[2021] IEHC 67

THE HIGH COURT

[2015/7403P]

BETWEEN

ALICJA KLODKIEWICZ

PLAINTIFF

AND

MARCIN PALLUCH AND COLLEGE FREIGHT LIMITED

DEFENDANT

JUDGMENT of Ms. Justice Butler delivered on the 1st day of February, 2021

1. This is the second defendant's application to set aside an order made by the High Court (Meenan J.) on 8th October, 2018 under O. 8, r. 1 of the Rules of the Superior Courts renewing a personal injuries summons which had been issued on 15 September 2015. The claim for personal injuries arises out of an accident which occurred on 27th April, 2012 in which the plaintiff's stationary motorcar was struck by an articulated lorry driven by the first defendant in the course of his employment with the second defendant. The accident was a serious one in which a passenger in the plaintiff's car was fatally injured. The plaintiff was rendered unconscious and suffered both physical and psychiatric injuries.

Factual and procedural history:

2. The procedural steps taken by the plaintiff subsequent to the accident are of some importance to this application. As the plaintiff has instructed three different firms of solicitors in connection with these matters I will refer to them respectively as the "first solicitor", the "previous solicitor" and the "current solicitor". I will refer to the second defendant as "the defendant".

3. The plaintiff's first solicitor acted promptly and notified both the defendants and their insurer of her intention to make a claim to the Personal Injuries Assessment Board on 28th June, 2012. A detailed letter of claim was sent to the defendants on the same date. That was followed by a letter to the defendants' insurer a month later on 26th July, 2012 enclosing a copy of correspondence from An Garda Siochána who were investigating the accident and seeking permission to inspect the vehicle involved in the accident.

4. The plaintiff instructed a different firm of solicitors before making her claim to PIAB on 25th April, 2014. In accordance with its statutory obligations, PIAB served a formal notice of the claim on the defendants' insurer on 29th July, 2014. On 26th September, 2014 the defendants' insurer consented to an assessment of the plaintiff's claim by PIAB under s. 20 of the Personal Injuries Assessment Board Act, 2003. Such consent did not, of course, amount to an admission of liability by the defendants or an agreement to pay the plaintiff any amount that might be so assessed. In the event PIAB was unable to complete an assessment because a final prognosis of the plaintiff's injuries was not going to be available within the time frame permitted by the 2003 Act. The plaintiff and the defendants' insurer were notified of this by letter from PIAB dated 20th March, 2015. That letter enclosed an authorisation under s. 17 of the 2003 Act allowing the plaintiff to bring legal proceedings against the defendants. As noted, these proceedings were issued on 15th September 2015.

5. Under O. 8, r. 1 (to which the court shall return) a summons remains in force for the purpose of service for 12 months after it is issued. Thus, in normal course the plaintiff's personal injury summons should have been served on the defendants by 14 September 2016. This was not done and no explanation has been provided by the plaintiff's previous solicitor as to why it was not done. Instead it appears that the plaintiff instructed her current solicitor in the autumn of 2017 and they sought the transfer of her file from her previous solicitor by letter dated 2nd October, 2017. Unfortunately, the plaintiff's previous solicitor was very slow to respond to this request and the documents eventually furnished in late December 2017 appeared to be incomplete. Despite extensive correspondence, the plaintiff's current solicitor could not get clarification from her previous solicitor as to whether the personal injuries summons had been served even after a complaint in this regard was made to the Law Society. As a result, the current solicitor concluded, correctly, that the summons had not been served and arranged for an application to be made to the High Court under O. 8, r.1 to renew the personal injury summons for a period of six months. This application, together with an associated application for an extension of time to make the application to renew, was granted by Meenan J. on 8th October, 2018 allowing service of the summons up to 7th April, 2019.

6. Unfortunately, the current solicitor's difficulties with the file did not end there. The file as transferred by the previous solicitor did not include the original summons and notwithstanding extensive correspondence and another complaint to the Law Society this was not provided within the period during which the renewed summons could be served. Consequently, a further application had to be made under O. 8 r. 4 to allow service of a copy summons. This application was granted by Meenan J. on 4th March, 2019 and the defendant was served with the proceedings on 15th March, 2019. Subsequently, the previous solicitor, without explanation, provided the original summons on 27th May, 2019.

7. Next it transpired that the defendant had been wound up by order of the High Court (Cross J.) on 19th September, 2012. The plaintiff's current solicitor appears to have been aware of this and also served a copy of the proceedings on the liquidator on 15th March, 2019. This necessitated another application to the High Court, this time under s. 678 of the Companies Act, 2014 seeking leave to proceed retrospectively against the defendant in liquidation. This application was allowed by Allen J. on 14th October, 2019.

8. The defendant does not take issue with this retrospective authorisation of proceedings against the company in liquidation and, therefore, for the purposes of the court's analysis the date on which service of the proceedings was effected is 15th March, 2019. However, the additional time required to obtain this authorisation explains the delay on the defendant's part in making the application currently before the court. On 27th November, 2019 the defendant's solicitor requested a copy of the affidavit grounding the motion to renew the summons which was provided in January 2020. Thereafter this motion issued on 12th March, 2020. Although the plaintiff tentatively suggests that the defendant had also been guilty of some delay, in light of this chronology I do not accept this to be the case. The defendant was at the very least entitled, if not required, to await the

authorisation of the proceedings under s. 678 before responding thereto and thereafter has acted with reasonable expedition.

