APPROVED **[2020] IEHC 465**

THE HIGH COURT

2017 No. 6171 P.

BETWEEN

ANNE MARIE DOWNES

PLAINTIFF

AND

TLC NURSING HOME LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 30 October 2020

INTRODUCTION

1. This matter comes before the High Court by way of an application to set aside an *ex parte* order which had the effect of renewing the summons issued in these proceedings for a period of three months. The application to set aside is made pursuant to Order 8, rule 2 of the Rules of the Superior Courts. Order 8 has been

amended with effect from 11 January 2019. It will be necessary to consider the implications of these amendments in some detail in this judgment.

2. For introductory purposes, however, it is sufficient to note that a twofold test now governs an application to renew a summons which is made *after* the expiration of a twelve-month period from the date of issue. First, the court must be satisfied that there are "special circumstances" which justify an extension of time to apply for leave to renew the summons. Secondly, the court must be satisfied either that reasonable efforts have been made to serve the summons, or that there is other "good reason" for renewing the summons.

3. Three matters are relied upon by the plaintiff in the present case as representing "special circumstances". First and foremost, it is said that the delay in serving the summons is attributable to inadvertence on the part of the legal advisors acting for the plaintiff. There had been a change in representation, with a new firm of solicitors only coming on record for the plaintiff on 17 June 2019. Secondly, the attitude of the defendant to the disclosure of medical records is criticised, and is said to have "very severely hampered" the plaintiff's efforts to pursue the proceedings. Thirdly, and more broadly, it is said that the balance of justice favours allowing the renewed summons to stand in that it would present difficulties for the plaintiff in terms of the Statute of Limitations were it to be set aside.

CHRONOLOGY

4. The key events in the chronology are set out in tabular form below. A more detailed narrative is then provided under the next heading.

10 July 2015	Date of death
29 April 2017	Solicitor's letter requesting release of medical records
6 July 2017	PIAB authorisation
6 July 2017	PIAB letter to nursing home
7 July 2017	Proceedings issue out of Central Office of the High Court
4 September 2017	Telephone conversation between the plaintiff's first firm of solicitors and insurance loss adjuster
5 July 2018	Order of Master renewing summons for six months
4 January 2019	Summons lapses
17 June 2019	Notice of change of solicitor filed
1 July 2019	Order for renewal of Summons for a period of three months granted *ex parte* by the High Court
30 July 2019	Summons served by registered post
8 January 2020	Motion issued by defendant seeking to set aside order of renewal

PROCEDURAL HISTORY

5. The within proceedings arise out of the death of Mr. Joseph Downes ("***the deceased***") on 10 July 2015. The proceedings are brought by the deceased's adult daughter, Anne Marie Downes ("***the plaintiff***"). The defendant to the proceedings is the owner and operator of the nursing home ("***the nursing home***") in which the deceased had resided for approximately three months until shortly before his death. The deceased had subsequently been transferred to hospital, and ultimately died in hospital some ten days later.

6. There are two elements to the claim: (i) a claim for personal injuries (including nervous shock) said to have been sustained by the plaintiff personally as a result of the death of her father; and (ii) a fatal injuries claim pursuant to Part IV of the

Civil Liability Act 1961 (as amended). This latter claim is taken by the plaintiff on her own behalf and on behalf of the other statutory dependants.

7. The gravamen of the case pleaded against the nursing home is to the effect that the nursing home had been negligent in their care of the deceased.

8. The plaintiff sought and obtained an authorisation to issue the proceedings from the Personal Injuries Assessment Board ("***PIAB***"). The authorisation is dated 6 July 2017. It appears that PIAB took the view that the claim was outside its statutory remit by virtue of section 3(d) of the Personal Injuries Assessment Board Act 2003. This section provides that the legislation does not apply to a civil action arising out of the provision of any health service to a person, the carrying out of a medical or surgical procedure in relation to a person, or the provision of any medical advice or treatment to a person.

9. The proceedings were instituted on 7 July 2017, by the issuing of a personal injuries summons out of the Central Office of the High Court. It is relevant to one of the arguments relied upon by the plaintiff to note that the proceedings were issued within two years of the date of death of the deceased, and would thus *appear* to have been issued within the relevant two-year limitation period prescribed under section 6 of the Statute of Limitations (Amendment) Act 1991. (cf. *Hewitt v. Health Service Executive* [2016] IECA 194; [2016] 2 I.R. 649).

10. The summons states on its face that it had been issued on a precautionary basis. It is expressly stated at paragraph (3) of the summons that it would be necessary *to serve* the summons for the purposes of applying for discovery of the deceased's medical records. In the event, however, the summons was not served within the twelve-month period provided for under Order 8, rule 1(1). Shortly before the expiration of this twelve-month period, the firm of solicitors then acting for the

plaintiff made an *ex parte* application to the Master of the High Court for leave to renew the summons. The Master made an order on 5 July 2018 renewing the summons for a period of six months from the date of the order. (The application predated the coming into effect of the revised Order 8, rule 1, and hence the maximum period allowed for a renewal was still six months not three months).

