

**THE HIGH COURT**

[2020] IEHC 551  
[2015 No. 9826 P]

**BETWEEN**

**ELIZABETH O'CONNOR**

**PLAINTIFF**

**AND**

**HEALTH SERVICE EXECUTIVE**

**DEFENDANT**

**JUDGMENT of Mr. Justice Barr delivered electronically on the 30th day of October, 2020**

**Introduction**

1. In this application, the defendant seeks an order pursuant to O. 8, r. 2 of the Rules of the Superior Courts, setting aside the order of MacGrath J. of 15th July, 2019, which order renewed the personal injury summons for a further period of three months pursuant to the provisions of O. 8, r. 1.
2. In a nutshell, the defendant submitted that the learned High Court judge who heard the renewal application in July 2019, did not have jurisdiction to make an order granting a further renewal of the summons, due to the fact that it had already been renewed by order of the Master of the High Court dated 22nd November, 2016. It was submitted that under the new O. 8 of the RSC, which was inserted into the rules by virtue of S.I. 482/2018 and which took effect from 11th January, 2019, it was only possible to have one renewal of a summons. Therefore, it was submitted that the court did not have jurisdiction to renew the summons a second time, as it had purported to do in July 2019.
3. In the alternative, it was submitted that given the facts in this case, the plaintiff had not established "*special circumstances*" as required by the rules such as to justify a renewal of the summons.
4. In summary, it was submitted on behalf of the plaintiff, that as this was a negligence case, which alleged professional negligence on the part of the surgeon who had carried out surgical treatment to the plaintiff, there was a clear requirement at law that the summons should not be served until the plaintiff and her legal advisors were in possession of a report from a suitably qualified expert giving the opinion that there had been negligence on the part of the professional concerned. It was submitted that such report had only come to hand in December 2018. Accordingly it would not have been appropriate to serve the summons before that time and in such circumstances it was appropriate that the court had granted a renewal of the summons in July 2019.
5. That is just an outline of the arguments submitted on behalf of each of the parties. These arguments will be dealt with in greater detail later in the judgment.

**Chronology**

6. On 15th August, 2013, the plaintiff gave birth to a child by way of caesarean section at St. Luke's Hospital, Kilkenny. In the following months and into the following year, the plaintiff developed problems with the functioning of her kidney and required operative treatment at a different hospital.

7. It is the plaintiff's case that on 19th December, 2014, she was told by the surgeon, who had carried out the caesarean section, that the damage to her kidneys was something that *"ought not to have occurred"*. As a result of that conversation, the plaintiff consulted with her solicitor. A personal injury summons was issued on her behalf on 25th November, 2015. As the summons had issued without the benefit of the plaintiff's medical records, or the benefit of an expert's report in relation to liability, it was vague in relation to the allegations that it made against the defendant. It had been issued on a protective basis so as to protect the plaintiff's interests and prevent her cause of action becoming statute barred.
8. Thereafter, the plaintiff's solicitor took up copies of the plaintiff's medical records from both St. Luke's Hospital in Kilkenny and the hospital where she had received further treatment in respect of her kidney. In October 2016, the plaintiff's solicitor wrote to an expert in the UK, Professor Lees, asking him to furnish a report on liability.
9. On 17th November, 2016, an *ex parte* docket was submitted seeking renewal of the summons by the Master of the High Court. This was made returnable for 22nd November, 2016. It was based on a grounding affidavit sworn by the plaintiff's solicitor on 16th November, 2016. In that affidavit he stated that the summons had not been served as a report was awaited from the expert in respect of the liability issues. He stated that an expert *"has been engaged"*.
10. By order dated 22nd November, 2016, the Master of the High Court renewed the personal injury summons for a period of six months from the date of the renewal. That order was perfected on 25th November, 2016. Under the terms of that order, the personal injury summons had been renewed for a further period until 22nd May, 2017.
11. The plaintiff's solicitor has very candidly stated that he was of the mistaken belief that the order made by the Master renewing the summons was for a period of twelve months, rather than six months. On the 7th November, 2017, the plaintiff's solicitor received the report from Professor Lees. On 13th November, 2017, the plaintiff's solicitor served the personal injury summons on the defendant.
12. By letter dated 22nd December, 2017, which the plaintiff's solicitor received on 2nd January, 2018, Messrs. Hayes Solicitors wrote stating that they acted on behalf of the defendant. They indicated that they had been furnished with a copy of a personal injury summons which had issued on 25th November, 2015. It had been certified as being a true copy on 13th November, 2017. Their letter continued in the following terms:-

*"As you are aware, the personal injury summons should be served within twelve months of issue. In the circumstances, we would be grateful if you could let us have proof of service and the date of service of the personal injury summons at your earliest possible convenience. Once we are in receipt of evidence that the personal injury summons was served within twelve months of the date of issue, we will take steps to enter an Appearance."*