Order 8, Rules of the Superior Courts

9. The application currently before the court is one pursuant to O. 8, r. 2 of the Rules of the Superior Courts seeking to set aside the order Meenan J. made on 8th October, 2018 renewing the personal injury summons. It might be noted in passing that the application is made by the second defendant only in circumstances where the proceedings do not appear to have been served on the first defendant within the extended period during which the renewed summons could be served. The second defendant submits, in my view correctly, that it is in fact immaterial that the application is made by only one of two defendants as, if it is successful, the effect will be to set aside the renewal of the summons such that it cannot be validly served on either defendant.

10. There is a very large volume of case law on the subject of the renewal of summonses and the interplay between the Statute of Limitations and the renewal of a summons issued but not served within a relevant limitation period. It may be useful to start by considering Order 8, Rules 1 and 2 the structure of which is to allow a plaintiff to apply ex parte to renew a summons but thereafter to allow a defendant to apply to have the renewal set aside. The relevant parts of Order 8 provide as follows:

> Rule 1 No original summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons. After the expiration of twelve months, an application to extend time for leave to renew the summons shall be made to the Court. The Court or the Master, as the case may be, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed summons….. and a summons so renewed shall remain in force and be available to prevent the operation of any statute whereby a time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original summons.
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> Rule 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.

11. It might be noted that O. 8, r. 1 has been substantially amended since the date of the plaintiff's application by S.I. 482/2018 which came into operation on 11th January, 2019. Where an application is made to the Master before the expiry of the original 12 months the threshold remains that he be satisfied reasonable efforts have been made to serve the defendant or that there is other good reason. Where the application is made directly to court after the summons has expired, those requirements have been replaced with a

requirement that the court be satisfied "that there are special circumstances which justify an extension" and those circumstances are to be stated in any order made renewing a summons. The requirement of "special circumstances" appears intended to be a different and higher threshold than that of a good reason. Consequently, in interpreting and applying the jurisprudence relating to the older version of O. 8, r. 1 it should be borne in mind that whilst the standard imposed may be high, it is not as high as a requirement to show "special circumstances".

12. At this point it might be useful to pause and consider the potential interaction between O. 8 and the statutory limitation period applicable to the plaintiff's proceedings. Under s. 3(1) of the Statute of Limitations (Amendment) Act, 1991 as amended by s. 7 of the Civil Liability and Courts Act, 2004 the plaintiff had a period of two years from the accrual of her cause of action (i.e. the date of the accident) to bring her proceedings). As the accident occurred on 27th April, 2012 that period would have expired on 26th April, 2014, the day after the Personal Injuries Assessment Board acknowledged receipt of her application. Under s. 50 of the Personal Injuries Assessment Board Act, 2003 in reckoning time for the purpose of the Statute of Limitations "the period beginning on the making of an application under section 11 in relation to the claim and ending 6 months from the date of issue of an authorisation… shall be disregarded". This provision had the effect of stopping the clock once the plaintiff made an application to PIAB and allowing her an additional period of six months once an authorisation issued from PIAB. Because the plaintiff had made her application to PIAB at the very end of the two year period under s. 3(1), the six month extension together with the residual days left of the original period expired on 21st September 2015.

13. The renewal of a summons under O. 8, r. 1 "prevents the operation" of the statutory limitation period from the date on which the original summons was issued. This means that if the order renewing the personal injury summons is not set aside, the proceedings stand as having been issued on 15th September 2015 and, in effect, the period between the 16th September, 2015 when the summons ceased to be in force under O. 8, r. 1 and its renewal on 8th October, 2018 is simply disregarded.

14. Although in principle an application under O. 8, r. 1 to renew a summons can be made by a plaintiff who is still within time to issue proceedings in practice this is unlikely. A plaintiff who can issue fresh proceedings is likely to do so as this avoids the risk that a defendant could apply successfully to have the renewal of the summons set aside. Therefore, in almost all cases under this order, the Statute of Limitations is potentially an issue for the plaintiff. The jurisprudence has moved from treating the fact that the plaintiff would be outside the limitation period for issuing fresh proceedings as a bar to the renewal of an out-of-date summons to treating that fact as a reason for such renewal to the current position where it is not "of itself" a justification for renewal but is a factor to be taken into account, particularly in considering an application under O. 8, r. 2.

Submissions of the parties

15. Much of the dispute between the parties in this case focused on whether the fact that the plaintiff would be statute-barred from issuing fresh proceedings in relation to this accident

is something which is capable of forming part of the "good reason" required under O. 8, r. 1 or, alternatively, is a matter which is only taken into account when assessing where the balance of justice lies as between the parties once a separate "good reason" has been established.

