

THE HIGH COURT

[2021] IEHC 778

RECORD NO. 2019/3939P

BETWEEN

TARA BRADY

PLAINTIFF

AND

ROBERT BYRNE AND DANIEL BYRNE

DEFENDANTS

**EX TEMPORE JUDGMENT of Ms. Justice Niamh Hyland delivered on 7 December 2021**

**Introduction**

1. This is an application by the defendants to set aside the order of Cross J. of 16 February 2021 extending the time for leave to renew a summons. As required by Order 8 rule 1(4) of the Rules of the Superior Courts ("the RSC"), Cross J. identified the special circumstances justifying the extension in the order, being, and I quote, "*The closure of the Plaintiff's Solicitors due to the Covid 19 pandemic and the resulting work backlog*".
2. By motion of 26 April 2021, grounded on an affidavit of Declan O'Flaherty, solicitor for the defendants, of 21 April 2021, the defendants seek to set aside the renewal of the summons.

**Nature of Proceedings**

3. The proceedings in question arise out of a road traffic accident which occurred on 28 August 2015 whereby it is alleged that the first named defendant caused a collision with the plaintiff's vehicle when driving the second named defendant's vehicle. The plaintiff alleges that she has suffered injury to her left hip, thigh and knee and that she has suffered psychological injuries arising from the accident, including post-traumatic stress disorder of moderate intensity and she identifies that she was admitted to St. Patrick's psychiatric hospital for 6 weeks in 2017.
4. The matter was referred to PIAB on 10 August 2017, 10 days before the expiry of the Statute of Limitations. On 26 November 2018, PIAB declined to adjudicate because of the interaction between one or more injuries arising from different causes. There were two letters from the defendants' insurers, Liberty, the first on 15 November 2016 and the second on 13 December 2018, inviting settlement talks.
5. The proceedings issued on 17 May 2019, and counsel for the defendants informed me that by 14 June 2019 the proceedings would have been statute barred. The proceedings having been issued on 17 May 2019, in the normal course they ought to have been served by 16 May 2020.

**Reason Given by Plaintiff for Delay in Serving**

6. In the affidavit of the plaintiff's solicitor, Mr. Kennedy, of 15 February 2021, relied upon before Mr. Justice Cross in seeking to renew the summons, he identified the reasons the time should be extended. Because of the importance of the reasons given in the context of this application, reasons that are stoutly stood over by the plaintiff, I will set them out in their entirety.

4. *The main reason why I have been unable to effect service of the said summons on the Defendants is due to the fact your Deponent has strictly followed and implemented Government restrictions and protocols further to the Covid-19 Pandemic.*
5. *In compliance with the above I closed my legal practice on 27 March 2020. My practice remained closed for a further two-month period from this date. The closure caused a considerable work backlog. With ongoing restrictions and with a reduced number of staff it has not been possible to process work as efficiently as pre-pandemic.*
6. *The Covid pandemic has caused and continues to cause significant disruption to the above practice”.*
7. A replying affidavit was sworn by Mr. Kennedy on 2 December 2021 in response to the grounding affidavit of Mr. O’Flaherty referred to above.
8. In that affidavit he expanded upon the issues for his practice that Covid had led to, referring to the fact that his firm of solicitors was restricted not only for the period of time that it closed for, but until the present date. He refers to the entire legal profession having been restricted and a work backlog continuing not only in solicitors’ offices but within the courts system. He refers at paragraph 20 to court procedures proceeding only under restriction and with particular special restraints and restrictions. At paragraph 21 he says that the legal profession and he himself were working under restrictions from home with limited opportunity to move around. He noted that he, being aged 74 years, was the subject matter of particular focus by the State and its health advisors, and he notes that Liberty Insurance was closed and the staff members dealing with this case and other cases, were not available arising from restrictions. However, he does not identify any impediment to serving the summons by virtue of Liberty being closed.
9. At paragraph 23 he states that after the reopening of his office, he himself could not attend his place of work under government direction and his office was open only in a limited capacity taking phone calls.
10. In relation to this specific case, he refers to a letter of advice or recommendation that he received from Mairead McDonnell, nurse therapist, where she said she felt the stress of attending legal meetings could precipitate a re-occurrence of the plaintiff’s illness and it would not be advisable to do that. That *letter is not exhibited. He says that having received that advice he formed the view that “the Plaintiff was in no fit state to deal with legal issues in the short term and, consequent upon and in order to protect and preserve the Plaintiff’s claim against the Defendants, the Plenary Summons was issued on 17 May 2019.”*
11. He goes on to say at the following paragraph, paragraph 18, as follows;