13. When the defendant's solicitor did not receive any response to their letter of 22nd December, 2017, they wrote further reminder letters on 14th February, 2018, 14th May, 2018 and 27th August, 2018, but without receiving any response thereto.
14. According to the plaintiff's solicitor, in 2018 he received advices from counsel that the report which had been furnished by Prof. Lees would not be adequate to deal with the issues of negligence that were likely to arise at the trial of the action. Counsel recommended that a report should be obtained from a consultant gynaecologist and suggested Dr. Clements in the UK as being a suitable person for this purpose. The plaintiff's solicitor has stated in his affidavits that he had difficulty obtaining return of the plaintiff's medical records from Prof. Lees. When these had been obtained, the plaintiff was seen by Dr. Clements in November 2018 and he furnished a report to the plaintiff's solicitor on 12th December, 2018.
15. On 22nd May, 2019, the plaintiff's solicitor wrote to the defendant's solicitor indicating that it was their intention to make an *ex parte* application with regard to extending time for the service of the personal injury summons. They suggested that it would be in everyone's best interests that that should be done by way of notice of motion. They suggested that the defendant's solicitor might enter a conditional appearance for the purpose of dealing with that application. By letter dated 12th June, 2019, the plaintiff's solicitor informed the defendant's solicitor that if they did not hear from them by 14th June, 2019 in response to their suggestion contained in the letter of 22nd May, 2019, they would proceed with an *ex parte* application. By letter dated 25th June, 2019, the plaintiff's solicitor furnished a copy of the personal injury summons which had been served on the defendant, a copy of the affidavit of service thereof, a copy of the *ex parte* notice of motion and the grounding affidavit sworn by the plaintiff's solicitor on 17th November, 2016 and a copy of the order made by the Master on 22nd November, 2016. They indicated that they were about to proceed by way of *ex parte* application to seek a further extension of the time for service of the personal injury summons. By further letter dated 3rd July, 2019, the plaintiff's solicitors wrote to the defendant's solicitor asking them to revert in the matter.
16. By letter dated 5th July, 2019, the defendant's solicitor stated that they had passed the correspondence of 25th June, 2019 with enclosures to their client. The client had reverted to advise them that they had no instructions to enter an appearance in this case, but had been instructed to obtain counsel's opinion in relation to the matter.
17. On 15th July, 2019, an *ex parte* application was moved by counsel on behalf of the plaintiff before MacGrath J. seeking an order pursuant to O. 8, r. 1 renewing the personal injury summons for such further period as the honourable court may see fit. That application was based on an affidavit sworn by the plaintiff's solicitor on 11th July, 2019. In that affidavit he stated that he had mistakenly thought that the summons had been renewed for a further period of one year by virtue of the order made by the Master of the High Court in November 2016. He stated that he had received the report from Prof. Lees on 7th November, 2017 and had served the personal injury summons directly on the

defendant on 13th November, 2017. Subsequently he had received correspondence from the defendant's solicitor and had then taken up a copy of the order of the Master of the High Court. He stated as follows at para. 13:-

*"I say that in light of the report of Mr. Lees being adequate to maintain proceedings against the defendant but not being sufficient to particularly progress matters I sought the advice of senior counsel as how best to proceed. I say that arising from this I was advised that a report be sought from Mr. Roger Clements, consultant obstetrician and gynaecologist."*

18. The plaintiff's solicitor went on to state that upon receipt of the advises of counsel, he immediately contacted Dr. Clements to secure a report on behalf of the plaintiff. He stated that there was difficulty in obtaining return of the plaintiff's medical record from Prof. Lees. There was considerable delay in obtaining the records. When he was provided with the records, the plaintiff was ultimately reviewed by Dr. Clements in November 2018 and he received a report from him on 12th December, 2018. He went on to state that he was then in possession of a report confirming the views of Prof. Lees and setting out a clear line of negligence and breach of duty against the defendant while the plaintiff was under its care. He went on to state that the proceedings were in a position to proceed and on that basis he sought an extension of time to allow for the proper service of the proceedings on the defendant.
19. He stated that the defendant had not been prejudiced, because they would have been aware of the incident that occurred as a result of the surgery carried out in August 2013. In addition, the defendant had been served with the proceedings on 13th November, 2017. It was submitted that in these circumstances the defendant had not been at a disadvantage in terms of their defence of the proceedings, because it had been served with same on 13th November, 2017.
20. The plaintiff's solicitor stated that notwithstanding that there had been delay since the expiry of the time for service of the proceedings from 22nd May, 2017, in light of the report previously received from Prof. Lees, he did not believe it prudent to progress the matter further without receipt of a further supportive report, which had only come into his possession in December 2018. The plaintiff's solicitor stated that in the circumstances outlined, there had been no real prejudice to the defendant caused by the delay in effecting proper service of the proceedings; whereas there would be considerable prejudice to the plaintiff if her summons were not renewed, as she would probably be statute barred if she were to attempt to serve a further set of proceedings. In the circumstances, the court was asked to accede to the plaintiff's request.
21. By order dated 15th July, 2019, the High Court (MacGrath J.) ordered that the summons be renewed for a further period of three months from that date. The order recited the special circumstances which justified the making of the order extending the time for leave to renew the summons as being *"there were ongoing investigations and misunderstanding over a prior order"*.

22. The personal injury summons was formally served on the defendant on 26th July, 2019.
23. On 20th December, 2019, further particulars of negligence and further particulars of personal injury were pleaded on behalf of the plaintiff.
24. On 15th January, 2020, the defendant issued its notice of motion seeking to set aside the renewal of the summons that had been made by order of the High Court on 15th July, 2019. The application was made returnable for 17th February, 2020. The application was based on the grounding affidavit sworn by Mark McCabe on 14th January, 2020. Having recited the history of the matter, it was submitted that the court did not have jurisdiction to make the order that it had done on 15th July, 2019 and/or in the alternative, there were no special circumstances established by the plaintiff which would justify such a renewal and there had been excessive delay and a lack of detail in the affidavit sworn on behalf of the plaintiff and there was considerable prejudice to the defendant due to the delay in formally serving it with the proceedings.
25. In response, an affidavit was sworn by the plaintiff's solicitor on 9th October, 2020 wherein he went through the history of the matter in some considerable detail. He stated that it was only in December 2018 that the plaintiff had obtained the report from Dr. Clements, which definitively set out that she had a case in negligence against the defendant. He set out the core of his defence to the defendant's application at paras. 15 and 16 in the following terms:-