11. The summons was not served within this extended period either. The summons thus lapsed on 4 January 2019. It should be explained that the summons did not become a "nullity" after that date, but it would not be in force for the purpose of service after that date *unless* renewed by leave of the court (see, by analogy, *Baulk v. Irish National Insurance Company Ltd* [1969] I.R. 66 at 71).

12. Some months later, on 17 June 2019, a notice of change of solicitor was filed in the Central Office by a new firm of solicitors. (The notice is dated 19 June 2019 but appears to have been filed two days earlier). On the same date, an affidavit was filed in support of an application for an extension of time to apply for leave to renew the summons. The application was subsequently made *ex parte* to the High Court (Murphy J.) on 1 July 2019.

13. The court acceded to the application, and the operative part of the order reads as follows.

> IT IS ORDERED pursuant to Order 8 Rule 1 of the Rules of the Superior Courts that the said Summons be extended and hence renewed for a period of three months from the date hereof in the circumstances where the unwillingness of the Defendant to provide reports and issues around the transfer of files between solicitors justify an extension

14. The application had been grounded on the affidavit of a partner in the second firm of solicitors. Given the nature of the arguments made before me on the application to set aside the order, it is necessary to refer in some detail to the content of that affidavit. The explanation offered for the failure to have served

the summons within the extended period is as follows (at paragraph 3 of the affidavit).

> "3. The Summons was not served within the twelve-month period specified in the Rules. As the Plaintiff did not have access to the medical records from the Defendant Nursing Home, an expert report could not be obtained. A six-month extension of time was thus granted by the Master from the 5th day of July 2018 pursuant to the Master's Order of the same date. The Summons was not served during this extended six month period in the following circumstances: –
>
> (i) Your deponent had been the partner supervising the assistant solicitor handling this file while practising in the firm of solicitors then on record, [the first firm of solicitors]. Your deponent left that firm of solicitors on the 25th June 2018 (10 days before the renewal of the summons).
>
> (ii) The plaintiff herself had understood and believed that the summons had been served but it would appear that it had not been, apparently due to inadvertence which arose at least in part due to your Deponent having left practice at [the first firm of solicitors] on the aforesaid date.
>
> (iii) Your deponent was professionally and contractually precluded from approaching, contacting or informing the plaintiff that he no longer practised at his former firm on foot of terms agreed with the residual partners upon his cessation of partnership with [the first firm of solicitors].
>
> (iv) Your Deponent was subsequently contacted in his new firm by the Plaintiff's solicitor in September 2009* and requested to act. At that stage, your deponent wrote to [the first firm of solicitors] seeking a transfer of the file of papers. The file was transferred electronically containing an electronic copy of all the relevant papers, excluding the original Personal Injuries Summons.
>
> (v) Unfortunately, at that time it was not realised by your deponent that the Summons had not been served. Your deponent then wrote on 1st May 2019 to [the first firm of solicitors] seeking a copy of the original summons. That original Summons was sent by [the first firm of solicitors] to your deponent's firm on the 2nd May 2019. Your deponent now wishes on the

> instructions of the Plaintiff to apply to renew the summons and to immediately serve the summons on the Defendant Nursing Home."
>
> **It has since been confirmed in writing to the registrar and at the second hearing that the date should read "August 2018".*

15. The affidavit goes on then to criticise the attitude of the nursing home to the disclosure of the deceased's medical records as follows.

> "4. It is very relevant to mention that the Plaintiff's efforts to pursue this case have been very severely hampered by reason of the attitude taken by the Defendant Nursing Home. The Defendant Nursing Home have repeatedly refused requests and efforts by the Plaintiff and her family to secure copies of the nursing home records relating to the deceased. The Nursing Home have refused to release the deceased's medical records relying on Regulations made under Part 6 of Statutory Instrument 236 of 2009. These Regulations were made under the Health Act 2007. In essence the Regulations do not impose a legal obligation on private nursing homes to provide medical records to the next of kin in the case of the death of a resident in the private nursing home. This resulted in the Plaintiff making an unsuccessful appeal to the Data Protection Commissioner in 2016. [The correspondence is then exhibited].
>
> 5. Currently advice is being sought from Counsel as to whether the provisions of the most recent Data Protection Act 2017 giving affect (*sic*) to the GDPR Directive might allow access to the records.
>
> 6. In all events the Plaintiff has at all times wished to pursue these Proceedings to the point of at least being able to secure an Order granting access to the deceased's medical records. At that point expert opinion will be sought to ascertain the nature and quality of the care afforded to the deceased and whether any act or omission caused or contributed to the deceased's death."

16. I will return to consider the exhibited correspondence at paragraph 53 *et seq.* below.

17. There is no reference in the affidavit to the fact that it had been expressly stated on the face of the "precautionary" summons that it would be necessary to serve the summons for the purposes of applying for discovery of the medical records.

Given this statement, it is difficult to understand how the defendant's "attitude" to the disclosure of medical records could constitute a reason for not having served the summons. It is precisely because the nursing home had not provided the medical records that the plaintiff's legal advisors had had to issue the proceedings on a precautionary basis, and had indicated an intention to serve the summons and then apply for discovery of the medical records.