*"It is this Firm's policy when proceedings have issued to serve the summons without delay. I formed the view that proceedings should be held pending an improvement in the Plaintiff's medical condition as she was not available to provide instructions as a consequence of the accident. Subsequently the Covid 19 pandemic unexpectedly struck".*

12. In response to this averment, counsel for the defendants pointed out that the plaintiff swore an affidavit of verification in respect of the personal injury summons in the usual terms in Malahide (where Mr. Kennedy's offices are located) in the presence of Mr. Kennedy on 17 May 2019. Counsel argued that this suggests that she was at least in a position to attend and swear the affidavit, and this is not consistent with the implicit suggestion in Mr. Kennedy's affidavit at paragraph 17 that she was not able to deal with legal issues at the time of the issuing of the summons.
13. Given that, as identified below, I consider the reason given for the necessity of an extension is the impact of Covid on the practice and not any other reason relating to the plaintiff's capacity or ability to give instructions, I do not need to resolve this dispute between the parties.

#### **Nature of Delay**

14. In my judgment in *Brereton v The Governors of the National Maternity Hospital* [2020] IEHC 172 of 9 April 2020, I identified the spectrum of delay that may be found in the case law (much of which of course comes from a time where the relevant test was good reason rather than special circumstances) ranging from the extreme i.e. a number of years after the expiry of the 12 month period, to periods of months and weeks. I noted that with the change in the legal test to special circumstances, much shorter periods of delay are likely to be treated as sufficient to justify a refusal. The 12 month period must be treated as contextualising any further delay.
15. In *Brereton*, I upheld the decision to renew the summons where the unexplained delay was 10 weeks. I noted that had the period of delay been longer my approach to the case would have been different.
16. Here, the summons was issued on 17 May 2019 and ought to have been served by 16 May 2020. The office of the plaintiff's solicitor re-opened no later than 26 May 2020. The application to extend was not made until 16 February 2021. The defendants accept that the closing of the office for 2 months comprises a special circumstance but say that it cannot justify a 9 month delay in bringing the application.
17. I am satisfied that the delay in question was over eight and a half months. The defendants have urged me to take into account the fact that this case has been characterised by delay, pointing out that the summons was not issued until the eve of the expiry of the Statute and that there was no effort to serve the summons within the 12 month period. Mr. Kennedy in his affidavit has explained the view had been taken that proceedings should not be served pending an improvement in the plaintiff's medical condition.

18. It seems to me that the delay I should consider is the delay from the expiry of the 12 month period for serving the summons and it is this delay that I have focused upon. I have considered in the context of prejudice to the defendants – discussed further below – the length of time that will have passed when this case finally comes to trial. That is not a decision to allocate blame to the plaintiff in this regard but rather a recognition of the passing of time since the date of the accident.