*"I say and I believe and respectfully submit to the court that awaiting of a properly supportive expert report prior to the service of proceedings on a defendant in a professional negligence suit amounts to special circumstances to justify the enlargement of time to serve the proceedings. It is universally agreed that prior to the service of proceedings in a professional negligence case it is preferable and appropriate that the plaintiff should be in possession of a supporting expert's report. I personally support the propriety of that principle.*

16. *I say that it was at all times my intention to serve the proceedings in accordance with my instructions, and I did not do so through a genuine misunderstanding as to the time permitted to do so, as I have already averred. I say that in that circumstance mere inadvertence as to the timing of same with respect of the previous renewal application before the Master ought to amount to good reason to permit the renewal of the summons before Justice MacGrath to stand."*

26. That concludes the relevant chronology in this case.

**Order 8, rule 1 of the Rules of the Superior Courts**

27. The current version of O. 8, r. 1, was inserted into the Rules by virtue of S.I. 482 of 2018. That statutory instrument provided that the new rules would come into operation on 11th January, 2019. It provided that the following rule would be inserted in substitution for the existing O. 8, r. 1:-

*"2. The Rules of the Superior Courts are amended:*

(i) by the substitution for rule 1 of Order 8 of the following rule:

*"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.*

*(5) The summons shall, where an order of renewal has been made, be renewed by being stamped with the date of the day, month and year of such renewal; such stamp to be provided and kept for that purpose in the Central Office and to be impressed upon the summons by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in the Form No. 4 in Appendix A, Part I; 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."*

28. The same statutory instrument also contained a provision amending O. 122, r. 7 in the following way:-

*"(ii) by the substitution for rule 7 of Order 122 of the following rule:*

*"7.(1) Subject to sub-rule (2) and to any relevant provision of statute, the Court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed.*

(2) *Sub-rule (1) does not apply to any application to which Order 8 applies.*”

### **Submissions of the Parties**

29. Mr. Buckley SC on behalf of the defendant submitted that there were two main grounds on which it was submitted that the court should set aside the renewal of the summons which had occurred on 15th July, 2019: firstly, it was submitted that the court lacked jurisdiction to make an order renewing the summons, due to the fact that it had already been renewed by order of the Master of the High Court on 22nd November, 2016; secondly, even if the court did hold that it had jurisdiction to make the order in July, 2019, it was submitted that when one had regard to the entire chronology in the case there were no special circumstances established by the plaintiff which would justify a further renewal of the summons as required by O. 8, r. 1(4).
30. In relation to the jurisdiction point, it was submitted that no matter which way the plaintiff jumped, the rules were against him. Under the old O. 8, an application could only be made during the currency of the previous period during which the summons had been renewed. That had not been done, because the summons had lapsed upon the expiry of the period provided for in the Master’s order on 22nd May, 2017. Accordingly, the application that was made to the High Court on 15th July, 2019, was not made during the currency of the previous summons. In this regard counsel referred to the decision of Feeney J. in *Bingham v. Crowley* [2008] IEHC 453. However, counsel further submitted that the old O.8 was irrelevant, as it had been replaced by the new O. 8 as and from 11th January, 2019.
31. It was submitted that the new O. 8 did not avail the plaintiff either, because it was clear from the wording of the new O. 8, r. 1 as inserted by S.I. 482/2018, that the court only had the power to grant one renewal of the summons. That had been clearly established by the decision of Meenan J. in *Murphy & Anor v. A.R.F. Management Limited & Ors* [2019] IEHC 802. Accordingly, it was submitted that when the application was made to MacGrath J. in July 2019, he lacked the jurisdiction to grant an extension of the time within which to serve the summons, as a previous renewal had already been granted by the Master in November 2016. It was submitted that in such circumstances the question of whether there were special circumstances justifying such further renewal, simply did not arise. In this regard counsel referred to *Meagher v. Sandys & Brophy* [2016] IEHC 37, where when considering the provisions of the old O. 8, the court held that once it was established that the application to renew had not been made during the currency of the previous renewal of the summons, the question of whether there was good or sufficient reason to renew the summons was not engaged.
32. Senior counsel submitted that even if the court was against the defendant on the jurisdiction point, the court should still set aside the renewal of the summons due to the fact that the plaintiff had not established that there were special circumstances which justified the extension, as required under the rules. It was submitted that the plaintiff’s solicitor had attempted to put forward a somewhat inconsistent case. In his final affidavit he had made the case that the initial medical report from Professor Lees was “*inconclusive*” and for that reason it was not appropriate for the plaintiff to serve the

summons, unless and until the plaintiff obtained a report from a suitably qualified expert expressing the opinion that there was indeed negligence on the part of the defendant, its servants or agents. The plaintiff's solicitor had submitted that such report had not come to hand until December 2018 and accordingly it was appropriate to hold off formal service of the summons and to seek an extension of time within which to serve it once that report had been obtained. However, counsel pointed out that those averments ran counter to both the averments contained in the earlier affidavit sworn by the plaintiff's solicitor and were contradicted by his actions in November 2017, when he actually purported to serve the summons on the defendant.