18. The affidavit does not refer to two other pieces of correspondence of potential relevance as follows.

    (i). It seems that the first firm of solicitors acting for the plaintiff had written to the nursing home on 29 April 2017 to request that a full copy of the medical records be released immediately to their client.

    (ii). A claims handler had written to the plaintiff's first firm of solicitors on 1 August 2017. This letter had sought a detailed version of events along with the specific allegations of negligence alleged against the insured, i.e. the nursing home. (It seems that the Personal Injuries Assessment Board had written to the nursing home on 6 July 2017 enclosing a respondent's notice. The letter had explained that the claim is outside the remit of PIAB; that an authorisation had issued; and that, therefore, there was no need for the nursing home to respond to the notice. This letter appears to have been passed on at some stage to the nursing home's public liability insurers).

19. Following upon the order of 1 July 2019, the new firm of solicitors acting on behalf of the plaintiff sent what is described as a "letter of claim" to the nursing home on 10 July 2019. The summons was subsequently served upon the nursing home by registered post on 30 July 2019.

20. On 8 January 2020, the nursing home issued a motion to set aside the order of renewal. The matter came on for hearing before me on Monday 19 October 2020, and I reserved judgment. Having reviewed the papers for the purpose of preparing a written judgment, it became apparent that certain potentially relevant correspondence, which had been exhibited before the Master, had not been exhibited as part of the application before me. Moreover, the recent judgment of my colleague, Cross J., in *Murphy v. Health Service Executive* [2020] IEHC 483 had not been opened. The parties were contacted by the registrar and requested to agree a booklet of *inter partes* correspondence. The matter was then listed for further argument on Wednesday 28 October 2020. On that occasion, both sides made very helpful supplemental submissions to the court.

21. Separately, it should be explained that a notice of motion seeking judgment in default of appearance issued on behalf of the plaintiff on 9 December 2019. It appears that the nursing home has intentionally not entered an appearance in circumstances where an application to set aside the renewal of a summons can only be made *prior to* the entry of an appearance (Order 8, rule 2). The parties have agreed that the motion for judgment should be adjourned generally pending the outcome of the application to set aside the renewal of the summons.

REVISED VERSION OF ORDER 8

22. The service of, and renewal of, summonses is governed by Order 8 of the Rules of the Superior Courts. Order 8 was subject to significant amendment with effect from 11 January 2019 when a new version of rule 1 was substituted by the Rules of the Superior Courts (Renewal of Summons) 2018 (S.I. No. 482 of 2018). The new version imposes more stringent requirements for the renewal of a summons.

23. The rule of most immediate relevance to the present application is Order 8, rule 1, 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.
>
> […]

24. As appears, the procedure and the legal test for the renewal of a summons differs according to the *timing* of the application.

(i) If the application is made prior to the expiration of the initial twelve-month period, then it is made to the Master of the High Court. The Master must be satisfied either that reasonable efforts have been made to serve the summons, or that there is other "good reason" for renewing the summons.

(ii). If the application is made subsequent to the expiration of the initial twelve-month period, then it is necessary to apply to a Judge of the High

> Court. A twofold test governs the application. First, the court must be satisfied that there are "special circumstances" which justify an extension of time to apply for leave to renew the summons. These "special circumstances" must be stated in the order of the court. Secondly, the court must be satisfied either that reasonable efforts have been made to serve the summons, or that there is other "good reason" for renewing the summons. Logically, the "special circumstances" test should be addressed first: it is only when an *extension of time* for making an application for leave to renew has been granted that it becomes necessary to consider the merits of the application to renew.

25. The twofold test prescribed for an application which is made after the expiration of the initial twelve-month period is common to both the pre- and post- 2019 versions of Order 8. The position under the original version is described as follows by the High Court (Kelly P.) in *Whelan v. Health Service Executive* [2017] IEHC 349 (at paragraph 30).

> "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. […]"

26. The judgment in *Whelan* goes on to explain that an extension of time should be sought, in terms, in the *ex parte* docket by reference to Order 122.

27. The High Court (O'Moore J.) has confirmed in *Ellahi v. Governor of Midlands Prison* [2019] IEHC 923 that a similar twofold test applies to the revised version of Order 8. This approach has been approved of in *Brereton v. Governors of the*

National Maternity Hospital [2020] IEHC 172 and *Murphy v. Health Service Executive* [2020] IEHC 483.

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. This has been achieved by a parallel amendment to Order 122 introduced under the Superior Courts (Renewal of Summons) 2018 (S.I. No. 482 of 2018). (cf. *Crowe v. Kitara Ltd* [2016] IECA 62, [60] to [62]). 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.

29. There has been some debate in the recent case law as to the practical significance of the twofold test prescribed for an application to renew a summons which is made after the expiration of the initial twelve month period. More specifically, it has been suggested that the requirement to fulfil both tests may be academic in many cases in that if a plaintiff meets the higher bar of "special circumstances", then they will by necessary implication also have met the "good reason" test. The High Court (Cross J.) in *Murphy v. Health Service Executive* [2020] IEHC 483 noted that counsel for the defendant in that case had conceded that there were no circumstances in which a court would hold that there were "special circumstances" justifying an extension of time, and not also conclude that there was "good reason" justifying the renewal of the summons.

