

THE HIGH COURT

[2021] IEHC 799
[2018/8257 P]

BETWEEN

SHAUN HOURIGAN

PLAINTIFF

AND

**MICHAEL CUNNINGHAM,
SCOUTING IRELAND SERVICES COMPANY LIMITED,
JOHN MOORE,
JOHN PEPPARD,
MINISTER FOR EDUCATION,
IRELAND
AND**

**THE ATTORNEY GENERAL,
EDMUND GARVEY (PROVINCIAL SUPERIOR FOR THE TIME BEING OF THE CHRISTIAN
BROTHERS),
THE PROVINCIAL SUPERIOR FOR THE TIME BEING OF THE CHRISTIAN BROTHERS
DEFENDANTS**

EX TEMPORE JUDGMENT of Ms. Justice O'Regan delivered on the 3rd day of December, 2021

Issues

1. This matter comes before the Court on foot of the defendant Mr. Moore's application to set aside the renewal of the summons that was granted on 14 October 2019. The notice of motion is dated 22 April 2020 and is grounded on an affidavit of Mr. Lavin, Solicitor, of 13 March 2020 and a further affidavit on behalf of the relevant defendant also of 13 March 2020. There are two replying affidavits on behalf of the plaintiff by Mr. O'Sullivan, Solicitor, respectively dated 28 July 2020 and 1 December 2021.

Background

2. The essence of the background is that in December 2015 the plaintiff made a criminal complaint to An Garda Síochána against persons including this defendant. The allegation was of a sexual nature which occurred in 1972/1973 and continued to early 1990.
3. On 22 April 2016 the plaintiff's solicitor wrote to An Garda Síochána looking for this defendant's address and was ultimately provided with the address of the solicitor of this defendant on 13 May 2016.
4. On 18 May 2016 a notice of claim to the solicitors was furnished and on 1 June 2016 the defendant's solicitor indicated that they had no instructions and to write directly to the defendant himself. However, subsequently without further prompting on 13 June 2016 instructions were taken, the allegations were denied and particulars were sought. It is common case that those particulars were not responded to.
5. On 5 August 2016 the plaintiff's solicitor wrote a letter to the effect that if the defendant's solicitor didn't identify the address of the defendant or accept service the plaintiff would employ the services of a private investigator.
6. On 26 September 2016 an application was made to PIAB.

7. No explanation is given as to why further applications were made to PIAB over the currency of the subsequent two years or thereabouts. The correct name of Scouting Ireland was furnished in September 2017 requiring an alteration to the authorisation. In April 2018 two further names were added requiring an alteration to the authorisation and again in July 2018 a further name required an alteration to the authorisation.
8. It is the case that when the first authorisation was given on 3 October 2016 a copy was sent to the defendant via his solicitor.
9. In July and August 2019 letters were written by the plaintiff's solicitor to the defendant's solicitor seeking authority to accept service of proceedings. In that regard the summons had issued on 18 September 2018 and therefore by July 2019 it is clear that the summons was in being for a ten-month period.
10. On 10 July 2019 a letter of instruction to a summons server issued. The summons server, in the affidavit of service which was furnished belatedly by the plaintiff's solicitor, indicates that it took two days to locate the defendant, although it took a period of five months from the initial engagement of the private investigator to the service on the defendant.

Superior Court Rules, Order 8, Renewal of Summons

11. In this case O.8 is engaged. It provides that no original summons will be in force for more than twelve months from the day thereof. Following an amendment to what was O.8 on 11 January 2019 it is provided that if there is to be a renewal of the summons during the currency of the summons that can be made to the Master, however, after the expiration of the relevant twelve-month period, the application is to come before the court and if there are special circumstances which justify an extension with such circumstances being stated in the order, the court may order a renewal.
12. It does appear to me that that wording identifies where the balance of justice and the special circumstances slot in and move together. In this regard, it is my view, that it is impossible to suggest that a balance of justice exercise could be undertaken absent special circumstances (see *Chambers v. Kenefick* [2005] IEHC 402 para.8).