33. In support of that proposition, counsel referred to para. 13 of the affidavit sworn by Mr. Reidy on 11th July 2019, wherein he had stated that in light of the report of Prof. Lees "*being adequate to maintain proceedings against the defendant but not being sufficient to particularly progress matters*", he had sought the advice of senior counsel as to how best to proceed. He went on to state that arising from that, he had been advised that a report should be sought from Dr. Roger Clements, Consultant Obstetrician and Gynaecologist. Counsel submitted that the key point there was that the solicitor has been of the view that the report from Prof. Lees was adequate to maintain proceedings. Indeed, his actions upon receipt of that report confirmed that belief, because he had attempted to effect service of the summons on the defendant on 13th November, 2017, shortly after receiving Prof. Lees' report. It was submitted that in these circumstances, it was untenable for the plaintiff's solicitor to state that he was not in a position to serve the summons until receipt of the report from Dr. Clements over twelve months later.
34. Counsel further submitted that there had been inordinate delay on the part of the plaintiff in progressing the matter. There had been a delay in initially sending the records to Prof. Lee and his report had been obtained in November 2017, almost two years after the date of issue of the personal injury summons and some six months beyond the time period provided for in the Master's order. There had been further inordinate delay in obtaining the report from Dr. Clements. The plaintiff's solicitor had attempted to explain that delay by stating that he had encountered considerable difficulty in obtaining the plaintiff's medical records back from Prof. Lees. However, counsel pointed out that he had been somewhat vague in relation to the attempts that he had made to obtain same from the doctor.
35. It was submitted that there was a further delay in obtaining the report from Dr. Clements. It was not known when the advices had been given by counsel to obtain such report, but that report had only come to hand in December 2018. There was then a further seven months' delay before the application was made to the High Court to renew the summons. It was submitted that in these circumstances, where the summons was being formally served in July 2019, which was almost six years after the date of the event giving rise to the proceedings, being the operation carried out on 15th August 2013, it was an undeniable fact that the defendant would experience considerable prejudice in defending the action due to the delay in progressing same.

36. It was submitted that the test for assessing whether there was good and sufficient reason as required under the old O. 8 as set down by Finlay Geoghegan J. in *Chambers v. Kenefick* [2007] 3 I.R. 526, provided that the court should ask three questions: whether there was good reason to renew the summons, which reason need not necessarily be referable to service of the summons; secondly, whether the court was satisfied because of the good reason, that it was in the interests of justice between the parties to make an order for renewal of the summons and thirdly, in considering the question of whether it was in the interests of justice as between the parties to renew the summons because of the identified good reason, the court should consider the balance of hardship for each of the parties if the order for renewal is or is not made. Counsel submitted that the same test can be applied when considering whether there are special circumstances which justify the renewal of the summons.
37. In this regard, counsel referred to the decision in *Brereton v. Governors of the National Maternity Hospital & Ors* [2020] IEHC 172 where it had been accepted by both parties that the special circumstances test imposed by the new O. 8, constituted a higher bar than the test previously in place under the old O. 8. In considering the meaning of special circumstances, Hyland J. concluded that previous case law on “good reason”, which refers *inter alia*, to consideration of the interests of justice and potential hardship to each party, was still relevant in the context of the “special circumstances” test.
38. Counsel pointed out that the issue of delay had been considered by Hyland J. in the *Brereton* case. She had noted that in the *Chambers* case the application had been made six months after the twelve-month period expired and in the *Brereton* case the application had been made two and a half months after the twelve-month period expired. It was submitted that there had been nothing like the inordinate delay that there had been in this case.
39. Finally, it was submitted that the plaintiff’s solicitor could not rely on inadvertence in relation to the terms of the Master’s order. He had simply made a mistake in relation to what he believed had been the period provided for in the Master’s order. However, had he taken up a copy of that order, he would have seen that the period was very clearly stated to be six months, and indeed that had been put in bold print in the order itself. It was submitted that in these circumstances, he could not plead his own lack of knowledge as a basis to extend the time within which to issue the proceedings in a professional negligence case.
40. In response, Mr. Counihan SC on behalf of the plaintiff submitted that when considering such an application as the present one, it was necessary to look at the specific circumstances of the individual case. In this case, the hospital would undoubtedly have carried out its own review of the operation in August 2013, due to the fact that there had been a partially adverse outcome to the surgery. In that regard they had been placed in a very good position, because they had access to the plaintiff’s medical records at that time. Secondly, it was not the case that the defendant was unaware of the broad thrust of the case until after the order made by MacGrath J. in July 2019. This was due to the

fact that the summons had been furnished to the defendant on 13th November, 2017. The summons itself set out in broad terms the essence of the negligence that would be pleaded in greater detail upon receipt of the expert's report, as in fact happened upon receipt of the report from Dr. Clements. Thirdly, it was submitted that in this particular action, the issue of liability would turn largely, if not exclusively, on the content of the medical records. In such circumstances, the defendant was not at all prejudiced by virtue of the renewal of the summons in July, 2019.