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.

33. Of course, the "good reason" test does allow for consideration of any explanation offered for the failure to serve the summons within the initial twelve-month period, e.g. difficulties in serving a defendant may constitute a "good reason". Crucially, however, the test is not so confined. See *Lawless v. Beacon Hospital* [2019] IECA 256 (at paragraph 24) of the judgment.

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

34. On the facts of *Lawless*, the Court of Appeal held that if a solicitor, acting responsibly and in a *bona fide* manner, decides to withhold service of complex medical negligence proceedings until advised reports are in his or her possession, then that constitutes a "good reason" justifying the renewal of the summons, subject always to the proviso that the delay involved is not found to have been unreasonable. (I return to this judgment at paragraphs 66 to 68 below).

35. An example of the existence of a "good reason" for renewing a summons notwithstanding an *unjustified delay* would be where the defendant had been on notice of the proceedings by dint of having been served with a courtesy copy of the summons, but had not been formally served with the original summons through inadvertence. See *Chambers v. Kenefick* [2007] 3 I.R. 526 (at paragraph 9).

> "[…] It is not the inadvertence which constitutes the good reason, but rather it is that such inadvertence and oversight is the explanation for which the summons, a copy of which had been furnished, was not formally served. It appears to me important for this reason. If, contrary to the facts of this case, there had been a deliberate withholding of the service of a summons then the fact that the defendant through his insurers had received a copy of the summons might not of itself constitute a good reason. Therefore, it is the fact that the copy summons had been delivered, coupled with the fact that the failure to subsequently formally and properly serve under the rules was simply due to inadvertence, which I have concluded constitutes a good reason."

36. Finally, the court has a *discretion* as to whether to allow a summons to be renewed even where the tests prescribed under Order 8 have been met.

GROUNDING AFFIDAVIT

37. The affidavit grounding an *ex parte* application to extend time for the making of an application for leave to renew a summons must set out in full the factual circumstances relied upon as justifying an extension of time. In particular, the affidavit must address the delay between the expiration of the initial twelve-month period and the date of the application to court. All relevant correspondence must be exhibited. Given that the application is made *ex parte*, there is a duty on solicitors to make full and frank disclosure of all relevant matters to the court.

38. The affidavit should also set out the facts relied upon as establishing the "good reason" for which it is said that the summons should be renewed.

39. It is a regrettable feature of much of the case law in this area that the affidavits grounding *ex parte* applications under Order 8, rule 1(3) have often been found to be deficient. See, in particular, the observations of Kelly P. in *Whelan v. Health Service Executive* [2017] IEHC 349 where the grounding affidavit in that case had been criticised as containing a number of "material misrepresentations". In the more recent case law, the courts have identified marked inconsistencies between the explanations offered on affidavit, on the one hand, and the actual content of the *inter partes* correspondence exhibited, on the other.

APPLICATION TO SET ASIDE

40. Order 8, rule 2 provides as follows.

> 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.

41. The approach to be adopted by the court in hearing an application under Order 8, rule 2 has been summarised as follows in *Chambers v. Kenefick* [2007] 3 I.R. 526 (at paragraph 6).

> "[…] it is open to a defendant, by submission, to seek to demonstrate to the court that, even on the facts before the judge hearing the *ex parte* application, upon a proper application of the relevant legal principles the order for renewal should not be made. This appears to me to be necessary having regard to the purpose of an application under O. 8, r. 2. It only relates to orders which have been made *ex parte*. On any *ex parte* application by a plaintiff, a defendant has not had an opportunity of making submissions to the court as to why the court should not exercise its discretion under O. 8, r. 1 to renew a summons. It appears to me that the purpose of including O. 8, r. 2 is to accord to a defendant fair procedures in the High Court, and to permit a

> defendant where he considers it necessary to make submissions to a judge, even on what might be described as an agreed set of facts, that the court should not exercise its discretion to renew a summons …"

42. This approach has since been approved of by the Court of Appeal in *Monahan v. Byrne* [2016] IECA 10.

43. It is thus open to a defendant either (i) to adduce new evidence or information so as to satisfy the court that, had the relevant facts been known at the initial *ex parte* hearing, the summons would not have been renewed, or (ii) to seek to demonstrate that, even on the facts before the judge hearing the *ex parte* application, the order for renewal should not have been made.

"SPECIAL CIRCUMSTANCES"

44. The dispute between the parties at the two hearings before me centred on the question of whether "special circumstances" have been established such as to justify the grant of an extension of time for the making of an application for leave to renew the summons. I address each of the three factors relied upon by the plaintiff under separate headings below.

(i). Inadvertence on the part of legal advisors

45. It is said that the delay in serving the summons is attributable to inadvertence on the part of the legal advisors acting for the plaintiff, related to a change in the plaintiff's legal representation during the course of the proceedings. This is recited in the order of 1 July 2019 as "issues around the transfer of files between solicitors".

