

THE HIGH COURT

[2023] IEHC 349

[Record No. 2019/5430 P]

BETWEEN

JOLANTA RAJAUSKIENE

PLAINTIFF

AND

SWORDS BARBERS LIMITED AND TADAS STECKYS

DEFENDANTS

JUDGMENT of Ms Justice Bolger delivered on the 12th day of June 2023

1. This is an application by the defendant pursuant to Order 8, Rule 2, Rules of the Superior Courts to set aside the order of Barr J. of 28 July 2021 renewing the Personal Injuries Summons for a period of three months. For the reasons set out below, I am refusing the application.

Background

2. The plaintiff claims to have sustained injuries as a result of an accident at her then place of work on or about 5 March 2017 when she was attempting to pull a door closed and her finger became trapped. I note the following dates:-

- 25 July 2018: Initiating correspondence from the plaintiffs' solicitors to the first named defendant, a company.
- 7 August 2018: Correspondence from the first named defendant's insurers, AXA, to the plaintiff's solicitors confirming that they were investigating the matter and could not comment on liability or indemnity until these investigations are complete.
- 1 October 2018: O'Byrne letter from the plaintiff's solicitors to both defendants.
- 15 October 2018: PIAB application.
- 24 October 2018: Letter from PIAB to the plaintiff's solicitors acknowledging receipt of the application and confirming having written to the defendants requesting consent to have the claim assessed.
- 10 January 2019: The company changed its registered address from the second defendant's personal residence.
- 11 April 2019: Letter from PIAB to the plaintiff's solicitors confirming having written to the defendants in relation to the claim but not having received payment for dealing with the application as a result of which they enclosed an authorisation permitting the plaintiff to take proceedings.
- 21 April 2019: The company changed the registered address of the company.
- February/March 2019: A single exchange of letters between the plaintiff's solicitors and AXA Insurance concerning the plaintiff's maiden name (referred to in the supplemental affidavit on behalf of the defendants sworn on 11 September 2022).
- 9 July 2019: A Personal Injuries Summons was issued.

- 12 July 2019: The plaintiff's solicitors sought to serve both defendants by registered post to the second defendant's residence which was also the previous registered address of the company which was obtained from the CRO website in September 2018.
- 31 July 2019: An Post marked the two registered letters as not called for.
- Early March 2020: Both registered letters were returned to the plaintiff's solicitors. The plaintiff's solicitors moved to effect personal service.
- Mid-March 2020: The plaintiff's solicitor's summons server sought to effect personal service by calling to the business and to the second named defendant's residence.
- 27 April 2020: AXA Insurance closed their file as they considered the proceedings to be statute barred.
- 26 May 2021: The plaintiff's solicitor swore an affidavit grounding an *ex parte* application to Barr J. to renew the Personal Injuries Summons.
- 28 July 2021: Barr J. made an order renewing the summons pursuant to O. 8, r. 3.

3. The plaintiff's solicitor had tried to serve the first named defendant, the company, by registered post at its previous registered address which it had changed in January 2019, approximately six months before that attempted service by registered post. It is unusual for a company to change its registered address so frequently although I do note that the account of the plaintiff's solicitor setting out those changes in the company's registered address, was not provided until after the *ex parte* order was made. Regardless of the fact that the company was sought to be served by registered post at its incorrect address, the second named defendant, who was also the company's secretary, director and a shareholder, has never disputed the averment of the plaintiff's solicitors that he resided at the residence at which attempts were made to serve him both by registered post and personally on a number of occasions. It is also the address to which the plaintiff's solicitor sent initiating correspondence which resulted in correspondence dated 7 August 2018, confirming the involvement of the first named defendant's insurance company who said it was carrying out investigations and further correspondence in February or March 2019 in relation to the plaintiff's maiden name.

4. The first named defendant's insurance company closed its file on 27 April 2020 at a time when the plaintiff was still within time to serve the Personal Injuries Summons that had issued on 9 July 2019.

