that expert evidence is or will be available to support such claim. In certain circumstances, such as when the time for issuing proceedings is in danger of expiring, Barristers may settle pleadings without such expert evidence, but should advise that proceedings should issue without being served until the required expert evidence is available."

83. Secondly the courts have consistently decried the issue and service of medical negligence proceedings, which put the competence or reputational integrity of doctors or institutions in issue, unless there is an appropriate/reasonable basis for doing so - see for example *Cooke v Cronin and Neary* [1999] IESC 54 where only a GP report had been obtained to support a claim that an episiotomy

had been not been properly performed. This creates a general obligation on legal advisors – solicitors and barristers – to obtain appropriate expert medical opinion before serving such proceedings alleging medical negligence.

84. I fully accept that the "reasonable basis" test does have exceptions, and it was these that were addressed by the Supreme Court (McKechnie J) in *Mangan.* There, having obtained expert reports on the caesarean section performed on the plaintiff, which was followed by post-natal respiratory distress, the proceedings were launched against the first defendant obstetrician alone. That (sole) defendant then obtained expert medical evidence on foot of which averments were made on affidavit by his solicitor Ms. Brassil (the medical report was not exhibited) and application was made to join a paediatrician and Mount Carmel Hospital as third parties; they were duly joined as third parties, and the plaintiff in turn obtained joinder of these two third parties as co-defendants - based solely on the averments in Ms. Brassil's affidavit. The second and third defendant applied to have their joinder as defendants set aside on the basis that the plaintiff had not obtained her own expert medical evidence to justify the joinder.

85. It is instructive to quote more fully paragraph 97 of the judgment of McKecknie J. that is relied on by the appellants:

> "97. It seems to me that the most appropriate way of expressing this requirement is to say that a reasonable basis must exist before any such proceedings are issued. Almost by definition therefore, there will be situations where it may not be necessary to insist upon the availability of an expert report before that takes place. There are several like examples to that given by Irvine J. in *Deasy*, in addition to which reference can be made to the issue of a holding writ to avoid the claim being statute barred *(Cunningham v. Neary* [2004] IESC 43, [2005] 2 I.L.R.M. 498 at para. 11). Such qualifications are necessary so as to be consistent with one's right to access the court system as well as being required to reflect the reality of professional

litigation. Further, I see no danger that this formulation would undermine the rationale for the rule in the first instance. As the same must apply to all professionals, a degree of flexibility is required, so as to accommodate a variety of diverse circumstances. I therefore think that the rule should best be framed in the manner suggested. In the vast majority of medical cases that will require a report, but there will be circumstances where such is not an essential precondition in all situations."

86. I am satisfied that the present appeal is one of the "vast majority of medical cases" that warranted the respondent's legal advisors obtaining appropriate reports from two relevant experts before an application was made to renew the summons.

87. Further it is not for the court to second guess what advice a barrister might give in relation to the requirements of expert opinion in any particular case. In medical negligence cases in particular it is notoriously difficult to establish liability, and many cases risk foundering on the issue of causation. It would be very wrong if a barrister, *in terrorem* of lapse of the summons and a risk of non-renewal by the court, were to settle pleadings or advise service before being satisfied that there was a *prima facie* case in breach of duty and causation, both being essential ingredients of the claim.

88. This case demonstrates the tension between the obligation on legal advisors to obtain expert professional opinion before serving professional negligence proceedings on the one hand, and on the other the barring of claims under the Statute of Limitations and the general requirement for claims to be processed promptly – particularly having regard to domestic caselaw on delay/want of prosecution, and the right to a timely trial under Article 6 of the European Convention on Human Rights. This tension is particularly acute in medical negligence claims where the basic period of limitation is now reduced to two years from the date of accrual of the action[1], but very often the circumstances giving rise to the claim are complex and involve consideration of extensive medical records, obtaining

[1] By s.7 of the Civil Liability and the Courts Act, 2004.

medical opinion from one or more experts – with the need for further investigation and reportage by additional experts only emerging after initial report(s) are received.