46. No proper explanation has been provided on affidavit, however, as to the nature of the "issues" around the transfer of files. No detail has been provided in respect of the sequence of events surrounding the transfer of the files. In particular, it is

nowhere stated when the initial transfer took place. The affidavit incorrectly states that the second firm of solicitors had been approached and requested to act in *September 2009* (it has since been confirmed that this should read *August 2018*), but that the original summons had not been transferred until 2 May 2019.

47. No detail is provided as to what occurred between August 2018 and May 2019 other than to say that the new firm of solicitors had not realised "at that time" that the summons had not been served. Put otherwise, there is no meaningful explanation as to what happened over this ten-month period. No explanation is provided as to why an application for a further renewal had not been made to a Judge of the High Court prior to the lapse of the summons on 4 January 2019. At that time, the plaintiff was still represented by the first firm of solicitors. The second firm of solicitors only came on record for the plaintiff formally some five months later: a notice of change of solicitor was filed on 17 June 2019.

48. At all events, inadvertence or inattention on the part of a plaintiff's legal advisors will rarely, if ever, constitute "special circumstances" for the purposes of Order 8, rule 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. The Rules Committee has reduced the maximum period for which a summons may be renewed by the Master and by a Judge, respectively, from six to three months. More broadly, it is now recognised that the courts themselves have an obligation to ensure that proceedings are progressed in a manner consistent with the parties' entitlement to a hearing within a reasonable time. It would defeat this legislative intent and would be inconsistent

with the courts' obligations, were the courts to indulge parties who fail to serve their proceedings within time.

49. There is nothing novel in these propositions. The same points had been made, albeit with greater eloquence, by Peart J. (then sitting in the High Court) in *Moynihan v. Dairygold Co-operative Society Ltd* [2006] IEHC 318 some fourteen years ago.

> "38. […] I have noticed a marked increase in the number of applications for renewal of summonses where the only reason for the failure to serve within the allowed period of twelve months is such an oversight on the part of the solicitor. Where a defendant comes before the Court to set aside an order of renewal in such circumstances, and the Court is considering the competing interests, it is hard to see that much weight in the basket of interests to be weighed should be given to the solicitor's mistake. 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 the expiration of one year from the date of issue, the Statute will have expired. Too often, it appears, a summons is issued and the plaintiff's solicitor then sits back and allows time to pass, albeit that during that time, efforts are made to negotiate settlement, obtain medical reports, or other expert reports. There are risks in so doing.
>
> 39. There is very often no difficulty whatsoever in serving the defendant. There is often no good reason for holding off taking the next step, namely serving the proceedings. Some brief time may be usefully spent in the interests in saving costs, by seeking to have a firm of solicitors nominated to accept service. But I would suggest that to spend the entire twelve months attempting to achieve such assistance would be an inappropriate use of time on the plaintiff's behalf. Neither is there any real likelihood that a plaintiff's position in negotiations would be prejudiced by serving the summons. To delay serving proceedings for this reason would rarely on its own be justified. Another reason being offered frequently is that the plaintiff's solicitor was awaiting the receipt of medical reports before serving the summons. These are but a couple of random examples of the reasons often given as to why a summons has not been served. The last of these reasons may be largely obsolete now given the need for detail to be included in the personal injury summons under the new legislation. But nonetheless, it is worth casting doubt upon

> the wisdom of letting the year since issue pass while reports are sought.
>
> 40. One reason for drawing attention to this difficulty is that increasingly it is becoming recognised that delay in the pursuit of litigation rests not alone on the parties to the litigation, but on the courts themselves. The courts have an obligation to ensure that proceedings through the courts are progressed in a manner consistent with the parties' entitlement to a hearing within a reasonable time. A failure on the part of the courts in this regard can result in a finding against the State by the European Court of Human Rights in Strasbourg, with a resulting award of damages to the party whose rights have been infringed. Too indulgent an approach by the Court to delay by either party in the pursuit or defence of litigation has the capacity to offend against Article 6 of the European Convention on Human Rights and Fundamental Freedoms, and the increasing attention rightly given nowadays to delay must result in the Court taking a firmer and more robust approach when dealing with applications which are brought arising from delay, be it delay on the part of a plaintiff in the pursuit of the claim, or by the defendant in its defence of the claim. The discretion vested in the Court by the rules of court to extend the time for doing certain acts by either party must now be interpreted in the light of the emerging jurisprudence both from the European Court of Human Rights, as well as from the courts here."

50. Peart J.'s "timely warning to practitioners" that proper attention must be given to the question of service of proceedings has even greater resonance now than it did in 2006. If inadvertence or inattention on the part of a solicitor did not normally constitute a "good reason" under the pre- 2019 version of Order 8, it will not meet the higher threshold of "special circumstances" prescribed under the current version.

51. For the sake of completeness, it should be noted that, in some instances, an order renewing a summons will be made *notwithstanding* a solicitor's inadvertence. Thus, in *Brereton v. Governors of the National Maternity Hospital* [2020] IEHC 172, the High Court (Hyland J.) granted an extension of time in circumstances where the defendants had been notified of the proceedings by letter

sent within time, but the summons itself had mistakenly not been enclosed with the letter as had been intended. The "special circumstances" consisted of the fact that the defendants had been put on notice within the initial twelve-month period and that the application to renew was made within ten weeks thereafter. (Hyland J. stated that had the period of delay been longer, even by a month or two, her approach to this case would have been different). Put otherwise, the extension of time was granted in spite of, rather than because of, the solicitor's inadvertence.