Jurisprudence

13. Recently, guidance on the application of the new order has been furnished by the Court of Appeal in the case of *Murphy v. HSE* [2021] IECA 3, Mr. Justice Haughton has indicated that O.8 doesn't assist as to the definition of "special circumstances" but it does appear that it is a more stringent application to secure an extension or a renewal of the summons when special circumstances are required as opposed to good reason which was the previous yardstick to be achieved. Mr. Justice Haughton said by incorporating the word special that denotes that it is beyond the ordinary or the usual that needs to be present. Mr. Justice Haughton in that decision also at para. 77 stated that

"As far as legal advisers are concerned in my view inadvertence or inattention, for example in effecting service of the summons, will rarely constitute 'special circumstances'".

It appears that the inadvertence of a solicitor in effecting service is not by definition never to be considered special circumstances, but merely that it is a rare event that it would be.

14. If we look at the basic principles that will be applied before I go to the affidavit and submissions, it is the case, following the case of *Murphy* aforesaid, that general and specific prejudice will be taken into account in dealing with the balance of justice. As I have said already, inadvertence by a solicitor will rarely be special circumstances and special circumstances must go beyond the ordinary. In assessing whether circumstances are special or not, this would not involve a consideration of the interests of justice but rather the factual matrix.
15. In *Altan Management (Galway) Limited v. Taylor Architects Limited & Ors.* [2021] IEHC 218, a judgment of Mr. Justice Heslin, it was held that delay cannot be ignored or hived off. One can take account of the *ex parte* application being less than comprehensive. An *ex parte* application must set out in full the circumstances of the delay and the justification for the renewal/extension and this follows from Mr. Justice Simons' decision in *Downes v. TLC Nursing Home Limited* [2020] IEHC 465. It is open to the defendant to introduce new evidence if known at an *ex parte* stage to the effect that no renewal should have been given or that the application did not demonstrate on the evidence that special circumstances existed. Mr. Justice Simons stated in that case that it was doubtful that a plaintiff can introduce new evidence at the *inter partes* application to set aside the renewal.
16. In a subsequent case of *Ward v. Harmony Row Financial Services LTD & anor* [2021] IEHC 656, a judgment of Mr. Justice Barr, Mr. Justice Barr stated "A plaintiff cannot advance new matters as constituting special circumstances on the application by a defendant to set aside the renewal of the summons."(para.39)

Balance of Justice

17. Moderate prejudice may tip the balance in respect of a strike out and Mr. Justice Clarke has already indicated in *Moloney v. Lacy Building and Civil Engineering Ltd* [2010] IEHC 8, that "the jurisprudence relative to inordinate and inexcusable delay is relevant in relation to the setting aside of a renewal of a summons".
18. In that regard in *Gorman v. Minister for Justice Equality and Law Reform & ors.* [2015] IECA 41, in the Court of Appeal when Ms. Justice Irvine was dealing with an inordinate and inexcusable matter, she was satisfied that moderate prejudice may tip the balance.
19. In a prior decision of Mr. Justice Clarke, *Rogers v. Michelin Tyre Plc & Michelin Pensions Trust* [2005] IEHC 294, in respect of inordinate and inexcusable delay, general prejudice would suffice apparently at that stage and significantly also in that matter he stated that it was understandable that there was a lack of specifics by the defendant (I will come back to that).
20. There is the court's own obligation to see justice being dispensed in court proceedings expeditiously. When one looks at the conduct of a particular defendant, if the defendant is

obliged to take a step in the proceedings and delays in doing so that is conduct that will be significant or taken into account. Further, if a defendant acquiesces to the delay and occasions the plaintiff to incur more costs that too will be a matter that will be weighed in the balance as against the defendant, however, it is clear that it is not mere inactivity by the defendant that will be held against him.