41. Counsel submitted that it was also appropriate to have regard to the fact that this was a medical negligence case. This meant that the plaintiff did not have the added time that would be available to ordinary plaintiffs when time was suspended from the point of view of the Statute of Limitations, while the application was proceeding through PIAB. This meant that the plaintiff was under considerable pressure to issue her proceedings within two years of the event so as to prevent the case becoming statute barred. For this reason, it was common for plaintiffs in such actions to issue a "*protective writ*" so as to protect their interests and prevent their action becoming statute barred. It was appropriate in such circumstances for the plaintiff and her legal advisors to hold off serving that writ until she was in possession of a report from a suitably qualified expert giving the opinion that there had in fact been negligence on the part of the defendant.
42. It was submitted that it was established in cases such as *Cooke v. Cronin & Neary* [1999] IESC 54, that it was inappropriate to serve a summons without the support of a report on liability confirming that there had been negligence on the part of the defendant.
43. It was submitted that in this case it had been reasonable for the plaintiff to hold off seeking to serve the summons until receipt of the comprehensive report from Dr. Clements, which only came to hand in December 2018. While there had undoubtedly been delays in obtaining that report, these had been explained due to the fact that there had been great difficulty in obtaining return of the medical records from Prof. Lees. It was submitted that where such a liability report was necessary from an expert, that that constituted special circumstances justifying the renewal of the summons. In this regard counsel relied on the decision of Cross J. in *Murphy v. The HSE* [2020] IEHC 483. It was submitted that there was not a two-tier test that had to be applied, namely, whether the court should grant an extension to make the application, followed by a consideration as to whether there were special circumstances justifying such extension, but rather the court must be satisfied simply that there are special circumstances which justify an extension. It was submitted that that was the test which applied in this case. It was submitted that even though the analysis of the test by Finlay Geoghegan J. in the *Chambers* case predated the amended rules, nonetheless the three steps she identified to establish whether there was good reason to justify a renewal, were equally apposite to the test for special circumstances as required under the current rules, even if the bar was set at a higher level under the current rules.
44. It was submitted that the absence of an expert's report justifying the institution of proceedings claiming damages for professional negligence, could constitute a good reason

for not serving a summons pending receipt of such a report. That had been clearly established in *Moloney v. Lacey Building and Civil Engineering Limited* [2010] IEHC 8: see paras. 5.7 and 5.8 of the judgment of Clarke J. (as he then was).

45. In relation to the fact that the plaintiff's solicitor had made a mistake concerning the period by which the summons had been renewed by virtue of the order of the Master of the High Court, it was submitted that that was simply irrelevant. The key question in this case was whether it was reasonable and indeed necessary for the plaintiff to hold off serving the summons until she was in receipt of an expert's report confirming that there had in fact been negligence on the part of the defendant. It was submitted that that was the sole relevant issue in the case and the fact that the plaintiff's solicitor had made a mistake in relation to an earlier order granting renewal of the summons, was not relevant.
46. In relation to the jurisdiction point raised by the defendant, it was submitted that the application that had been made before MacGrath J. in July 2019, had been made under the new O. 8. It was the first and only application made to the court in respect of the summons which had lapsed in May 2017. It was submitted that the terms of the old O. 8 were not relevant, because it had been replaced by the new O. 8 as and from 11th January, 2019.
47. Counsel submitted that it was important to note that this application was not an appeal from the order of MacGrath J., nor was it a judicial review of that decision. It was an application whereby the court could reconsider the matter *de novo* in light of all the information which was put before the court on this application. This meant that the court could have regard to the fact that it was only in December 2018 that the plaintiff came into possession of the report from Dr. Clements and accordingly it had been reasonable and appropriate for her to hold off serving the summons until receipt of that report. That had necessitated the bringing of the application before MacGrath J. It was appropriate also to have regard to the fact that this was a medical negligence case and in this regard counsel referred to the decision in *Green v. Hardiman* [2019] IESC 51 and in particular to the dicta of Charlton J. at paras. 19.7 and 19.8.
48. Finally, counsel submitted that when looking at the issue of the balance of justice and the issue of hardship, for the reasons outlined earlier, it could not be said that the defendant had suffered any real prejudice by the delay in formally serving the summons, by virtue of the fact that it was in possession of all the necessary facts for some considerable period of time; whereas the plaintiff would suffer considerable hardship if the summons was not renewed, as it would be likely that her action would be statute barred, meaning that her ability to seek compensation from the wrongdoer in respect of her serious injuries would be lost. It was submitted that in these circumstances the interests of justice lay in favour of renewing the summons, as had been done by virtue of the order of MacGrath J. of 15th July, 2019.

## **Conclusions**

49. In *Behan v. Bank of Ireland* (Unreported, High Court, 14th December, 1995), Morris J. (as he then was) gave the following assessment of the basis on which these applications are to be determined:-

*"In my view in moving an application of this nature the defendant takes upon itself the onus of satisfying the court that there are facts or circumstances in the case which, if the court which made the order in the first instance, ex parte, had been aware, it would not have made the order. It is clear, in my view beyond dispute, that this application is not to be dealt with on the basis that it is an appeal from the original order and, accordingly, it is incumbent upon the moving party to demonstrate that facts exist which significantly alter the nature of the plaintiff's application to the extent of satisfying the court that, had these facts been known at the original hearing, the order would not have been made."*

50. In *Chambers*, Finlay Geoghegan J. considered the dicta of Morris J. in the *Behan* case and stated as follows at p. 529 of the report:-

*"With respect to Morris, J. it appears to me that it does not set out the full circumstances in which the court may consider an application under O. 8, r. 2. It appears to me that in addition to the approach set out by Morris, J. 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, and therefore I propose considering this application from the defendant on that basis."*

51. The approach set down by Finlay Geoghegan J. in the *Chambers* case has been followed by Feeney J. in *Bingham v. Crowley*; by Clarke J. in the *Moloney* case and by Baker J. in *Meagher v. Sandys & Brophy*. This Court accepts that the approach set down by Finlay Geoghegan J. in the *Chambers* case represents the correct basis on which the court should approach the application made by the defendant herein.
52. There has been some difference of judicial opinion in relation to the correct interpretation of O. 8 in its current form. In *Murphy & Anor v. ARF Management Ltd & Ors*, Meenan J. held that under the new form of O. 8 the court only had to apply the test as to whether there were "special circumstances" which justified a renewal of the summons: see paragraph 10 of the judgement.