52. Finally, I do not accept that the analogy which counsel for the plaintiff sought to draw with Order 27, rule 14(2) and *McGuinn v. Commissioner of an Garda Síochána* [2011] IESC 33 is well made. Whereas it is correct to say that that rule also employs the term "special circumstances", the context is entirely different. A party seeking to set aside judgment obtained in default of appearance must demonstrate that there were "special circumstances" explaining and justifying the failure at the time when the judgment was obtained. Moreover, the "special circumstances" in *McGuinn* did not consist of inadvertence on the part of the defendant alone: rather, the defendant's solicitor had been mistakenly told by the plaintiff's solicitor that the motion had been struck out.

(ii) Disclosure of medical records

53. The second matter relied upon as constituting "special circumstances" concerns the disclosure of medical records. This is recited in the order of 1 July 2019 as "the unwillingness of the Defendant to provide reports". Counsel for the plaintiff very fairly accepted that this ground is secondary to the "inadvertence" ground (discussed above).

54. The attitude of the nursing home to the disclosure of medical records is criticised in the grounding affidavit, and is said to have "very severely hampered" the plaintiff's efforts to pursue the proceedings. The nursing home stands accused of having "repeatedly refused" requests and efforts by the plaintiff and her family to secure copies of the nursing home's records relating to the deceased.

55. As appears from the correspondence exhibited, however, the position is somewhat more nuanced. The nursing home had stated that whereas it would not provide copies of the medical records, for patient privacy reasons, it was prepared to allow the plaintiff to inspect the documentation and to assist in responding to any questions. The position is put as follows in a letter of 11 August 2015.

> "Unfortunately, we are not in a position to supply copies of the medical chart as it is not the policy of TLC Nursing Home Limited to release such records relating to deceased residents unless there is written authorisation from the person to which the records relate. Our decision is based on our creation, retention of, access to, and destruction of records policy. TLC Nursing Home Limited is not subject to the terms of the Freedom of Information Acts.
>
> Our confidentiality policy is implemented in compliance with the Data Protection Acts. As per the Data Protection Acts – 'the rights to access/amend under the Data Protection Acts only apply to personal data of living individuals. There is no right to access/amend the information of deceased persons. A particular data controller, for reasons of good will, may choose upon request to supply data relating to a deceased person to a relative' (Data Protection Commissioner, 2015).
>
> As per our previous correspondence, we would be more than happy to meet with you and facilitate you to view the records on site, and to answer any questions you may have. Please contact me by phone, email or post to arrange a suitable time to view those records.
>
> I look forward to hearing from you and hope that we can answer any queries you may have relating to your Dad."

56. For reasons which have not been explained on affidavit, it seems that the family never took up this offer to view the medical records. It should also be noted that

the relevant correspondence dates from 2015 and 2016. The affidavit grounding the *ex parte* application under Order 8, rule 1(3) does not identify any subsequent attempts to secure the medical records. In particular, it does not address events subsequent to the issue of the proceedings.

57. (The affidavit in support of the earlier application before the Master of the High Court exhibits a letter which the first firm of solicitors had written to the nursing home on 29 April 2017 requesting that a full copy of the medical records be released immediately to their client. That affidavit also refers to a telephone conversation on 4 September 2017 between the plaintiff's first firm of solicitors and an insurance loss adjuster acting on behalf of the defendant's public liability insurer. The solicitor avers that she explained to the loss adjuster that until the plaintiff receives a copy of the deceased's medical records from the nursing home, the plaintiff will not be in a position to fully particularise the claim. This appears to have been the last attempt to seek to obtain the medical records prior to the *ex parte* application on 1 July 2019. This affidavit evidence was not before the High Court at the time of the *ex parte* application).

58. Counsel at the first hearing before me sought to suggest that it would have been inappropriate to serve the summons in the absence of an independent expert's report confirming that there were grounds for alleging negligence against the nursing home, and that such a report could not have been obtained without first securing access to the deceased's medical records. Reference was also made, at the second hearing, to the principle that, in the absence of exceptional circumstances, discovery would not generally be ordered until the pleadings in a case were closed, citing *Craddock v. Raidió Teilifís Éireann* [2014] IESC 32;

[2014] 1 I.R. 591. As noted earlier, however, these points were presented as very much secondary to the "inadvertence" ground.

59. The attempted reliance on the non-disclosure of medical records as a justification for an extension of time within which to apply for leave to renew the summons is entirely inconsistent with the stated position as *per* the summons itself. Specifically, the summons states on its face that it had been issued on a precautionary basis. This is elaborated upon as follows at paragraph (3) of the summons.