21. In *Sweeney v. Cecil Keating t/a Keating Transport and McDonnell Commercials (Monaghan) Ltd* [2019] IECA 43, a judgment of Ms. Justice Baker in the Court of Appeal, it was held that there was no onus on a defendant to progress a plaintiff's proceedings and prejudice can be assumed once there has been a lapse of extensive time.

Submissions of the parties

22. The renewal was secured on foot of an affidavit of Mr. O'Sullivan on behalf of the plaintiff of 30 September 2019 - to suggest that it is brief is not an overstatement. It has been explained since that para. 3 of that affidavit was included in error, so it appears that it was intended to have an affidavit which was even more brief than what was presented before the Court. Significantly, there is no exhibit in the affidavit.
23. Insofar as the error incorporated is concerned it erroneously states the fact that the proceedings are medical negligence proceedings brought about by the care of the plaintiff in the defendant's hospital on 23 September 2014, and the failure of the defendant to appropriately investigate and diagnose an event. This, in my view, is very significant, even though it was clearly included in error as suggested. I don't find that there was any intention to mislead, however, the solicitor who signed the affidavit was swearing to an affidavit which as I say was brief in form and did not address the fact that para. 3 was included in error.
24. In submissions it was suggested that it is patently the case that para. 3 should not have been included. That argument cannot be made as against the Judge only who heard the *ex parte* application in circumstances where it was equally patent to Mr. O'Sullivan when he was swearing the affidavit and presumably also patent to counsel who moved the application. We do not know of the circumstances surrounding how the affidavit was either read out, or if Mr. Justice Meenan read it himself but it is clear from submissions and from the lack of suggestion otherwise that the error in the inclusion of para. 3 was not addressed to Mr. Justice Meenan and presumably therefore Mr. Justice Meenan had regard to that.
25. In the affidavit it is stated at para. 5 "I say that the reason for the delay in serving the summons is that enquiries are still ongoing as to the whereabouts of the third and fourth named defendants. I say that Lynch Security Solutions a firm of private investigators are making enquiries on our behalf. I say that this is the first application to renew the summons herein."
26. As aforesaid, Lynch Security Solutions were only instructed in July when the summons was then just over two months from expiring. It is clear that it took two days ultimately for the investigator to attend to identifying the place of residence of the defendant and

therefore even if we look at the five-month period involved it is clear that if there was an attendance to the necessity to serve the proceedings once the summons issued in September 2018 there was ample scope within the 12-month period to serve the summons. In fact, two days would have been sufficient to serve the summons.

27. The fact that there is no exhibit and that the correspondence and the background were not set out is of significant concern.
28. The court in granting the renewal identified the special circumstance as being difficulty in effecting service. It was granted as we know in the context of a medical negligence matter and that appears to be erroneous and therefore it does appear to me if we look at that affidavit and we strip out para. 3, knowing that there were no exhibits included and without giving any dates as to when the summons was issued and when actual efforts were commenced to effect service on the defendant, I am satisfied that the order of renewal would not have been given on that date. In other words, I am satisfied that there were no special circumstances at that time when we bear in mind the fact that Mr. Justice Haughton in *Murphy* says "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'" (para.77).
29. Insofar as the erroneous paragraph is concerned, a lot of the recent case law on renewal of a summons and the grant of such renewal is in the context of medical negligence claims. For example, *Brereton* was just such a medical negligence claim and there was in that case inadvertence by both the solicitor and the applicant as is clear from a reading of the *Brereton* judgment.
30. Mr. Justice Haughton in *Murphy* does identify later on in his judgment that part of the reason for the renewal and the refusal to set aside the renewal was solicitor inadvertence. However, in that case also, it was explained that there was a change of solicitor. In this case there was no explanation whatsoever as to the ten months allowed to lapse before attention was given to service on this defendant.
31. Insofar as submissions are concerned, the defendant argues that there was no evidential foundation to find special circumstances at the *ex parte* stage and that appears to be an argument fully made out. There was a breach of duty of candour. I feel that the background is also relevant, and in particular the letter as far back as 5 August 2016, indicating that if the solicitors did not accept service the plaintiff would secure a private investigator.
32. If the Court was advised that the plaintiff did not attend to looking at serving this defendant until ten months had elapsed, I believe that would have been particularly significant also and therefore I find that there is a problem by the brevity of the affidavit grounding the application in circumstances where there was no exhibit at all or engagement with what brought the parties to the application of renewal. There was inclusion of inaccurate information and the defendant relies on that. I accept it was not