**Obligation of Candour**

19. Before considering the special circumstances test, I will address the argument made by the defendants at hearing that there was a lack of candour in the application made before Cross J. The argument arose in the following circumstances.
20. In Mr. O’Flaherty’s affidavit, he notes that Mr. Kennedy’s firm acted for the plaintiff in another High Court case listed for hearing on 6 October 2020 and points out that the plaintiff’s solicitor could not have forgotten the within proceedings in those circumstances. Counsel for the defendants asserts that this was a material fact that ought to have been disclosed to Mr. Justice Cross at the application to renew the summons.
21. In his replying affidavit, Mr. Kennedy states that the case was settled without the formal input of the plaintiff on the basis of discussions between respective senior counsel, who subsequently had the settlement ruled by the Court based on the submissions of senior counsel, which arose principally from the fact that the plaintiff was indisposed. He goes on to say that the plaintiff did not attend at his offices to sign her consent to the settlement but her husband Colin Brady attended the office to collect it on the plaintiff’s behalf (paragraph 25). Counsel for the plaintiff asserts that had this matter been brought to the attention of Mr. Justice Cross it would only have made it more likely that he would have renewed the summons, given the identification of the psychiatric issues facing the plaintiff.
22. Insofar as the duty of candour is concerned, I do not consider there was any breach of same by the plaintiff or her solicitor in relation to the application before Cross J. It is certainly true that the affidavit identifying why the summons was not served within time is sparse and relies only on Covid as the reason for the failure to serve the summons. For the sake of completeness, it may have been preferable if Mr. Kennedy had identified in his affidavit grounding the application to renew that he had acted for the plaintiff some 5 months previously in other proceedings. However, a finding of a lack of candour on the part of a solicitor is a serious one and I do not think the facts in this case approach the threshold that would have to be surmounted for such a finding to be made.
23. Nonetheless, the action taken by Mr. Kennedy’s office in relation to this case is relevant, in that it shows that the office was indeed continuing to operate both generally and in relation to the plaintiff, and was, in this instance, in a position to attend at Court for her case that was listed for hearing and to settle that case. The averments made by Mr. Kennedy in this respect must be taken into account in considering the reason given for the necessity for the extension of time, i.e. the limitations imposed on his office by Covid.

24. Before analysing the justification proffered for an extension of time, I think it would be helpful to consider the question of prejudice and/or hardship to both parties depending on the approach I adopt.

**Prejudice and/or Hardship to the Plaintiff**

25. In his affidavit, Mr. Kennedy places considerable reliance upon the impact of a decision to set aside the renewal of the summons. He avers at paragraph 28 that this is a case where the plaintiff suffered actual physical injury through no fault of her own and that an order setting aside the renewal would cause the plaintiff actual prejudice "*i.e. the loss of her right to seek redress in the Courts for injuries suffered by her through the fault of someone else*".
26. I should say at this point that there is no admission of liability by the defendants and in my view the two emails offering settlement talks cannot be treated as a concession by the defendants that liability will not be contested in the case. No such concession is made, and the terms of the emails are neutral in this respect.
27. In the email of 15 November 2016, Ms. Greene, the claims coordinator, states that she would like to take the opportunity to invite the plaintiff to settlement talks if she feels ready to do so. In the email of 13 December 2018, she again invites the plaintiff to settlement talks if she feels ready to do so and states she is available to meet the solicitor and her client at a time and location convenient to them both.
28. Neither of those emails amount in my view to an admission of liability or anything like it. I cannot therefore proceed on the assumption that the case is one that must be treated as an assessment only, as I am urged to do by counsel for the plaintiff.
29. Nonetheless, I must recognise that acceding to the relief sought by the defendants will almost certainly mean that the plaintiff's claim is statute barred and in those circumstances she will be forced to seek relief – if she considers it appropriate to do so – by making a claim for professional negligence as against her solicitor. As Butler J. observed in the case of *Klodkiewicz v Palluch and College Freight Ltd.* [2021] IEHC 67, "*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*". (I should note at this stage that I have carefully considered *Klodkiewicz* as urged to do by counsel for the plaintiff but its relevance is limited given that it was applying the previous good reasons test as opposed to the special circumstances test).
30. Moreover, I fully accept the submission of counsel for the plaintiff that I should take into account in this respect that part of the plaintiff's claim in this case is for psychiatric injuries. I note the reference at paragraph 12 of Mr. Kennedy's affidavit to a medical report obtained by PIAB from Mr. Cooney, consultant psychiatrist, identifying that that the plaintiff's condition had worsened to the extent that she required hospital admission for a period of 6 weeks. Reference is made to a follow-up report of 10 September 2018 (although those dates appear to be incorrect) by Mr. Cooney. Neither of those reports are

