[2019] IEHC 832

THE HIGH COURT

[2017 No. 2327 P]

BETWEEN

FRANK CHANDLER

PLAINTIFF

– AND –

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 9th December, 2019.

1. The facts underlying this application to set aside an *ex parte* renewal of Mr Chandler's personal injuries summons are best explained by way of the chronological summary that follows:

1983.	Mr Chandler commences employment with the Irish Naval Service.
2010.	Mr Chandler's medical advisors claimed to have become aware that Mr Chandler suffers from high blood pressure.
07.12.2013.	Mr Chandler suffers a heart attack.
07.12.2013-July 2015.	Mr Chandler is out of work.
05.02.2017.	Mr Chandler's medical records received by his solicitor.
17.02.2017-2.03.2017.	Mr Chandler receives advice from Senior Counsel to issue but not serve proceedings pending medico-legal investigations.
13.03.2017.	Personal injuries summons issues.
April 2017.	Mr Chandler's solicitors seek Dr Kurbaan's terms and conditions.
25.08.2017.	Dr Kurbaan agrees to act for Mr Chandler.
25.09.2017	Date sworn to as date of receipt of Dr Kurbaan's first report. (See also 23.11.2017).
28.08.2017.	Brief sent to Dr Kurbaan.
26.09.2017.	Mr Chandler's solicitors issue letter to Minister for Defence advising that they are representing the plaintiff in a claim for personal injuries and ask the Minister to admit liability.
13.11.2017.	State Claims Agency, by email, request further details.
23.11.2017.	Date sworn to as date of receipt of Dr Kurbaan's first report. (See also 25.09.2017).

29.11.2017.	Mr Chandler's solicitors reply by email to State Claims Agency's request for further details. State Claims Agency acknowledges receipt of email.
30.11.2017.	State Claims Agency requests signed authority to take up Mr Chandler's medical records.
12.03.2018.	Personal Injuries summons expires without being renewed.
04.09.2018.	Mr Chandler's solicitors discover that summons has not been served.
12.9.2018.	Mr Chandler's solicitors apply *ex parte* to renew personal injuries summons; renewal order granted.
26.11.2018.	Personal Injuries Summons (with renewal order) served on State Claims Agency.
3.12.2018.	State Claims Agency requests copy of affidavit grounding renewal application and nominate RDJ to accept service of proceedings.
13.12.2018.	Personal Injuries Summons served on RDJ. Grounding affidavit served on State Claims Agency. RDJ send letter to Mr Chandler's solicitors seeking copy of motion and affidavit grounding renewal order.
21.12.2018.	Copy of motion and grounding affidavit sent to RDJ.
04.1.2019.	RDJ write to Mr Chandler's solicitors acknowledging receipt of original/copy summons and requesting copy of motion and grounding affidavit.
11.1.2019.	Mr Chandler's solicitors write to RDJ attaching copy of letter of 21.12.2018 together with a copy of the motion and grounding affidavit. Letter also requests original writ, acceptance of service and entry of appearance.
13.3.2019.	Mr Chandler's solicitors write to RDJ requesting original writ and acceptance of service.
02.4.2019.	RDJ letter confirming receipt of instructions to apply to set aside renewal order.
10.4.2019.	Notice of motion and grounding affidavit in set-aside application filed.
23.5.2019.	Replying affidavit sworn and served.

30.5.2019.	Motion assigned hearing date of 18.11.2019.

2. Order 8(1) of the Rules of the Superior Courts (Renewal of Summons) 2018 (S.I. No. 482 of 2018) allows for renewal of a summons "*if* [the court is] *satisfied that reasonable efforts have been made to serve such defendant, or for other good reason*". This application is focused on whether there was "*other good reason*". Here, unfortunately for Mr Chandler, no "*good reason*" has been identified for the renewal of his summons.

3. The court has been referred to a number of cases, all of which point to the following four Supreme Court decisions as the ultimate decisions in this area:

   (1) *Baulk v. Irish National Insurance Co. Ltd*. [1969] IR 66 ("*Baulk*"), where Walsh J., for the Supreme Court, concluded, at p. 72, that in circumstances where the defendants "*have been aware from the very beginning of the plaintiff's intention to sue them, as they were parties to the motion which resulted to leave being given to name them as defendants*", no injustice would be done by allowing renewal of a summons in circumstances where commencement by fresh summons would have led to the claim being statute-barred.

   (2) *McCooey v. Minister for Finance* [1971] IR 159 ("*McCooey*"), where Ó'Dálaigh C.J., for the Supreme Court, indicated, at p. 165, that the fact that Mr McCooey's claim if made by a fresh summons would be statute-barred *and also* that the fact that at an early date the defendants had been aware of that claim, constituted *"good reason*" for renewal.

   (3) *O'Brien v. Fahy t/a Greenhills Riding School* (Unreported, Supreme Court, 21st March 1997) ("*O'Brien*"), where Barrington J., for the Supreme Court concluded in a brief *ex tempore* judgment, "*applying the principle in McCooey*" that in circumstances where "*the Defendant was not told until some four years afterwards that a claim would be brought against her and one of the factors in…McCooey…was that the Defendants had known right from the beginning that a claim would be made against them"*, renewal of a summons ought not to be allowed, notwithstanding that Ms O'Brien's claim would be statute-barred absent renewal.