intended, however, it is the case that it was a potentially very significant inaccuracy which was not corrected.

Is the claim statute barred?

33. The pre-commencement delay, in my view, doesn't necessarily have any bearing at all on this matter. This has been the case in several Superior Court judgments in the context of a prohibition of a historic sexual abuse claim because of the impact on a particular victim who has been sexually abused at a young age and the difficulty in coming forward and acknowledging that later on in life. So although the defendant argues that the plaintiff's claim was statute barred in any event (by the date of renewal), I cannot accept that in all of the circumstances. Also, I am cognisant of the fact that at the relevant time once an application is made to PIAB, until the authorisation is made there is a moratorium on the passage of the limitation period - there is a Supreme Court judgment to the effect that even in the circumstances as I have heard, with having to revert to PIAB to amend the authorisation, the reality was that the legislation at that time was such that all of those amendments did in fact extend the limitation period. For that reason, I don't believe it is material to this matter. It doesn't seem to me that the case was statute barred in any event.
34. *O'Reilly v. Northern Telecom (Ireland) Ltd* [1998] IEHC 168, a judgment of Ms. Justice Laffoy that has been referred to in the body of the case law addressed to the Court says that the fact that a claimant might be statute barred is never good enough as good reason in the prior O.8 to order a renewal, because in the words of Ms. Justice Laffoy "... if an excuse of that nature was countenanced, the time strictures imposed by the Statute of Limitations, 1957 could easily be set at nought." (para. 13). It does appear most likely that absent the renewal and consequential need for fresh proceedings there is (currently) a problem under the statute for the plaintiff in respect of this defendant.

Grounds for renewal

35. The defendant argues correctly that the plaintiff is confined to the grounds relied on in the affidavit, that too is significant in my view because if one reads the submissions on the part of the plaintiff the plaintiff is actually not confining himself to the grounds before Justice Meenan but rather is looking to expand, for example, arguing that the defendant contributed to the problem. However, in accordance with the Court of Appeal judgments in *Millerick v. Minister for Finance* [2016] IECA 206, or in fact in Ms. Justice Baker's judgment in *Sweeney* the defendant is not under an obligation to progress the plaintiff's claim and it is only in circumstances where some act of obstruction by not taking a step which he should take, or acquiescence, would amount to conduct which should be taken into account against the defendant.
36. This is not a documents case and that too is a significant change or differentiation from the status as to medical negligence proceedings. In medical negligence claims, generally speaking, the notes are critical as it would be very difficult for any medic to recall a case absent their notes, and therefore that too is relevant to the instant matter.

37. The defendant did have general knowledge since 2016 when a complaint was made but we have no information whatsoever as to the specific complaint against this defendant to An Garda Síochána. The solicitor's notice of claim of 18 May 2016 is of little assistance to us as the detail given was in respect of all defendants and was not specific to this defendant. This defendant did seek specifics as to the claim against him in June 2016 but that was not afforded.
38. The plaintiff points to the fact that in the affidavit of the defendant no reference was made to the fact PIAB served its authorisation on this defendant via his solicitors on 3 October 2016. I have reviewed the PIAB application and the attached handwritten medical letter on behalf of the plaintiff and it does not appear to me that specifics as against the defendant were in fact included in any such document. Yes, the defendant failed to reference that letter he received from PIAB, however, this does not equate to the failure of the plaintiff to engage with circumstances up to 30 September 2019 in an *ex parte* application when there is a duty of candour to the Court and the defendant was not involved and was not in a position to correct the plaintiff at that stage.