exhibited and no psychiatric reports of any sort are exhibited to this application although two reports from Mr. Collins, orthopaedic surgeon, of 13 January 2016 and 5 September 2016 are exhibited. I accept the submission of counsel for the defendants that the plaintiff bears the burden of proof of persuading me that the summons ought to be renewed and that it is for the plaintiff to exhibit any reports she considers relevant.

31. Nonetheless, I am satisfied on the basis of what has been placed before me that the plaintiff does have a significant psychiatric component to her claim and that, given her hospitalisation in St. Patrick's and other averments made by Mr. Kennedy about her inability to provide instructions, she must be treated as a person who is likely to be particularly adversely affected by a decision not to permit renewal of the summons. I therefore conclude there would be significant prejudice to her by a decision not to renew the summons, although it is important to note that she will not be left without an alternative - albeit less satisfactory - form of recourse.

### **Prejudice and/or Hardship to the Defendants**

32. It is averred by Mr. O'Flaherty that the defendants will be prejudiced by reason of the elapse of time since the date of the accident. He says at paragraph 10 that, although it is accepted that the defendants and their insurer have been on notice of the claim, this does not detract from the fact the defence has been prejudiced by the effluxion of time where, as of the date of swearing his affidavit, it is already approaching 6 years post-accident and it is likely to be far later on before evidence is given in the case at hearing.
33. Counsel for the plaintiff criticises the fact that no affidavit is sworn by the defendants personally in this respect but I think I can take it that there is presumptive prejudice arising from a delay of more than 6 years from the date of an accident where, if liability is contested, it will be necessary to hear both the plaintiff and the defendants in relation to the circumstances of the accident.
34. However, I also accept that the defendants had notice very early on of the claim and therefore they were in a position to gather evidence at that early point in time, including in this case a garda abstract. In summary, I consider there is prejudice to the defendants but it is of a relatively mild nature and I think it is fair to say that the prejudice to the plaintiff in the event of a decision adverse to her on this motion will be considerably greater than the prejudice to the defendants in the event of a decision adverse to them on this motion.

### **Special Circumstances**

35. I turn now to the crux of the case and that is whether there are special circumstances within the meaning of Order 8, rule 1(4) of the RSC. The correct approach to this test has been set out by Haughton J. in *Murphy v HSE* [2021] IECA 3. It is necessary to identify some fact or circumstance beyond the ordinary or the usual. No hard and fast rules should be laid down in respect of whether special circumstances arise. Equally, I accept that I must look at whether it is in the interests of justice to renew the summons and this entails considering hardship/prejudice on the part of both parties.