53. In *Ellahi v. Governor of the Midlands Prison & Ors* [2019] IEHC 923, O'Moore J. came to the conclusion that there were two hurdles for a plaintiff to overcome when making an application for renewal of a summons outside of one year from the date of issue of the summons. Firstly, they had to show that there were special circumstances justifying an extension of time in order to seek leave to renew the summons and secondly, there was a separate requirement to show that on the facts of the case there were other good reasons which justified the renewal of the summons. To that extent the "good reasons" test which applied under the old form O. 8 continued to be relevant. In reaching that conclusion O'Moore J. relied on the decision of Kelly J. (as he then was) in *Whelan v. HSE* (Unreported, High Court, 31st May 2017) and in particular to the dicta at para. 30 of the judgment, where Kelly J. stated:-

*"If an application to renew is made within 12 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."*

54. In the *Brereton* case, Hyland J. looked at the issue as to whether the test applicable under the new form O. 8 was a single test, or was a bifurcated test as proposed by O'Moore J. In the case before her the judge came to the view that there were special circumstances justifying the extension of time to bring the application for renewal. Those same circumstances justified a renewal of the summons, whether one applied the special circumstances test or the good reason test. However, given the divergence of judicial opinion that appeared on the case law before her, she came to the following conclusion in relation to the appropriate test at para. 11:-

*"In all the circumstances, given that the matter was explicitly argued in Ellahi, but not, it appears in Murphy, I will follow Ellahi and apply the good reason test to the renewal of the summons here."* (See generally paragraphs 5 – 11 of the judgment).

55. While I am hesitant to depart from the views expressed by my learned colleagues, O'Moore and Hyland JJ., I am of the view that the opinion expressed by Meenan J. in *Murphy & Anor v. ARF Management Ltd. & Ors* is the correct interpretation of O. 8 as it currently stands. I am of the view that there is not a bifurcated, or two-tiered, test to be applied under the current O. 8. I say this for two reasons: firstly, the wording of O. 8 makes it clear that if a plaintiff requires an extension of time to serve a summons and he/she makes that application within one year of the date of issue of the summons, such application is made to the Master of the High Court, who may order a renewal of the summons if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason. The rules go on to provide that after the expiration of 12 months, an application to extend time for leave to renew the summons shall be made to the court. Thus the rules themselves explicitly provide that outside the period of one year from the date of issue of the summons, an application can be made for renewal of the summons to

the court. There is no reference in the rules to needing the permission of the court, or an extension of time, to bring such an application beyond the one-year period.

56. Secondly, if it were necessary to have an extension of time to make the application to renew the summons, that extension would have to be granted under O. 122 of the rules. However S. I. 482/2018 specifically precludes the application of O. 122 to the new O. 8. It should be noted that that was not the position at the time of the decision of Kelly J. in *Whelan v. HSE*.
57. Accordingly, I am of the view that there is only one test applicable when an application is made to the High Court for renewal of a summons, which application is made more than one year from the date of issue of the summons. That test is whether there are "*special circumstances*" justifying such renewal and such circumstances have to be stated in the order of the court. This is entirely consistent with the rules as currently drafted.
58. The issue of delay remains relevant to the consideration of whether there are "*special circumstances*" which justify the renewal, as pointed out by Hyland J. in *Brereton*. The longer a plaintiff delays beyond one year from the date of issue of the summons, the more difficult it will be for him/her to persuade the court that there are special circumstances which justify the renewal of the summons.
59. This is also consistent with the dicta of Clarke J. (as he then was) in *Moloney* at paragraphs 5.7 and 5.8, where he opined that while it could be a valid reason for not serving the summons, that a plaintiff in a medical negligence action was awaiting an expert report on liability, but the plaintiff had to satisfy the court that he/she had moved with expedition to get such report. Thus, a delay in making an application for renewal of the summons remains relevant to the consideration of whether there are special circumstances justifying such renewal. The longer a party delays, the harder it will be for him/her to establish special circumstances justifying a renewal of the summons.
60. Having considered the chronology of events as set out in detail earlier in this judgment, together with the helpful and learned submissions of counsel, the court has come to the view that the argument put forward by senior counsel on behalf of the defendant to the effect that MacGrath J. did not have jurisdiction to make the order renewing the summons, is correct.
61. The terms of O. 8, r. 1 as inserted into the rules by virtue of S.I. 482/2018 were considered by Meenan J. in *Murphy & Anor v. ARF Management Limited & Ors*. In the course of his judgment, he analysed the differences between the old O. 8 and the new O. 8. He came to the conclusion that the following were the material amendments:-
  - "(i) *The period of renewal was reduced from 6 months to 3 months;*
  - (ii) *The words 'and so from time to time during the currency of the renewed summon' in the original O.8 are not repeated in the amended O.8;*

- (iii) *The original rule provided that the court may order a summons 'be renewed' whereas the amended rule provided that the court may order 'a renewal' of the summons; and*
- (iv) *Under the original rule the court may renew a summons 'if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason' whereas the amended rule provided that 'the court ... may order a renewal of the ... summons ... where satisfied that there are special circumstances which justify an extension ...'"*

62. In that case, Meenan J. had to consider whether the court had jurisdiction under the new O. 8, r. 1 to grant more than one renewal of the summons. Having regard to the amendments that had been made to the order, he came to the conclusion that under the provisions of the new O. 8, there could only be one renewal of the summons, either by the Master of the High Court, or by the court itself, as the case may be. He came to that conclusion due to the fact that the words "[...] *and so from time to time during the currency of the renewed summons*" had been deleted from the amended O. 8. He noted that it had been those words that had enabled multiple renewals by the court, provided that the application was made during the currency of the renewed summons. He found that the absence of those words clearly indicated that more than one renewal was no longer permissible.