16. In making his application counsel for the defendant stressed that the court was not dealing with an appeal from the decision of Meenan J. to renew the summons but rather with what is effectively a *de novo* application. Although the application to set aside the renewal was brought by the defendant, the onus remains on the plaintiff to establish either that reasonable efforts had been made to serve the summons or that there is other good reason for the court to do so. As the plaintiff had not adduced any evidence of efforts to serve the defendants, the only basis on which the court can consider whether the summons should be renewed is the "other good reason" ground. In terms of the test to be applied the defendant relies on the decision of Finlay Geoghegan J. in *Chambers v Kenefick* [2007] 3 IR 526 as establishing the relevant standard: -

> "Firstly, the court should consider is there a good reason to renew the summons. That good reason need not be referrable to the service of the summons. Secondly, if the court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Thirdly, in considering the question of whether it is in the interests of justice as between the parties to renew the summons because of the identified good reason, the court will consider the balance of hardship for each of the parties if the order for renewal is or is not made."

Applying this test, the defendant argues that the plaintiff has not established a good reason why the summons should be renewed. As a matter of principle it is contended that the fact the plaintiff would be statute barred from issuing fresh proceedings is not capable of constituting a good reason. It is a fact which would fall to be weighed in the balance if the plaintiff had established a good reason, but the defendant contends as that has not been done the first limb of the *Chambers* test has not been satisfied the court should not go further. Specifically, the defendant contends that by the time the plaintiff's current solicitor was instructed over a year after the summons had ceased to be in force, it was already too late and consequently that the evidence of the plaintiff's solicitor as to the efforts made by him to progress the case and the difficulties he encountered in obtaining documents and information from her previous solicitor are largely irrelevant. The defendant also contends that the plaintiff cannot rely on the failures or negligence of her previous solicitor as constituting a good reason, relying on the decision of the Supreme Court (O'Flaherty J.) in *Roche v Clayton* [1998] 1 IR 596. At the same time the defendant accepts if the court were to move to consider the second and third limbs of the *Chambers* test, that the balancing exercise to be undertaken would largely favour the plaintiff. It is accepted that the defendants and their insurer were on notice of the plaintiff's potential claim from an early stage. It is also accepted that the defendant has

not suffered any particular prejudice by reason of the delay which has taken place such that reliance is placed only on the presumptive prejudice which arises and potentially affects any defendant where there is a delay in the commencement or prosecution of litigation.

17. Counsel for the plaintiff, while not disputing the authority of the decision in *Chambers v Kenefick,* argued that the three steps identified by Finlay Geoghegan J. can entail a considerable degree of overlap. Matters such as the fact that the plaintiff would be statute-barred from pursuing her claim if the renewal is set aside, are potentially relevant both to the issue whether there is a good reason and also to the balance of justice as between the parties and the respective hardship that might result. It was submitted that later case law showed a more global approach being taken where various matters are looked at by a court in combination with each other. Counsel relied in particular on the judgment of Herbert J. in *Aherne v MIBI* [2012] IEHC 351 in this regard. He also argued that "other good reason" did not require a single, headline reason to be identified. A number of factors each of which might not individually reach the requisite threshold could, in combination, amount to a good reason. Thus, in the context of this case the plaintiff contends that the failure of her previous solicitor to serve the summons on time and to advise the plaintiff of that failure, the need for the plaintiff to engage another solicitor to advance the proceedings, the pro-active efforts of her current solicitor in seeking to obtain her full file and all relevant information (culminating in complaints to the Law Society), the prompt and appropriate actions taken by her current solicitor, the fact that failure to renew the summons would render the plaintiff's claim statute barred and the fact that her alternative remedy, a claim for professional negligence against her previous solicitor, is considerably less satisfactory all amount cumulatively to a good reason which justifies the renewal of the summons.

18. Finally, the plaintiff made a number of arguments as to the lack of prejudice suffered by the defendant in particular because it was at all times aware of the plaintiff's intention to bring proceedings. By virtue of the initial notification of that intention and the subsequent PIAB process the defendant had a full opportunity to investigate the claim. The plaintiff points to the defendant's insurer's active participation in the PIAB process as refuting any possible argument the defendant is being taken by surprise by the late service of the personal injuries summons.

19. These arguments give rise to a number of issues for determination. Firstly, the court must consider the extent to which a refusal to renew the summons resulting in the plaintiff's claim being statute-barred can constitute a good reason or form part of such reason. As part of that analysis the defendant's argument that this is something which only goes to the balancing exercise when the interests of justice are being addressed and, consequently, cannot be considered under the first limb of the *Chambers* test must be addressed. Secondly, the court must consider the extent to which the plaintiff can rely on the alleged negligence of her previous solicitor as a good reason or part of such reason. Finally, in principle if the court considers there is a good reason to renew the summons it should then proceed to consider the interests of justice and the respective hardship to

each side if the order is or is not made. However, in the circumstances of the present case that should be unnecessary as the defendant has effectively conceded that the balance of justice favours the plaintiff and has confined its argument to the issue of whether a good reason has been established.

Case Law

20. There is a very large volume of judicial decisions dealing with the renewal of summonses under O. 8. Unfortunately, there is considerable inconsistency in this case law both over time and as between different judges. Consequently, even where propositions are regarded as well-established there are still judgments which appear to run contrary to the orthodox position. I am conscious in writing this judgment that the version of O. 8 that is in issue here has since been changed so there is little benefit, save to the immediate parties, of a detailed recitation and analysis of the case law on the version which is no longer in force. Therefore, I propose to focus only on the case law directly relevant to the core issues of whether a resulting statute-bar and/or alleged solicitor's negligence are capable of constituting a good reason.