5. The plaintiff's solicitor identified the following as special circumstances justifying the extension of time sought:-

- (i) Her admitted inadvertence in causing a copy of the summons to be served on the defendants by registered post. She stated on affidavit that this happened because her legal secretary was on maternity leave at the time and the file was handed to a junior secretary in the firm.
- (ii) The registered letters were returned uncalled for to the solicitor's office in early March 2020 even though the date of return marked by An Post on the envelope was 31 July 2019.
- (iii) The plaintiff's solicitor immediately arranged for a summons server to effect personal service. He called to the shop premises looking for the second named defendant and was told by an unidentified man that the second named defendant was not there and that, when the summons server enquired as to his whereabouts, the man told the summons server that he

knew nothing. The summons server then sought to effect personal service by calling to the second named defendant's address but there was no reply. The summons server subsequently attended at the same address, but again there was no response.

- (iv) Very shortly after the summons server's unsuccessful attempts at personal service, the restrictions imposed by COVID-19 came in, resulting in the closure of the shop and the cessation of the summons server's attempts at personal service.
- (v) The COVID-19 restrictions caused some upheaval in the plaintiff's solicitor's office. The plaintiff's solicitors stated on affidavit that she failed to supervise the file with sufficient diligence because of the disarray caused by COVID-19, the lack or absence of secretarial staff and her belief that the company had in fact been properly served.

6. The plaintiff set out the following as matters to be balanced by the court in assessing where the interests of justice lay:-

- (i) The second named defendant notified their insurers of the claim as the plaintiff's solicitor received correspondence from those insurers in August 2018.
- (ii) The defendants have demonstrated no specific prejudice arising from the renewal of the summons.
- (iii) The proceedings will be statute barred if the order of Barr J. is set aside.
- (iv) The defendants' insurers chose to close their file in April 2020 at a time when the plaintiff was still within time to serve her summons.
- (v) The defendants delayed in issuing the within motion until 9 May 2022, some twelve months after the plaintiff's *ex parte* application had been instituted and some eight months after the defendants were served with the order of Barr J. renewing the summons.
- (vi) Whilst the plaintiff will have the option of a claim against her solicitors if her summons is not renewed, this has been acknowledged in the case law to be a more difficult claim than her personal injury proceedings (*Klodkiewicz v. Palluch & College Freight Ltd* [2021] IEHC 67, cited with approval by Hyland J. in *Brady v. Byrne* [2021] IEHC 778).

7. The defendants' solicitors assert that the defendants have been prejudiced by:-

- (i) The delay in terms of locating and interviewing potential witnesses to the alleged incident the subject matter of the proceedings.
- (ii) The lack of communication from the plaintiff's solicitors for a three-year period from 15 August 2018 to 24 August 2021 with the exception of a single exchange of letters in February to March 2019 concerning the maiden name of the plaintiff.
- (iii) The defendants' prejudice in their ability to assess any negligence in relation to the physical condition of the premises in which the alleged incident occurred as it is now more than five years since the alleged incident and the defendants are no longer in occupation of the building.

- (iv) The lack of any explanation from the plaintiff as to the simple failure to request a nomination of solicitors from the insurance company or to inform the insurance company when they were instructed to issue proceedings.

Order 8: Renewal of summons

8. Order 8 provides for an application to renew a summons that had not been served within twelve months of its issue. The application pursuant to O. 8, r. 4 requires a court to be satisfied that there are "*special circumstances which justify an extension*". In considering what is meant by "*special circumstances*", Hyland J. in *Brereton v. The Governors of the National Maternity Hospital* [2020] IEHC 172 looked to the concept of special circumstances in the case law on security for costs, citing the decision of Denham J. (as she then was) in *West Donegal Land League v. Udaras Na Gaeltachta* [2006] IESC 29, [2007] 1 I.L.R.M. 1, where it was found that the essence of the order for security of 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 on balance the interests of the plaintiff company and those of the second named defendant in a fair and proportionate manner. Hyland J. concluded:-

"the previous case law on good reason, which refers, inter alia, to a consideration of the interests of justice and potential hardship to each party, is still relevant in the context of the special circumstances test." (at para. 21)

This *dicta* was cited with approval by Haughton J. in the Court of Appeal in *Murphy v. HSE* [2021] IECA 3, where he said, at para. 74, that:-

"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."

He went on, at para. 76, to say:-

"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."

The decision of Haughton J. was cited with approval by the Court of Appeal in *Nolan v. Board of Management of St. Mary's Diocesan School* [2022] IECA 10.