63. He further held that the original O. 8 referred to "[...] *may order that the original [...] summons be renewed [...]*"; whereas the amended O. 8 referred to "*a renewal of the [...] summons*" as opposed to "*renewal*" which could be both in the singular and in the plural, see s. 18 of the Interpretation Act, 2005. He was of the view that that interpretation was consistent with the effects of the deletion of the words in the original rule, which he had already referred to, which permitted renewals on more than one occasion. In these circumstances he came to the following conclusion at para. 13 of the judgment:-

*"By reason of the foregoing, I am satisfied that, on its true construction, the amended O. 8, as provided for by S.I. 482 of 2018, provides that a court can only renew a summons on one occasion. It is no longer permissible for a court, having already renewed a summons, to order a further renewal."*

64. The court is satisfied that the interpretation of the current O. 8, r. 1 as set out by Meenan J. in *Murphy & Anor v. ARF Management Limited & Ors* is the correct interpretation of this rule. Accordingly, it is clear that there can only be one renewal of a summons under O. 8, r. 1. As the summons in this case had already been renewed by order of the Master of the High Court dated 22nd November, 2016, the court did not have jurisdiction to grant a further renewal of the summons by virtue of the application made to it in July 2019. As the court did not have jurisdiction to grant a second renewal of the summons, this Court will set aside the renewal of the summons which had been granted by virtue of the order made on 15th July, 2019.

65. As the court has reached the view that MacGrath J. did not have jurisdiction to make the order extending the time for service of the summons, which was made in July 2019, the issue of whether there were special circumstances justifying such renewal does not arise. However, even if the court is wrong in its finding on the jurisdiction point, the court is not satisfied that the plaintiff has established that there were special circumstances justifying the renewal of the summons in July 2019.
66. While it was urged on the court by Mr. Counihan SC on behalf of the plaintiff, that the court should have regard to the fact that this was a medical negligence case in which it was necessary to await a report from an expert confirming that there had been negligence on the part of the defendant, its servants or agents, prior to effecting service of the summons on the defendant, the court is not satisfied that the mere fact that this is a medical negligence action, where the plaintiff does not have the added luxury of submitting a claim to PIAB and thereby obtaining an additional period under the Statute of Limitations, constitutes a good reason why extra indulgence should be given to such plaintiffs. Such an argument was considered by Hyland J. in the *Brereton* case and was rejected in the following terms:

*"[...] I should address at the outset an argument raised by the plaintiff to the effect that she was in an unusual situation as compared with the plaintiffs who were bringing proceedings for personal injury and who had to go through the Personal Injuries Assessment Board in that such plaintiffs had, overall, a considerably longer period within which to serve a personal injuries summons. I do not accept this submission. The fact that the rules applicable to medical negligence cases differ from those applicable to other types of personal injury actions cannot mean that plaintiffs bringing medical negligence cases are to be treated in a more indulgent fashion insofar as renewals of a summons is concerned."*

67. In *Moloney v. Lacey Building and Civil Engineering Limited* Clarke J. (as he then was) considered the question of whether the absence of an expert's report would justify the failure to serve a plenary summons. He stated that it was clear that the absence of an appropriate expert's report would only justify a failure to serve a plenary summons where the existence of the report concerned would be reasonably necessary in order to justify the commencement of proceedings in the first place. He went on to state as follows at para. 5.8:-

*"In summary, therefore, insofar as the absence of an appropriate expert report may be put forward as a good reason for not serving a plenary summons, it seems to me to follow that the expert report concerned must be reasonably necessary in order to justify the decision to responsibly maintain proceedings in the first place, rather than be necessary in order to take further steps in the proceedings (such as the drafting of a statement of claim or bringing the case to trial) and, it must also be established that any delay occasioned by the absence of the expert report concerned was reasonable in all the circumstances, such that appropriate*

*expedition was used by the party placing reliance on the absence of the expert report concerned, in attempting to procure same."*

68. The issue of delay was also considered by Hyland J. in the *Brereton* case, where the learned judge looked at the *Chambers* case and noted that there had been inadvertence on the part of the plaintiff's solicitor to formally serve the defendant, notwithstanding the fact that he had previously furnished a copy of the summons to the defendant's insurers and had entered into correspondence with them, but had, through inadvertence, neglected to formally serve the defendant within the prescribed period. In the case before her there had been a clear intention to serve the summons within time, but for a variety of reasons that had not been done. She stated as follows at para. 29:-

*"In both cases, inadvertence explains why the summons was not served within time. In neither case was there excessive delay before the application was made. In Chambers, the application was made six months after the twelve-month period expired. In this case the application was made two and a half months after the twelve-month period expired."*