21. That said, it may be useful to identify at the outset a number of propositions, largely undisputed by the parties, which provide the framework within which the core issues fall to be examined. Firstly, as the defendant points out, an application under O. 8, r. 2 is not an appeal from the order made under O. 8, r. 1; it requires the full *de novo* consideration of whether the summons ought to be renewed. The judge hearing the inter partes application cannot be bound by the views formed by the judge who granted the ex parte order as this would be contrary to natural justice (see Hogan J. in *Monaghan v Byrne* [2016] IECA 10). Further, contrary to what is suggested in some of the case law relied on by the plaintiff (particularly *O'Grady v Southern Health Board* [2007] IEHC 38), a defendant making an application under O. 8 r. 2 does not have to adduce new or additional evidence to that which was considered by the judge who made the *ex parte* order. It is open to a defendant to argue that the renewal order should be set aside on the basis of a proper analysis of the facts and evidence presented at the *ex parte* stage (see Finlay Geoghegan J. in *Chambers v Kenefick* above).

22. As regards the substantive requirements of O. 8, where a plaintiff relies on "other good reason" it is not necessary that the reason is referable to the service of the summons (*Chambers v Kenefick* above) although the circumstances which led to the summons not being served within the initial twelve-month period are likely to be relevant to the court's overall consideration of the application. Equally a defendant does not have to demonstrate actual prejudice in order to have a renewal set aside, although again the extent to which prejudice will be suffered by a defendant is likely to be relevant to the court's overall analysis. Actual prejudice may weigh heavily against the renewal of a summons even where there might otherwise be good reason to renew it.

23. Finally, it is worth observing that over the last 15 years or so the courts have adopted an increasingly restrictive attitude towards the renewal of summonses under O. 8. This means that the precedential value of earlier decisions, even those of the Supreme Court, may have been reduced. Clarke J. in *Moloney v Lacey Building & Civil Engineering*

Limited [2010] 4 IR 417 identified this as reflecting a "tightening up" of the approach of the courts in the parallel jurisprudence relating to dismissal for want of prosecution. Peart J. identified the obligation on the courts under Art. 6 of the European Convention on Human Rights (the right to a fair trial within a reasonable time) as resulting in "a firmer and more robust approach when dealing with applications which are brought arising from delay" (*Moynihan v Dairygold Co-Operative Society Limited* [2006] IEHC 318).

Statute of Limitations as a "good reason"

24. As noted above, for pragmatic reasons a very large proportion of applications under O. 8, r. 1 are brought by plaintiffs who would be statute-barred if they sought to issue fresh proceedings in respect of the same claim. This has meant that the courts have frequently examined whether the consequences of the Statute of Limitations can constitute a good reason for renewing a summons. A review of the case law suggests that the taking into account of the Statute of Limitations depends to a significant extent on whether, notwithstanding the failure to serve proceedings, the defendant was on notice of the plaintiff's intention to claim, and more recently, on the nature of that notice.

25. In *Baulk v Irish National Insurance Company Limited* [1969] IR 66 the Supreme Court renewed a summons on foot of an application made more than two years after the summons had originally issued and outside the statutory limitation period for issuing fresh proceedings. The case was unusual in that the plaintiff wished to sue the driver of the vehicle in which he had been a passenger who had died as a result of injuries sustained in the accident. The defendant insurer was on notice of the claim from the outset as the institution of proceedings had been delayed because no representation had been raised to the driver's estate thus necessitating an application to court on behalf of the plaintiff for leave to institute proceedings against the defendant. The defendant had consented to that order being made. In delivering the majority judgment of the Supreme Court, Walsh J. distinguished between the requirement in the Statute of Limitations that proceedings "be brought" before the expiration of a certain period and the lack of any express requirement in respect of the service of proceedings so issued. He went on to say: -

> "While the phrase "other good reason" may refer to the circumstances or factors which throw light on the failure to serve the summons within the twelve months, in my view it is not exclusively referable to the question of service but refers also to any other reason which might move the Court, in the interests of doing justice between the parties, to grant the renewal. This matter was dealt with in the decision of this Court in *Armstrong v. Callaghan* in which in my own judgment in that case I indicated that, in my view, the fact that the Statute of Limitations would defeat any new proceedings, which might be necessitated by the failure to grant the renewal sought, could itself be a good cause to move the Court to grant the renewal.
>
> In the present case it does not appear to me that any injustice would be done, in the wide sense of the term, to the defendants by the granting of the renewal in this case. They have been aware from the very beginning of the plaintiff's intention to

sue them, as they were parties to the motion which resulted in leave being given to name them as defendants."

It is evident that although Walsh J. regarded the Statute of Limitations as being capable of constituting a good reason, as the overall intent was to do justice between the parties, he examined the consequences of the Statute in conjunction with the extent to which the defendant had actual notice of the plaintiff's intended claim before concluding that the summons should be renewed. In other words it did not necessarily follow from the fact that the Statute of Limitations could constitute a good reason that renewal would or should be granted in all cases.