36. This latter part of the test comes from the *Chambers v Kenefick* [2005] IEHC 402 decision relied upon by the plaintiff's counsel. I accept it remains in place, albeit that the questions of interests of justice and hardship are considered not after having established good reason, as was the case under the previous version of Order 8 of the RSC, but in the round when considering whether special circumstances have been established.
37. Before dealing with the Covid issues, I should say that various matters were raised in the replying affidavit of Mr. Kennedy, relating to the mental state of the plaintiff and the change of address of the defendants. It is quite correctly accepted by counsel for the plaintiff that reasons not identified in the original application to extend time cannot be added where there is an application to set aside. Accordingly, I think the additional matters identified by Mr. Kennedy should therefore be treated as background context rather than additional reasons for the lack of service.
38. It is also worth observing what is not identified as a special circumstance. The plaintiff's solicitor does not rely on inadvertence or mistake. He does not rely on the plaintiff's lack of capacity or inability to give instructions. His sole reason for failing to serve the summons in time is the existence of Covid and the impact that it had on his working arrangements.
39. The real difficulty for the plaintiff in this case in my view is that no substantive explanation has been advanced as to why the summons was not served shortly after the office of the plaintiff's solicitors reopened in late May 2020. Mr. Kennedy says that his office was working from home and that he was not physically permitted to attend the office. He says that business was disrupted and this was widespread across the profession. He says that the courts were affected and that there was and is a considerable backlog. All of these things are true. However, as observed by the defendants' solicitor, serving a summons is a relatively straightforward and simple task. It does not require any particular equipment or physical presence on site or any particular personnel to ensure it is done.
40. It is true that an application to Court was required since the 12 month period had expired. However, after the initial shock of Covid, the legal profession, like other businesses, adapted. Deadlines continued to arise and to be met. The courts, including the Central Office, remained open throughout Covid. That is demonstrated, inter alia, by the fact that the plaintiff had no difficulty in accessing the Court to seek an order extending the summons during February 2021. Nor was any general amnesty given in relation to time periods under the RSC during that time.
41. Of course, a certain amount of leeway and allowance for the Covid pandemic must be provided but here no evidence has been given to identify why the plaintiff's solicitor was not in a position to seek to serve the summons and/or seek an order extending time within a reasonable amount of time after his office re-opened. The mere existence of Covid and the substantial impact it had on the running of Mr. Kennedy's business is not, *per se*, a reason to allow a delay of over eight and half months to accrue from the expiry of the 12 month period.

42. Moreover, there is an additional factor in this case that significantly undermines Mr. Kennedy's argument that he was unable to carry out business normally because of Covid. This is the fact that his office did in fact act for the plaintiff in a different matter in October 2020. As noted above, that necessitated attendance by a solicitor at the Four Courts, an application to the Court and a settlement agreement. It is difficult to square that activity on behalf of the plaintiff with the argument that the disruption caused by Covid meant the firm could not effect service of the summons because of a work backlog and staff restrictions.
43. Applying the test identified by Haughton J. in *Murphy*, a fact or circumstance must be identified beyond the ordinary or usual. Covid is certainly beyond the ordinary or usual but the legal world adapted and by mid-2020, the plaintiff's solicitor ought to have been in a position to serve the summons and to seek an extension of time in which to do so. He has not identified any reason beyond Covid as to why he did not do so. At that stage it had become expected that time periods laid down in the RSC continued to apply even given the presence of Covid and the disruption it had caused. The plaintiff's solicitor has failed to identify circumstances that operated to prevent service beyond those faced by every other solicitors practice at the time i.e. the impact of Covid.
44. In summary, in the circumstances of the case, I conclude that no satisfactory explanation has been given for the delay in serving the summons in this case.

#### **Balance of Justice**

45. In determining this application, I must at all times consider the balance of justice. Given my conclusion that no satisfactory explanation has been given for the delay, I must now weigh the relevance of prejudice to both parties.
46. I have identified above that I consider the prejudice to the plaintiff in refusing to renew the summons considerably greater than the prejudice to the defendants in renewing the summons. Nonetheless, that does not seem to me sufficient to tilt the balance in the plaintiff's favour where there is an absence of a satisfactory explanation for the delay.
47. The test of special circumstances, requiring as it does a holistic consideration of the reasons for the delay, the balance of justice and considerations of hardship/prejudice, as well as the period of delay, cannot be treated as removing the requirement for a convincing explanation for the failure to serve the summons in a timely fashion or the necessity for an extension of time. Hardship or prejudice to a plaintiff alone cannot in my view amount to special circumstances. Accordingly, I do not consider that special circumstances have been established in this case, given the length of delay and the absence of a satisfactory explanation for same.

#### **Conclusion**

48. Accordingly, in the circumstances I set aside the decision of Cross J. extending the time for leave to renew a summons.