89. In his dissenting judgments in *O'Sullivan v Ireland and others and Bons Secour* [2019] IESC 33 and *Green v Hardiman* [2019] IESC 51, in which the court considered the interpretation of "date of knowledge" under ss.2 and 3 of the Statute of Limitations (Amendment) Act, 1991, O'Donnell J. concluded, uncontroversially, with this observation –

> "24. …In that regard, it is plain that medical negligence cases pose particular difficulties. The two-year limitation period for the commencement of actions is short, given the necessity to obtain expert advice on lability, normally from witnesses with sufficient expertise to provide an authoritative opinion, and who are often based outside the jurisdiction. I note that it is proposed to extend the general period to three years, but in any consideration of the limitation period for personal injuries actions or other claims more generally, specific attention could usefully be addressed to the difficulties posed by claims arising from alleged medical negligence."

90. It goes without saying that legal advisors are dependant on the medical experts to produce timely reports, but this does not always happen and is not within the solicitor's control. Even the task of identifying the right expert and one willing and able to provide a report can take time and may be problematic, and in practice often involves seeking opinion from an expert in another jurisdiction. This is demonstrated in the present appeal where Mr. Kelly initially tried to obtain a report on causation from one expert who did not respond, and he then had find and approach another expert.

It is also not uncommon for the two year period to have expired before issuance of the summons, and for issues related to "date of knowledge" and an extension of the limitation period under s.2 and 3 of the Statue of Limitations (Amendment) Act, 1991, to arise - as in the present appeal where the appellants have made it clear that the statute will be raised, and the respondent will be relying on a

"date of knowledge" argument. Such issues will commonly also need be addressed *inter alia* by expert medical evidence.

91. In my view it would be going too far to say, as counsel for the respondent suggested in response to a direct question from the court, that medical negligence claims come within a special category when it comes to considering applications for renewal of the summons. However in light of the factors identified by O'Donnell J. it is not surprising that, apart perhaps from cases where effecting service is the issue, the preponderance of applications for renewal of summonses arise in medical negligence cases, with plaintiffs contending as the special circumstance delay in obtaining expert medical opinion. That this may be the reality cannot, in my view, mean that responsibly deferring serving of the summons while awaiting reasonably required medical opinion should not constitute 'special circumstance' – provided the plaintiff and legal advisors act with reasonable expedition.

92. In this regard 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.

94. There was a clear evidential basis for the trial judge's findings that the there was an absence of necessary medical reports until the second report from Dr. Subramanian was received on 14 January, 2020. Mr. Kelly avers that these expert opinions were necessary to complete the medico-legal investigation prior to service of proceedings. I accept that averment on its face. The court should not try to gainsay the averments of Mr. Kelly to the effect that the respondent's legal advisors required expert opinions on breach of duty and causation before sending a letter of claim and then serving the proceedings after renewal of the summons.

95. There can also be no doubt that issuing a 'protective' summons to avoid a claim becoming statute barred/to stop time running is a legitimate exercise in medical negligence cases to enable appropriate investigation to be undertaken and supporting expert opinion and advice to be obtained. In this court in *Lawless v Beacon Hospital and others* [2019] IECA 256 Peart J. observed:

> "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."

96. The trial judge, and the appellant in its submissions to this court, were critical of the respondent for not having served a courtesy copy of the summons before it lapsed, and for not putting the appellant on notice of the claim or of the issue of the proceedings, and for not explaining why they were not being served. It was suggested to us that the summons could have been served with an accompanying letter requesting the HSE to hold off entering an appearance until the investigation was completed and a decision taken on whether to proceed with the claim.

97. I do not believe this to be justified, and in this respect I am persuaded by the submissions of counsel for the respondent. Such service or notification is not, as Peart J. said, the starting point – it is only something to be considered. It is likely that had there been such notification, or a courtesy copy been served, this would have triggered an obligation on the HSE to notify the State Claims Agency of an adverse event and possible claim, and to communicate with relevant medical and administrative staff in Mayo General Hospital. This in turn might have created a "notifiable event", as it was described, requiring individual medical personnel to notify their own indemnifiers, with potentially significant consequences. There is much to be said for the submission by counsel for the respondent that to take such a step would have brought about the precise mischief that the Code of Conduct seeks to avoid, namely, the unnecessary naming of potentially innocent professional parties, and would have been contrary to the caselaw warning against professional proceedings being pursued without a reasonable basis for the claim.

98. Further s. 8(1) of the Civil Liability and the Courts Act, 2004 requires that within eight weeks of the cause of action a letter of claim should be sent to the defendant, with potential consequences for costs if this is not done. Under subsection (2) the "date of the cause of action" is defined to mean the date of accrual of the cause of action or date of knowledge, whichever occurs later. It will be the respondent's case the date of knowledge was on receipt of Dr. Subramanian's report on 14 January,

2020, and therefore the letter of claim fell to be served within 8 weeks of that date – and was in fact served on 29 January 2020. This does in my view support the argument that in order to comply with the s. 8 obligation it was permissible for the respondent to await the reports before serving the summons or any letter notifying of the claim.