26. Academic writers such as Delany and McGrath "*Civil Procedure in the Superior Courts*" (4th Ed. 2018 at p. 156) note that "subsequent cases retreat from this position" citing the judgment of Barrington J. in *O'Brien v Fahy* (Unreported, Supreme Court, 21st March 1997) as illustrative of this retreat. However, I am unable to discern a significant difference in principle between the approach taken by Barrington J. and that taken by Walsh J. in *Baulk* and followed by Ó Dálaigh J. in *McCooey v Minister for Finance* [1971] IR 159. *O'Brien v Fahy* concerned an accident which had taken place in a riding school. Proceedings were issued on the last day of the then three-year limitation period and no attempt was made to contact the defendant or to serve the proceedings until some 11 months after that when the defendant's insurers were asked to and did nominate solicitors to accept service. Service was not effected until after the 12 months had elapsed and the summons was no longer in force. Whilst the defendants were aware of the accident which had occurred on their premises, they had no formal notice of the plaintiff's intention to make a claim until nearly four years after the accident had occurred. Barrington J. considered the matter as follows: -

> "The good reason which the plaintiff advances is that the Statute has now run and if the summons is not renewed the plaintiff will have lost her right of action and that would be an injustice to her and that is a matter to which it appears the court must give a very great weight. But applying the principle in *McCooey v Minister for Finance* [1971] IR 159 it is not the only matter to which the court must pay attention because it is quite clear that in this case the defendant was not told until some four years afterwards that a claim would be brought against her and one of the factors in the *McCooey* case was that the defendants had known right from the beginning that a claim would be made against them. …
>
> On the other hand the defendant did know nor was she given any warning that a claim would be made against her and her solicitor has sworn an affidavit saying that, as a result, were a claim to be now made the plaintiff (*sic*) would be greatly prejudiced in the defence of the case as it is now nearly four and a half years since the alleged accident and he says at this stage it is extremely difficult, if not impossible, to investigate all the circumstances surrounding the accident. It appears to me that the lapse of such a time without knowing that claim was going to be made is something which itself implies prejudice and when the defendant and

her solicitor are prepared to swear affidavits that in fact it is not a theoretical prejudice but an actual prejudice which the defendant would suffer; one must set that against the loss to the plaintiff, if as a result of a refusal to renew the summons which is out of time, her claim becomes statute-barred."

27. In both of these cases the matter relied on by the plaintiff as constituting a good reason was the effect that the Statute of Limitations would have on their ability to pursue their claim if the summons were not renewed. In both cases the court considered that reason and balanced it against the potential injustice to a defendant required to defend proceedings some considerable time after the cause of action had accrued. The key factual difference was that the defendant in Baulk had been on notice of the claim from the outset and had been actively involved in an earlier procedural step which the plaintiff was required to take before the proceedings could be instituted. In contrast, although the defendant in *O'Brien* was generally aware of the accident, she was unaware of the plaintiff's intention to pursue a claim against her until nearly four years after the accident had occurred. This had a material impact on her ability to defend the claim as she and her insurers could not at that remove take the normal investigative steps that would be taken on receipt of notification of a potential claim. Significantly, the Supreme Court in *O'Brien* did not suggest that the consequences of the Statute of Limitations were in themselves incapable of constituting a good reason. The application was unsuccessful in the circumstances because the defendant had not been notified of the plaintiff's potential claim and therefore would be significantly prejudiced in her defence of the proceedings.

28. In light of the actual analysis carried out by the Supreme Court in *Baulk* and in *O'Brien v Fahy*, it is difficult to understand the conclusions reached by the Supreme Court the following year in *Roche v Clayton* [1998] 1 IR 596. Unfortunately, the judgment of O'Flaherty J. does not contain any particular analysis as to why he states "it is not a good reason in light of *O'Brien v Fahy* to renew a summons simply to prevent the defendant availing of the Statute of Limitations. The Statute of Limitations must be available on a reciprocal basis to both sides of any litigation." Indeed, it is interesting to note that the argument made by counsel for the defendants as recorded in the report does not contend that the Statute of Limitations could not constitute a "good reason". Instead counsel for the defendants argued "the court has a very wide discretion as to the renewal of the summonses. The Statute of Limitation was only one factor in determining whether 'good reason' had been shown". It may be that what O'Flaherty J. had intended to express was the more nuanced proposition that the consequences of the Statute of Limitations could not be taken to constitute a good reason without considering the effect the delay will have on the defendant and, in particular, the extent to which the defendant is on notice of the intended claim. However the judgment is expressed in far more absolute terms. Thus, whilst *Roche v Clayton* purports to follow *O'Brien v Fahy*, in fact it appears to go significantly further than *O'Brien v Fahy* and did so without any particular argument to that effect having been made on behalf of the successful defendants.