> "PRECAUTIONARY SUMMONS:
>
> (3) This Personal Injury Summons is being issued, at this point in time, to protect the Plaintiff's right of access to the courts as well as that of the dependents. The full nursing home, nursing care and medical records and/or necessary expert reports are not available to the Plaintiff in order to inform the decision to issue and/or maintain proceedings. This has arisen due to the outright refusal of the Defendant its servants and/or agents to provide to the Plaintiff the said records, notwithstanding repeated requests to do so. Should the Plaintiff a weight receipt of the said records and/or reports, her claims, and those of the dependents, would almost certainly be statute barred. The result is that the Plaintiff's claim cannot actually be pleaded fully or particularised fully at this point in time, notwithstanding the issuance of this summons. *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.** On receipt of the said records and report, the Plaintiff will apply to amend the summons, if necessary, or alternatively, will provide further particulars of negligence/breach of duty and/or particulars of personal injury, once the records and/or reports have been received. The Plaintiff does not intend to further prosecute these proceedings in the absence of a reasonable basis for doing so, *save insofar as is necessary for the purposes of obtaining discovery from the Defendant prior to the close of pleadings*.*"
>
> *Emphasis (italics) added.

60. As appears, it is expressly acknowledged that it would be necessary to serve the summons for the purposes of applying for discovery of the deceased's medical records. It is entirely contradictory for the plaintiff's side now to argue that the nursing home's refusal to provide copies of the medical records to the deceased's family in 2015 and 2016 can constitute a good reason for not having served the summons within the initial twelve-month period of the summons (7 July 2017 to 6 July 2018), still less a special circumstance justifying an extension of time to bring an application for leave to renew. The service of the summons was a necessary first step to the bringing of the intended application for an order of discovery of documents. No attempt is made in the grounding affidavit to explain this contradiction. Indeed, at paragraph 6 of the affidavit it is expressly stated that the plaintiff has *at all times* wished to pursue these proceedings to the point of at least being able to secure an order granting access to the deceased's medical records.

61. More generally, the case law recognises that there may be tension between (i) the principle that proceedings alleging professional negligence should not be brought in the absence of a report by an independent expert confirming that there is a reasonable basis for such a claim, and (ii) the principle that proceedings should be progressed in a manner consistent with the parties' entitlement to a hearing within a reasonable time. The High Court (O'Sullivan J.) observed in *Allergan Pharmaceuticals (Ireland) Ltd v. Noel Deane Roofing and Cladding Ltd* [2006] IEHC 215; [2009] 4 I.R. 438 that it would be ironic if the concern not to serve proceedings upon a professional defendant without having a sound basis for doing so could result in proceedings not being served until after the expiration of the relevant limitation period. The Court of Appeal (*per* Hogan J.) in *Monahan v.*

Byrne [2016] IECA 10 observed that the renewal of a summons outside of a limitation period is to some degree at odds with an underlying principle of the Statute of Limitations itself, namely, that a defendant is entitled to assume that he will not face the prospect of litigation after the expiration of a fixed passage of time. I respectfully agree with both of these observations.

62. The courts have long since recognised the particular difficulties which a claim for professional negligence presents for a defendant. Even if the claim is groundless, the publicity engendered by the proceedings can be damaging to the defendant's professional reputation and business. The defendant may be under duress to settle the proceedings by making a payment to the plaintiff notwithstanding that the claim lacks any merit, i.e. to dispose of the "nuisance value" of the claim. To guard against these dangers, the courts have said that it is irresponsible and an abuse of the process of the court to commence professional negligence proceedings without first ascertaining that there are reasonable grounds for so doing. In medical negligence actions, this will normally necessitate a report of an independent expert. Crucially, however, this is not the only safeguard afforded to a defendant. The parallel case law on the dismissal of proceedings for inordinate and inexcusable delay recognises the special difficulties which delay can cause in professional negligence cases. (See, for example, *Tanner v. O'Donovan* [2015] IECA 24, [42] to [46]). More generally, the reduction of the limitation periods for personal injuries actions (including medical negligence actions) by the Oireachtas, and the imposition of more stringent requirements for the renewal of a summons by the Rules Committee, reflect the importance of expedition in this type of litigation. The default position is that a defendant should be served with proceedings no later than three years after the events giving rise

to the claim, i.e. the two-year limitation period plus the twelve-month period for the service of proceedings.

63. It would, indeed, be ironic if the convention of not *serving* proceedings, which allege professional negligence, pending the securing of an independent expert's report were to have the unintended consequence that a defendant is not properly notified of a claim against them until years after the relevant limitation period has expired. It is the lesser of two evils that a defendant be served within time, and thus made aware that proceedings have been issued against it, albeit on a "precautionary" basis. This would allow the defendant to ready itself for the potential action, e.g. by taking statements from relevant witnesses, ensuring the retention of all relevant documentation, and notifying its insurers.

64. This topic has been considered very recently by the High Court (Cross J.) in *Murphy v. Health Service Executive* [2020] IEHC 483. The court held that the failure of the plaintiff to notify the defendants of their case and to deliver a courtesy copy of the summons until they had received medical reports was wrong. The court then stated as follows (at paragraphs 34 and 35).

> "[…] 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 advisors have been reasonably prompt in obtaining the necessary reports.
>
> The failure of the plaintiff solicitor to notify the defendants at all of the fact of the proceedings and in this case even furnish 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."