99. As a result I find that the trial judge erred in characterising the failure of the respondent's solicitor to notify the HSE of the fact of the proceedings, or to serve a courtesy copy of the summons, as "not alone regrettable, but is not acceptable".

100. As the trial judge noted, this is not one of those cases where the summons was allowed to lapse through inadvertence or error on the part of legal advisors. There was a deliberate decision not to serve before 31 August 2019 because the requisite medical opinion had not been received. In my view there was evidence before the court from which the trial judge could conclude that there was no significant or culpable delay. It was reasonable to have regard to the age and condition of the respondent in deciding that the early delay of five months, spanning the Christmas period in 2018, which was caused by her mislaying the request to put her solicitors in funds to obtain medical opinions, was not blameworthy, particularly having regard to the nature of the medical event giving rise to the claim, and the claimed effect on her.

101. Nor do I perceive there to have been any significant delay in briefing Mr. Saab, obtaining and providing additional statements, and in briefing Dr. Subramanian, during the course of 2019.

102. The appellant invites the court to focus on the delay since the expiry of the summons, and to compare the period from 31 August 2019 to 4 February 2020, some 5 months, unfavourably in comparison with the 10 week delay that Hyland J. in *Brereton* consider "relatively short" and at the lesser end of a spectrum of cases with delays running from extremes of two to five years to moderate delay of six to twelve months. Hyland J. was persuaded to grant renewal in that case, but commented in paragraph 31 –

> "…I am of course conscious that with the change in the legal test to 'special circumstances', much shorter periods of delay are likely to be treated as sufficient to justify a refusal to renew a summons."

103. That however was a case of inadvertent failure to serve, which was explained by a change in solicitors. In the present appeal the bulk of the 5 months after the lapse of the summons was taken up with continuing efforts on the part of the respondent's legal advisors to obtain the required expert medical opinion, and the delay was in securing those reports was explained and was reasonable. In my view the respondent and her legal advisors acted with reasonable expedition during this period.

104. The criticism is made that, knowing the summons was due to expire on 31 August, 2019, application should have been made to the Master under O.8 r. 1 & 2, and that the failure to do so is fatal or at any rate should militate against the court finding "special circumstances".

105. This argument has some attraction. It may be said that if a plaintiff awaiting reports does make such an application to the Master – which, based on "other good reason", might generally be thought to have a good prospect of success – it would enhance the prospects of later demonstrating "special circumstances" if the reports are still not received within the 3 months extension and a court application to renew becomes necessary. Indeed in the present appeal if this had been done it would in my view have strengthened the case for establishing special circumstances.

106. This argument, which is perhaps more easily made with the benefit of hindsight, does not convince me in this case. As a general point, and as I have pointed out earlier in this judgment, nothing in O. 8 *requires* that a renewal be obtained from the Master before a further renewal is sought from the court. Secondly, viewed from the perspective of the respondent/her legal advisors, there was no guarantee that the further medical opinions required as of August 2019 would be delivered within three months of 31 August i.e. by 30 November 2019 and in time to enable the summons to be served – let alone providing enough time to send the preliminary letter of claim required by s. 8 of the Civil Liability and Courts Act, 2004. Thirdly I accept that in August 2019 the amended O. 8 was

new to practitioners and it was not crystal clear whether it would be possible to obtain a renewal from the Master and a further renewal from the court; although the decision of Barr J. in *O'Connor* finding that if the Master renewed the court did not have jurisdiction to grant further renewal (which I have now found to be mistaken), was not handed down until 30 October 2020, it does demonstrate this uncertainty.

107. Most significantly in this case the initial report from Dr. Subramanian was not received until 3 December 2019, which was some days outside the 3 month extension that Master could have granted. Therefore even if the respondent had obtained such an order it would still have been necessary to apply to court under O.8 r.1 (3)/(4) for a renewal on the basis of special circumstances.