29. Despite the apparent misreading of *O'Brien v Fahy* in *Roche v Clayton* such that a difference in outcome in the former is treated in the latter as establishing a new principle,

subsequent case law largely starts from the premise that these two cases mean that the potential consequences of the Statute of Limitations for a plaintiff is no longer capable of constituting a good reason for the purposes of O. 8, r. 1. Not all of the case law is absolutist on the point. For example, Hogan J. in *Monaghan v Byrne* [2016] IECA 10 having reviewed the case law concludes at para. 27: -

> "It is accordingly clear from this case-law that the fact that an action might otherwise be statute-barred does not in *itself* constitute a 'good reason' within the meaning of Ord. 8, r.1 by which a summons should be renewed." (italics in the original)

This is consistent with the views of Clarke J. in *Moloney v Lacy Building and Civil Engineering Limited* [2010] 4 IR 417 at 427 where he concluded:

> "To the extent, therefore, that *Baulk v. Irish National Insurance Co. Ltd*. [1969] I.R. 66, might give rise to a possible argument to the effect that the fact that the plaintiff might otherwise be statute barred can provide good reason on its own, it seems to me that subsequent Supreme Court authority makes it clear that that argument is not tenable. It follows that the "good reason" must be more than a simple need to renew the summons so as to avoid the defendant being able to rely on the statute. It does seem that the history of events up to the time when the statute might have applied and, in particular, the extent to which the potential defendant knew of the existence of the claim and, most especially, the fact that proceedings had been brought on foot of it, can constitute good reasons for the purposes of the rules."

30. The difficulty lies in determining the nature of the qualification which arises from the use of the phrase "of itself" or "on its own" in these extracts. Does this mean that although a Statute of Limitations reason cannot operate so as to automatically entitle a plaintiff to renew an expired summons, when that reason is examined in the context of the surrounding facts, having particular regard to whether the defendant was on notice of the claim and the extent of the prejudice, if any to the defendant, it is still capable of constituting a good reason? Alternatively, does it mean that as a matter of principle a reason grounded on the Statute of Limitations is not legally capable of constituting a good reason so that the consequences of the Statute only fall for consideration when balancing the interests of justice? The approach taken in the earlier cases of looking at the overall circumstances of both parties before deciding whether there was a good reason implicitly accepted that a Statute of Limitations concern could in principle ground a good reason. However, the three-step approach adopted by Finlay Geoghegan J. in *Chambers v Kenefick* in which the identification of a good reason is separated out from the balancing of the respective interests and prejudice to the parties has moved the jurisprudence towards an approach where a Statue of Limitations concern is treated as not being capable of constituting a good reason. Thus, "of itself" is increasingly treated as requiring another discrete reason justifying renewal before the consequences of the Statute of

Limitations will be considered rather than importing consideration of the Statute of Limitations in the overall context of the case.

31. Interestingly this is not a distinction Finlay Geoghegan J. draws in *Chambers v Kenefick*. She identifies at an early stage in the judgment that the Statute of Limitations is not central to the application (para. 8, p. 530), presumably because the case was a "date of knowledge" case in which the date on which the cause of action accrued was not readily apparent and likely to remain in dispute. The reason offered for non-service was the inadvertence or oversight of a solicitor who, having provided the defendant with a copy of the summons within time, mistakenly assumed that service had been effected. The effect of the Statute of Limitations was only raised by the plaintiff – and consequently considered by the court – as a potential hardship if renewal were not permitted.

32. Although *Moloney v Lacy Building and Civil Engineering Limited* definitely marks a turning point in terms of tightening up the jurisprudence, it is interesting to note that Clarke J. does not absolutely exclude the possibility of the consequences of the Statute of Limitations constituting a good reason. Whilst the emphasis placed on the policy behind the Statute of Limitations certainly boded ill for the plaintiff's reliance on this as part of the reason proffered (the plaintiff also contended it was reasonable to have awaited an expert's report), Clarke J. actually proceeds to examine in detail the extent to which the defendant had notice of the proceedings or, as he describes it, (was) "aware in a formal sense that proceedings have been commenced". In effect, although the emphasis in his analysis shifts from the effects of the Statute itself to the extent to which the defendant was on notice of the claim, the exercise in which he engages is the same as that carried out by the Supreme Court in *Baulk* and in *O'Brien v Fahy*. However, because of the increased importance placed on the policy behind the Statute of Limitations he no longer regards it as sufficient that the defendant had been on notice of the potential claim and the plaintiff's intention to pursue it. Instead he looked to see whether the defendants were on "meaningful notice of the fact that proceedings had, in fact, been commenced, rather than that the proceedings were being threatened". He did not regard it as sufficient that "the possibility of a claim had been intimated".

33. In *Crowe v Kitara Ltd*. [2016] IECA 62 the Court of Appeal, Mahon J. upheld a judgment of Moriarty J. in the High Court in which he had been sceptical about the arguments made by the plaintiffs regarding the application of the Statute of Limitations and the need to procure expert witnesses but nonetheless granted an order under O. 8, r. 1 renewing the summonses. The cases were taken by the owners of apartments in a building found to be seriously defective for fire safety reasons rendering it unsafe for human habitation and their apartments worthless. Moriarty J. reached his conclusion on the basis that ultimately the relevant factors were the interests of justice and "the relevant degree of prejudice which an adverse outcome would be likely to occasion to either side". The Court of Appeal described his conclusions as follows: -

> "Clearly, Moriarty J. in his judgment felt that there did exist *other good reason*, or, more accurately, as appears from his judgment *other good reasons*. While the

learned High Court judge did not rank particularly highly those factors which he identified as reasons supporting the renewing of the summonses, it is nevertheless evident from his judgment that the most compelling reason in his view related to the catastrophic consequences for the plaintiffs if the renewals of their summonses were to be set aside."