9. Here, the plaintiff's solicitor has admitted to inadvertence. The case law questions whether a solicitor's inadvertence can ever be relied on as a special circumstance (as per Haughton J. in *Murphy v. HSE*), and the defendants rely on that in submitting that the circumstances here do not justify an extension of time. Usually a solicitor's admitted inadvertence relates to a failure to issue or serve proceedings within the time allowed. In this case, the solicitor's actions, which she described both as inadvertence and a lack of due diligence, was to seek to serve the defendants by registered rather than ordinary post, which she explained by the absence of her legal secretary who was on maternity leave at the time. When it came to her attention that neither defendant had been served, she took immediate steps to arrange for personal service, which efforts were thwarted by the onset of COVID-19.

10. Even accepting the difficulties posed by COVID-19, there was a considerable further period of delay after the commencement of lockdown in March 2020 as the application to

renew was not instituted until May 2021, by which time many offices and businesses had realised the need to adapt their work methods to the new realities of lockdown. The plaintiff's solicitor refers to her particular circumstances of running an office on a skeleton staff in seeking to justify that delay.

11. The court must assess the interests of justice and balance the prejudice both sides will suffer in the event of the renewal or non-renewal of the summons. There is a significant prejudice to the plaintiff in the event of the summons not being renewed, as her proceedings will be statute barred. This is set off to an extent by the cause of action that may be available to her to bring a claim of professional negligence against her solicitor, but it has been recognised that this can be a difficult claim. Added to the legal difficulties is the possible personal cost to a person to decide whether to bring proceedings against the very person they chose to represent their interest in a personally difficult situation, as any personal injuries claim will usually be.

12. There is also a potential prejudice to the defendant in having to defend a claim so many years after the accident is alleged to have occurred. The extent of that prejudice seems to me to be similar to that found by Hyland J. in *Brereton v. Governors of the National Maternity Hospital* [2020] IEHC 172, at para. 34, to have been of a "relatively mild nature" given that the defendants had been on notice of this claim since 2018 and confirmed at that time through the first named defendant's insurers, that it was being investigated. The defendants' solicitor says on affidavit that the delay has resulted in prejudice in terms of locating and interviewing potential witnesses to the alleged accident and in their ability to assess any negligence in reference to the physical condition of the premises as the defendants are no longer in occupation of that building. However no specific detail of that has been provided, there is no explanation of how witnesses cannot be located and/or interviewed or who those witnesses are, in circumstances where the matter had been investigated by the defendants' insurers as far back as 2018 and presumably up until April 2020 when they decided to close their file as they had not heard from the plaintiff since March 2019.

13. In balancing the interests of justice and respective prejudice for each side, I note that the defendants waited some time from when they were made aware of the plaintiff's intention to renew the summons and the making of the order by Barr J., before instituting this application in July 2021, albeit there was correspondence from them to the plaintiff's solicitor indicating their intention to bring this application in November 2021 and February 2022.

14. Whilst I acknowledge the defendants may experience some prejudice in having to defend a claim of which they heard nothing from March 2019 until the renewal of the summons in July 2021, I have not been satisfied of a sufficiently specific prejudice such as would outweigh the prejudice to the plaintiff in being statute barred in her proceedings and left only with the option of professional negligence proceedings. There has been delay on both sides in bringing the motion to renew and the motion to set aside the renewal. It is not a case of one period cancelling the other but both periods of delay form part of the overall balancing exercise in determining where the interests of justice lie.

15. I am, therefore, refusing this application.

Indicative view on costs

16. In accordance with s. 169 of the Legal Services Regulation Act 2015, my indicative view on costs is that the plaintiff is entitled to the costs of this motion to be adjudicated upon in default of agreement as they have succeeded in opposing the defendants' application to set aside the renewal of the summons, but I am also of the indicative view that there should be a stay put on the costs order pending the resolution of the overall proceedings. If either party wishes to make submissions as to why a different costs order should be made or submissions on any other aspect of the final orders to be made, I will hear same when the matter is put in before on 12 July 2023.

Counsel for the Plaintiff: Hugh O'Donnell BL

Counsel for the Defendant: Hugh Guidera BL