Balancing factors

39. (1) The defendant properly points out that there was no evidence of a contribution to the delay by the defendant and I accept that.
- (2) The defendant says that the plaintiff's claim as against the other defendants will survive the application as there are separate and distinct assault and trespass allegations made against them.
- (3) The plaintiff argues that it could be catastrophic not to renew the summons in the instant circumstance because the psychological impact on the plaintiff might be argued to be all related to the instant defendant's behaviour by the remaining defendants. It is acknowledged by Mr. Justice Haughton in *Murphy* that special circumstances is a higher bar than "good reason". In any event if it was true and the plaintiff was deprived of any success in his claim, then it is of course, as was noted in *Brereton*, the case that with legal inadvertence there is the potential for an alternate claim in favour of the plaintiff.
- (4) The plaintiff argues that the failure of the defendant to give his address in August 2016 tips the balance in favour of a dismissal of the application. I cannot accept in the context of the principles and the case law emanating from the Court of Appeal that that would be the case. I do accept the plaintiff's argument that the period of time between the lapse of the summons and the application by *ex parte* docket to renew it on 1 October 2019 is not significant and if that was the only issue I would not interfere with the renewal order that was made.
- (5) The plaintiff complains that there was a delay of three and a half months between the service of the *ex parte* documentation and the within motion to set aside the renewal and relies on a number of cases, however, as was conceded on behalf of

the plaintiff a seven-month period was not sufficient to disentitle a defendant to relief in one such matter.

- (6) No specific prejudice has been suggested by the defendant and that is an argument made by the plaintiff, however, it does appear to me that this arises from the fact in large part that by the time the affidavits were served no statement of claim was yet served. It was only subsequent to the defendant's affidavits that the statement of claim was served which was 8 July 2020. The affidavits were of March 2020. In *Rogers* Mr. Justice Clarke found it understandable that specifics weren't identified in that case, it seems that a similar situation might arise here. The knowledge of the defendant since 2015 up until the PIAB letter in October 2016, as I have said earlier, was in general terms.
40. That in effect comprises the various submissions of the parties and in my view as I have indicated earlier it does appear in identifying special circumstances the plaintiff is confined to the suggestion that there was difficulty in effecting service.
41. Any catastrophic event occasioned to the plaintiff (see para. 38(3) hereof) by reason of setting aside the renewal can equally or in any event be said to arise by the failure to address the service on the defendant in a timely fashion.
42. As early as 2006, Mr. Justice Peart in *Moynihan v. Dairygold Co-operative Society Ltd* [2006] IEHC 318, addressed the fact that practitioners must be aware of the limitation as to how long a summons survives and in this situation it is one year and thereafter one cannot assume that a summons will be renewed. It is only in special circumstances that a court, after its expiry, will renew it and we know from *Murphy* that it is rare that solicitor inadvertence will assist.

Conclusion

43. I am satisfied that special circumstances were not identified at renewal stage and the plaintiff is not entitled to expand on the asserted special circumstances at this stage, however, if I am incorrect the additional matters identified as special circumstances by the plaintiff are not in fact special circumstances within the meaning of O.8.
44. I am further satisfied that absent special circumstances a balance of justice exercise does not arise, however, if I am incorrect on this point by reason of the foregoing, the balance of justice does not favour the renewal of the summons of 14 October 2019 to stand.
45. In those circumstances it is appropriate that an order be made to set aside the summons.

Costs

46. Insofar as the costs are concerned they are not quite a discretion of the Court, costs follow the event unless in particular circumstances the Court feels that costs should not follow the event and it is an obligation on the Court to set out those circumstances as to why costs should not follow the event. Costs will be awarded in favour of the applicant/defendant.