69. In the course of her judgment, Hyland J., having looked at the varying periods of delay that had occurred since the expiry of the twelve-month period within which to serve the summons and the date upon which the application for renewal had been made in previous cases, she went on to state that she was conscious that with the change in the legal test to "special circumstances" under the new O. 8, much shorter periods of delay were likely to be treated as sufficient to justify a refusal to renew a summons. She stated that had the period of delay been longer, by even a month or two, her approach to the case before her, where the delay had been two and a half months from expiry of the initial period, would have been different. However, she stated that in the context of a twelve-month period within which to issue a summons, it was her view that a ten-week delay in the context of that case was sufficient to persuade her that the balance of justice favoured upholding the decision to renew the summons.
70. In the present case there has been inordinate delay in effecting a formal service of the summons on the defendant. The summons was issued in November 2015 and the initial application to the Master of the High Court seeking a renewal of the summons was made on 22nd November, 2016. The summons was not served within the six-month period that was provided for under the Master's Order. It is not possible for the plaintiff's solicitor to plead in aid of the plaintiff's position, the fact that he mistook the legal position. The period of six months was provided for under the old O. 8. While it was regrettable that the plaintiff's solicitor was not aware of this fact, either from his knowledge of the rules, or by taking up a copy of the Master's order, he cannot plead his lack of knowledge as a means to resist the defendant's application.
71. Upon receipt of the report from Prof. Lees, a decision was made by someone that it was appropriate to serve the summons and a purported service thereof was effected on 13th November, 2017. It is difficult to see how the taking of that step, can be seen as being consistent with the later averment that the report from Prof. Lees was inconclusive and

therefore not sufficient to warrant the service of proceedings on the defendant. The actions of the plaintiff's solicitor run counter to that argument. It may well be that counsel recommended that a better report from the point of view of the plaintiff, or a stronger report from the point of view of establishing liability, should be sought from a different expert, but that does not of itself mean that the plaintiff can defer serving the proceedings for an inordinate period of time until such report came to hand.

72. It was submitted on behalf of the plaintiff, that the court should have regard to the fact that if the summons is not renewed her action may well be statute barred. That argument was considered by O'Moore J. in the *Ellahi* case, where he quoted extensively from the judgment in *Whelan v. HSE* where Kelly J. (as he then was) having reviewed the cases which considered the relevance of the fact that the plaintiff's case may be statute barred if the summons is not renewed concluded as follows at para. 44:-

*"These cases indicate that the courts have moved from the sort of indulgence demonstrated towards plaintiffs in the Baulk and McCooey cases to a position which takes account of the injustice which may be visited on a defendant in having to defend a stale claim, the underlying policy of the Statute of Limitations and the obligation on courts to ensure that proceedings progress with reasonable speed."*

73. O'Moore J. went on to summarise the position as follows at para. 22:-

*"[...] in summary, on the authority of Whelan, the following two propositions are established. Firstly, the question of prejudice on the part of the defendants does not in itself decide the fate of this application. Secondly, the argument made before me by counsel for the plaintiff that the summons should be renewed because of the possibility that the claim will otherwise potentially be statute barred is not one that should succeed."*

74. In the *Brereton* case, Hyland J. adopted a slightly more equivocal approach to the issue of the effect on the plaintiff of non-renewal of the summons, when she stated as follows at para. 31:-

*"[...] I am also acutely conscious of the very clear line of case law to the effect that a plaintiff being statute barred is not in itself a sound basis for ordering renewal of a summons (see Whelan v. HSE). Nevertheless, it is clear from Chambers that the likely consequences for the plaintiff of a refusal to renew from the point of view of the operation of the Statute of Limitations are at least potentially relevant. For that reason, I consider it appropriate to consider this issue in considering the potential hardship to the parties."*

75. In the circumstances of this case, I am satisfied that the fact that the plaintiff may be statute barred if the summons is not renewed, is more or less balanced out by the issue of prejudice to the defendant if the summons is renewed. A hardship will be worked on either party no matter which way the decision is made. If the summons is not renewed the plaintiff may lose her cause of action against this defendant. However, if the

summons were to be renewed, while the action itself may turn largely on medical records, it is undoubtedly the case that there would be some viva voce evidence that could be very relevant, in particular in relation to the statement that was alleged to have been made to the plaintiff by the surgeon on 19th December, 2014. Being faced with a stale claim many years after the date of the operation, or the date of that alleged statement, puts the defendant at a considerable disadvantage. Accordingly, I am of the view that a hardship would be worked on either party no matter what order is made.

76. At the end of the day, the undeniable fact is that even if the plaintiff had made her application for a second renewal of the summons, immediately upon receipt of Prof. Lees' report in November 2017, she would still have been out of time to seek a renewal of the summons, even under the more lenient terms of the old O. 8, because she could only have sought such renewal during the currency of the previous period of renewal, which had expired six months earlier on 22nd May, 2017.
77. Her position was also perilous due to the fact that there had been inordinate delay in obtaining the further report from Dr. Clements and then making the application to the court in July 2019. As Clarke J. pointed out in the *Moloney* case, parties seeking a renewal on the basis of the delay in obtaining an expert's report, have to establish that they moved with all reasonable expedition in obtaining that report. I am not satisfied that the plaintiff has discharged such burden in relation to obtaining the report from Dr. Clements. For these reasons, the court is not satisfied that the plaintiff had established special circumstances justifying the renewal of the summons at the time that the application was made before MacGrath J. on 15th July, 2019.
78. Accordingly, for the reasons set out herein, the court grants the application made by the defendant to set aside the renewal of the summons, which was effected by order of the High Court on 15th July, 2019.