65. On the particular facts of *Murphy*, the court ultimately held that there had been no culpable delay in the obtaining of the requisite medical reports.

66. For the sake of completeness, it should be noted that the Court of Appeal, in a case decided by reference to the pre- 2019 version of Order 8, held that if a solicitor, acting responsibly and in a *bona fide* manner, decides to withhold service of complex medical negligence proceedings until advised reports are in his or her possession, then that constitutes a "good reason" justifying the renewal of the summons, subject always to the proviso that the delay involved is not found to have been unreasonable. Peart J., delivering the judgment of the court, went on to make the following observation. See *Lawless v. Beacon Hospital* [2019] IECA 256 (at paragraph 41).

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

67. It should be reiterated that this judgment was decided by reference to the pre- 2019 version of Order 8, rule 1, and, by definition, does not address the additional "special circumstances" threshold introduced *subsequently*.

68. The facts of the present case are entirely distinguishable from those of either *Murphy* or *Lawless*. In each of those cases, the delay in serving the summons had been explicable by reference to the taking of active steps by the respective

plaintiff's solicitors to secure independent expert's reports. By contrast, in the present case, there is no evidence of any attempt to obtain the deceased's medical records, as a necessary first step to obtaining an independent expert's report, since the initial contact with the defendant's insurers in September 2017.

69. In summary, therefore, the asserted "unwillingness of the Defendant to provide reports" does not represent a "special circumstance" such as to justify an extension of time. The stated rationale in issuing the proceedings, on a precautionary basis, had been to pursue an application for discovery. The plaintiff had thus always intended *to serve* the proceedings *in advance of* having obtained an independent expert's report, and ultimately did serve them on this basis (albeit some three years after the proceedings had first issued).

(iii). Statute of Limitations

70. Thirdly, and more broadly, it is said that the balance of justice favours allowing the renewed summons to stand in that it would present difficulties for the plaintiff in terms of the Statute of Limitations were the renewal to be set aside.

71. This circumstance is not one which is stated in the order of 1 July 2019. It will be recalled that, under the revised version of Order 8, rule 1, the "special circumstances" must be stated in the *ex parte* order. It must be doubtful, therefore, whether a plaintiff is entitled to put forward *new* grounds at an *inter partes* hearing under Order 8, rule 2.

72. At all events, the position under the pre- 2019 version of Order 8 had been that the mere fact that a plaintiff's claim would be statute-barred was not of itself "good reason" for renewing a summons. See, for example, *Monahan v. Byrne* [2016] IECA 10 (at paragraphs 23 to 31) and *Whelan v. Health Service Executive* [2017] IEHC 349 (at paragraphs 37 to 44). The High Court (O'Moore J.) has

confirmed in *Ellahi v. Governor of Midlands Prison* [2019] IEHC 923 that similar principles apply to the revised version of Order 8.

CONCLUSION AND FORM OF ORDER

73. The "timely warning to practitioners" sounded by Peart J. some fourteen years ago, to the effect that attention must be given to the question of service of legal proceedings after the issuance of the summons, bears repeating. (*Moynihan v. Dairygold Co-operative Society Ltd* [2006] IEHC 318 at paragraphs 38 to 40). If anything, the warning has even greater resonance now than it did in 2006. The reduction of the limitation periods for personal injuries actions (including medical negligence actions) by the Oireachtas, and the imposition of more stringent requirements for the renewal of a summons by the Rules Committee, reflect the importance of expedition in litigation.

74. The default position is that a defendant should be served with personal injuries or fatal injuries proceedings no later than three years after the events giving rise to the claim, i.e. the two-year limitation period plus the twelve-month period allowed for the service of proceedings. Plaintiffs and their legal advisors should not assume that an extension of time will be granted by reference to the fact that medical reports were awaited or by reference to inadvertence on the part of the legal advisors. At the very least, consideration should be given to the service of a courtesy copy of summons within time.

75. The plaintiff in the present case has failed to demonstrate that there are "special circumstances" which justify *an extension of time* within which to apply for leave to renew the summons for the purposes of Order 8, rule 1. None of the three

matters put forward as representing "special circumstances" reach this threshold, for the reasons set out at paragraphs 44 to 72 above.

76. The finding that the "special circumstances" threshold has not been met has the consequence that it is not necessary to consider the separate and distinct question of whether there is "good reason" to renew the summons. As discussed at paragraphs 32 to 36 above, 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 serving the summons.

77. Accordingly, I propose to make an order pursuant to Order 8, rule 2 setting aside the order renewing the summons which had been made *ex parte* on 1 July 2019.

78. Insofar as the issue of the costs of these proceedings is concerned, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

79. The default position under Part 11 of the Legal Services Regulation Act 2015 is that legal costs follow the event, i.e. the successful party is entitled to recover their legal costs as against the unsuccessful party. This applies also to interlocutory applications. If the default position were to obtain, then the

defendant would be entitled to its costs as against the plaintiff (such costs to be assessed in default of agreement). In the event that the plaintiff contends that a *different* form of order should be made, written submissions should be filed on her behalf by 13 November 2020. Any replying submissions on behalf of the defendant should be filed by 27 November 2020.

Approved
Garrett Simms