34. The Court of Appeal agreed with Moriarty J. that the other good reason requirement had been satisfied "albeit just about reached". The Court of Appeal seems to have placed somewhat greater reliance on the difficulties the plaintiffs had encountered in connection with their expert witnesses than did the High Court. It also noted that the limitation period had not expired at the time the proceedings were instituted such that it had only become a feature of the case relatively recently. However, for reasons discussed above it is a frequent feature of these cases that the proceedings have been issued within the statutory limitation period and renewal is sought outside it. For present purposes it is significant that the Court of Appeal proceeded to allow renewal in a case where the reasons advanced included the effects of the Statute of Limitations, these reasons were not regarded as particularly strong but the consequence of non-renewal was "stark" because of the effect of the Statute. Interestingly in light of the judgment of Clarke J. in *Moloney v Lacy Civil and Engineering Company Limited*, the defendant had received only minimal notice of the intended proceedings by way of phone call from the plaintiff's solicitors and had no particulars of the claim being made against him.

35. I note a further departure from the apparent strictness of Clarke J.'s approach in the most recent judgment on this topic from the Court of Appeal, albeit a judgment which looks at the new text of O. 8 rather than that under consideration here – *Murphy v Health Service Executive* [2021] IECA 3. Haughton J. held that the trial judge had erred in finding the plaintiff's position to be unacceptable by reason of not having served a courtesy copy of the summons before it lapsed, not having put the defendant on notice of the claim or of the issue of the proceedings and not explaining why they were not being served. The trial judge's criticism appears to have been by way of analogy with the facts looked upon favourably by Finlay Geoghegan J. in *Chambers v Kenefick*. However, the Court of Appeal took account of the fact that in the particular context of medical negligence, notification of a claim in itself has significant consequences including requiring individual medical personnel to notify their own indemnifiers which in turn has potentially significant consequences which would run counter to the rationale behind the principle that professional negligence proceedings should not be pursued without a reasonable basis for the claim and an expert report to support it. Whilst the views of Haughton J. in *Murphy* might be regarded as applying only to cases of professional negligence, *Moloney v Lacy Building and Civil Engineering Limited* was also a professional negligence case albeit the professional was an architect rather than a medical practitioner.

36. In light of this case law, I accept that the plaintiff in this case cannot rely *simpliciter* on the fact that her claim will be statute-barred as entitling her to secure renewal of the summons. However, in my view she is not precluded from relying on that fact as constituting a good reason or part of a good reason in conjunction with other facts and

circumstances relating to her case. In particular, she can rely on the extent to which the defendant has been on notice of her claim and has engaged in the various processes relating to it as well as the effect that non-renewal will have on her as together constituting a good reason. In this regard I accept the argument made by the plaintiff that matters which do not of themselves constitute a good reason may be capable of doing so when viewed in combination with other factors. These elements must be considered by looking at the circumstances of the case as a whole and the relevant prejudice an adverse outcome will have on each side in order to determine where the interests of justice lie. This is not to depart from the three-steps identified in *Chambers v Kenefick* but rather to acknowledge that these are not "separate and watertight sequential steps, the effect of which would be to exclude consideration of questions relating to the interests of justice when the court addresses itself to the question whether there is a good reason to renew the summons" *per* O'Sullivan J. in *Allergan Pharmaceuticals v Noel Deane Roofing* [2009] 4 IR 438.

Solicitor's default

37. The plaintiff also advanced her previous solicitor's failure to act and the time and effort required of her current solicitor to get to a point where the proceedings could be served as part of her "good reason". I think her reliance on the action or inaction of each solicitor has to be examined separately as different considerations apply to each.

38. The starting point for such examination is that a solicitor properly instructed is acting as agent for the client. This is problematic for the plaintiff as regards her previous solicitor as it means she cannot readily rely on her own solicitor's default as an excuse on her own behalf. Unfortunately, as her previous solicitor's engagement with the process since October 2017 has been dilatory and unhelpful to say the least, the court has no information or explanation as to what may have happened between the institution of proceeding in September 2015 and October 2017 when the plaintiff instructed her current solicitor save for the obvious fact that the proceedings were not served. Delay on the part of a plaintiff's solicitor has been rejected as a good reason by O'Sullivan J. in *Allergan Pharmaceuticals v Noel Deane Roofing* [2009] 4 IR 438 and by Peart J. in *Moynihan v Dairygold Co-operative Society* [2006] IEHC 318. Indeed, in the latter case Peart J. regarded it as a factor weighing in the balance against a plaintiff who would, if renewal were refused, have a cause of action against the solicitor. It was also rejected by O'Flaherty J. in the Supreme Court in *Roche v. Clayton* [1998] 1 IR 596 but apparently on the basis that the plaintiff's allegations against his solicitor had "nothing to do with the defendants". It is difficult to understand this rationale as there is no requirement under O 8, r. 1 that the reason relied on by a plaintiff for seeking renewal of a summons will have anything to do with the defendant and quite frequently it will not. Further, there may be cases in which a solicitor who has been responsible for a delay can explain that to the satisfaction of the court - as indeed occurred in *Chambers v Kenefick*. However, where no explanation at all is offered for a solicitor's delay it is difficult to see how a court can accept that delay as constituting a good reason however harsh the effect may be on the plaintiff who is a client of that solicitor.