108. The trial judge also addressed the balance of justice, and whether the appellant would suffer prejudice if the summons was renewed. He correctly noted that "absolutely no specific prejudice" was alleged. There is no suggestion that the medical records are incomplete or that a material witness is no longer available to assist the defence. That remained the position before this court, and the appellant's submissions relied on general prejudice from the passage of time since the event giving rise to the claim occurred. In my view that submission carries little weight. This claim could not be equated to the "stale" claims referred to by Kelly P. in *Whelan v HSE* where requiring a defendant to defend could visit injustice. The reality is that treating medical or other hospital staff will very often not recollect the particular treatment of a particular patient, even after a relatively short time, and frequently witnesses as to fact in medical negligence cases will be wholly reliant on the medical notes in giving their evidence.

109. In considering the balance of justice, the trial judge felt that the failure to notify the appellant of the claim or provide a courtesy copy of the summons was outweighed by the potential prejudice to the respondent if the summons was not renewed. As I have already decided that the trial judge's criticism in this respect was misplaced, it follows that it could not weigh against the respondent in considering where the balance of justice lay. The trial judge went on to find -

"38. …If the defendant's application was granted as the defendants have already indicated that they will be making a plea under the statute of limitations in any event should their application be refused, it is clear that if the plaintiff is forced to issue new proceedings that the application under the statute of limitations would be significantly strengthened."

I note that this circumstance is not stated as a "special circumstance" in the order of Murphy J. of 3 February 2020 – that order merely refers to "circumstances where delays occurred in obtaining medical reports."

110. In any event in my view the extent to which the Master, or a court as the case may be, may have regard to the Statute of Limitations in considering where the balance of justice lies, has not changed under the amended O. 8. Having review the caselaw, in *Whelan v HSE* Kelly P. at paragraph 39 concluded that –

"Thus, the mere fact that a plaintiff's claim would be statute-barred is not of itself 'other good reason' for renewing a summons."

Similarly in this court in *Monahan v. Byrne* [2016] IECA 10 Hogan J. held:

"31. It follows, therefore, that the fact that the action might otherwise be statute-barred is not *in itself* a "good reason" such as might justify the court renewing the summons for the purposes of Ord. 8, r. 1. If it did, then this might have the effect whereby, in the words of Laffoy J. in *O'Reilly, "*the time strictures imposed by the Statute of Limitations 1957 could easily be set at naught.""

This does not mean that it cannot be considered in considering where the balance of justice/hardship lies, but rather that *of itself* it will not constitute "good reason" or "special circumstances" justifying renewal. A similar view – that the High Court can take into account the Statute of Limitations – was taken by Finlay Geoghegan J in *Chambers.* I have also quoted earlier from the decision of Hyland J in *Brereton* where she took the view that it was appropriate to consider the likely consequences for a

plaintiff of a refusal to renew from the point of view of the operation of the Statute of Limitations, and that this was at least potentially relevant. I agree with that view.

111. The trial judge was therefore entitled to take into account the Statute of Limitations point. His view was that if renewal was refused, thus forcing the respondent to issue fresh proceedings, this could significantly strengthen the defence under the Statute of Limitations. Given that the basic period of limitation had already expired by the time the summons was issued, it may be that this overstates the position, but it was a view that the trial judge was entitled to take in the exercise of his discretion. At any rate I am satisfied that the trial judge correctly addressed his mind to the balance of justice, and potential prejudice, and exercised his discretion in such a manner that this court should not interfere with his decision to dismiss the motion.

Cross-appeal – costs in the High Court

112. Turning to the cross-appeal, as I have found that the trial judge erred in his criticism of the respondents for, as he saw it, failing to notify the HSE of the claim and/or serve a courtesy copy of the summons at an earlier time, and as this was what led him to make "no order as to costs", it follows that that order should be set aside. In my view the appellant failed in its application in the High Court and there was no good reason to depart from the usual rule that costs should follow the event, a rule now enshrined in statute by s.169 of the Legal Services Regulation Act, 2015. Accordingly the respondent should be entitled to have her costs in the High Court paid by the appellant, to be adjudicated in default of agreement.

Costs of appeal

113. As the respondent has succeeded entirely on the appeal, it follows that the respondent should also be entitled to the costs of the appeal to be paid by the appellant, such costs to be adjudicated in default of agreement. Should either party seek a different order in respect of the costs of the appeal then they should so notify the Court of Appeal Office within fourteen days from electronic delivery

of this judgment and a short remote costs hearing will be scheduled. Should either party request such a hearing it is likely to have further costs implications for the party that is unsuccessful.

Whelan and Noonan JJ. having read this judgment have indicated that they are in agreement with same.