39. Different considerations apply to the time taken by the plaintiff's current solicitor to bring the applications necessary to renew the summons, obtain liberty to serve a copy summons and permission to pursue the company in liquidation. At the point where the plaintiff instructed her current solicitor, then her previous solicitor ceased to be her agent. Consequently, the failure of her previous solicitor to respond to her current solicitor's requests for documents and information in circumstances where her current solicitor assiduously pursued those requests is something that can be taken into account by the court. The defendant argues that this period is irrelevant as the summons had already expired and the statutory period elapsed by the time her current solicitor was instructed. I do not agree that this is necessarily so in circumstances where O.8, r.1 expressly allows for an application to renew a summons to be made after the expiration of the initial 12 month period.

40. I accept that the actions of the plaintiff's current solicitor commencing in October 2017 might not of themselves constitute good reason if looked at in isolation from the other reasons advanced by the plaintiff and from the facts and circumstances of the case. The plaintiff has not suggested that they be looked a tin that context. Each of the three formal applications to court made by the plaintiff's current solicitor were ones that were necessary in the circumstances of the case as they stood at the material time. No doubt the plaintiff's current solicitor was frustrated in progressing these matters expeditiously by his inability to obtain documents and information from the plaintiff's previous solicitor in a timely manner. The length of the delay before the matter reaches court and the reasons for that delay are undoubtedly relevant given that the court is required to look at the interests of justice and to balance the potential prejudice to each of the parties. This is apparent from the fact that the defendants rely, albeit not very strongly, on the presumptive prejudice arising from the extended delay from 2012 in prosecuting proceedings.

Application to this Case:

41. The effects of non-renewal of the summons in this case will be stark for the plaintiff. The accident in which she was involved was a particularly serious one and while the injuries she sustained are not at the catastrophic end of the spectrum they are nonetheless significant and long-term. If the possibility of recovery against the original tortfeasor is precluded, she is left with a potential cause of action against her previous solicitor. A claim of professional negligence is more difficult to bring home than a straightforward running down action and in addition to this uncertainty would entail additional delay and expense for the plaintiff. Whilst of itself this would not entitle the plaintiff to a renewal of the summons, the circumstances of this case and the extent to which the defendant has had actual notice of her claim from the outset are also weighty factors. The plaintiff's first solicitor notified the defendants and their insurers of the accident and of her intention to claim by way of formal solicitor's correspondence from a very early stage. Thus, the defendant has had a full opportunity to investigate the circumstances of the accident, to take statements from potential witnesses and to preserve evidence from the outset. Given that there is another claim arising out of the same accident currently before the courts, it is highly probable that the defendant has in fact taken these steps.

42. Further, in my view the making of an application to PIAB by the plaintiff enhanced this notice moving it beyond the mere intimation of a claim. Whilst not amounting to formal notice of the fact that proceedings had been commenced (at a time of course when they could not have been), the involvement of the defendant in the PIAB process and the furnishing of a consent to assessment by PIAB is akin to the involvement of the defendant in Baulk in consenting to an order granting the plaintiff liberty to sue the deceased driver's insurer. In both cases the defendant consented to a formal step which was a precondition to the plaintiff being able to issue proceedings against him. This is not to say that notification of an application to PIAB would in all cases necessarily be a sufficient addition to the plaintiff's concerns regarding the Statute of Limitations to amount to a good reason. However, in this particular case it is that notification and the defendant's consent to assessment together with the early notice of the claim which had already been provided and the fact that the accident gave rise to a number of other potential claims at least one of which has progressed to formal court proceedings which, combined, are in my view capable of amounting to a good reason.

43. I have also had regard to the level of delay involved which, although material, is not as lengthy or as significant as in many of the cases cited to the court. The plaintiff's application to PIAB and the institution of her proceedings were both within time albeit, as the defendant points out, at the very end of the relevant periods. There is undoubtedly a period of delay between the issuing of proceedings in September 2015 and the order of Meenan J. renewing the summons in October 2018 (although the summons could have been validly served up to October 2016 without leave of the court). Of the two-year period between October 2016 and October 2018 only one year is unexplained. The other year was spent by the plaintiff's current solicitor attempting to obtain her file and clarity in respect of service of the proceedings from her previous solicitor. Indeed, I note that had the plaintiff's previous solicitor responded promptly to the correspondence in October 2017 and provided both the file and a clear explanation regarding service, although an application to court would still have been required, the proceedings would likely have been served on the defendants some 15 months earlier than they actually were. However, I do not regard this delay as prejudicial to the defendant in light of the early notice given of the claim and the fact that there are other proceedings in being arising out of the same accident such that the steps required to deal with the issue of liability are ones which most likely have already been taken on the defendant's behalf. I also do not regard the length of delay in all of the circumstances as giving rise to a presumptive prejudice which would warrant denying the plaintiff the entitlement to proceed with her claim.

44. As the defendant has not raised any actual prejudice and has quite fairly conceded that a balancing of the relevant factors favours the plaintiff, in my view the interests of justice in this case do not require the court to set aside the order made renewing the personal injuries summons and I refuse the defendant's application.