   (4) *Roche v. Clayton* [1998] 1 IR 596 ("*Roche*"), where O'Flaherty J. for the Supreme Court concluded, at p. 600, by reference to *O'Brien* (which itself was decided by express reference to *McCooey*, which earlier case was decided by express reference to *Baulk*) that *"[i]t 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"*. This pronouncement cannot have come as a surprise to anyone who had read the decisions referenced at (1) - (3) above, all of which had factored in early knowledge of the intended law-suit as part of the rationale for the decisions given; nor does it appear that O'Flaherty J. saw himself as doing anything new in this regard: he sees himself to be following *O'Brien*, which had expressly followed *McCooey*, which had

expressly followed *Baulk*. O'Flaherty J. does add, at p. 600, that *"[t]he Statute of Limitations must be available on a reciprocal basis to both sides of any litigation"*, but in truth that is no more than to say that the any benefits under the Statute, as one would instinctively expect (and the Supreme Court has never indicated otherwise), applies, without discrimination between classes of beneficiary, to any beneficiary of same.

4. All four decisions of the Supreme Court considered above appear to be entirely consistent with one another. Hogan J. states, it is true, in *Monahan v. Byrne* [2016] IECA 10, para. 23, referencing the High Court decision in *Moloney v. Lacey Building and Civil Engineering Ltd* [2010] 4 IR 417, that *Baulk* and *McCooey* have been "*effectively qualified*". At the same time, however, he acknowledges that neither *Baulk* nor *McCooey* have been "*formally overruled*". Unless overruled they remain extant and, for so long as they do, so are the ultimate authorities, along with *O'Brien* and *Roche* in this area. The upshot of the foregoing is that it remains the view of the Supreme Court, as expressed in the above-considered sequence of four cases, none of which have been overruled by the Supreme Court, that the fact that a fresh summons would be statute-barred coupled, *e.g.,* with the fact that at an early date the defendants have been aware of a claim, can constitute "*good reason*" for renewal of a summons; or, as Hogan J. succinctly puts matters in *Moloney*, para. 31, effectively summarising the outcome of the Supreme Court precedents referenced above, "*the fact that the action might otherwise be statute-barred is not in itself a good reason such as might justify the court renewing the summons", i.e*. there must be more before a "*good reason*" could be said to present.

5. The court has been referred to the judgment of Finlay Geoghegan J. in *Chambers v. Kenefick* [2007] 3 IR 526, at p. 530, where she indicates, at paragraph [8], by reference, *inter alia*, to the above-mentioned decisions of the Supreme Court, though without any interrogation of same, and in a case where, at pp. 529 - 30, she indicates that "*Statute of Limitation difficulties…do not appear to me to be central to this application*", that particular sequencing should apply in a "*good reason*" application brought pursuant to Order 8(1) RSC. Although considerable emphasis was placed on the judgment in *Chambers* by counsel for the defendants at the hearing of the within application, the court respectfully does not consider that the within application is one in which sequencing is, in truth, a real issue. This is because Order 8(1) RSC can only be invoked successfully where there is "*good reason",* the first step of the *Chambers* test simply requires the court to ask itself 'is there 'good reason'?' and in this case, no matter how one comes at matters, no "*good reason*" has been offered for renewal of the summons. It is important not to be unduly ritualistic about sequencing and doubtless there will be cases in which an actual or potential good reason is agreed and/or so apparent that a court will leap to the next limbs of analysis, but this is not such a case; no actual or potential *"good reason*" has been offered. In this regard, the following points seem to the court to be of especial significance:

. It is accepted that it was prudent for Mr Chandler's solicitor to issue, but not serve, the proceedings on 13.3.2017.

. From the date of receipt of Dr Kurbaan's report (on whichever is the correct date) there was no valid reason to refrain from serving the summons. In truth, there was a clear obligation to proceed with some expedition at this point, given that the summons was being issued long after the alleged events giving rise to the proceedings. The only reason given for the delay of approximately one year is inadvertence on the part of Mr Chandler's solicitor. However, such inadvertence is not generally good reason for a summons to be renewed (see, *inter alia, Moynihan v. Dairygold Co-operative Society Ltd*. [2006] IEHC 318, at pp. 13 - 15).

. The court respectfully does not accept that the letter of 26.9.2017 advances matters for Mr Chandler: that letter does not disclose that proceedings were in being; curiously the correspondence then effectively rested on 30.11.2017 with a request for an authority (unprovided up to the date of hearing) to take up Mr Chandler's medical records.

. The court respectfully does not accept that the defendants have suffered no prejudice by reference to what has occurred:

The claim appears from the summons to date back to 1983; there is a selective quote in the evidence before the court from Dr Kurbaan's report which refers to Mr Chandler's blood pressure prior to his heart attack and points to an issue with cholesterol "*for many years".*

- The court would likely have given greater weight to the claim that this is a 'documents only' claim, were it in a position to do so. Unfortunately the court (and indeed the defendants) have no sense as to whether this is so, given that, *e.g*., Dr Kurbaan's report is not before the court and Mr Chandler, to the date of hearing of this application, has never given an authority to take up the relevant records.
- The defendants, it seems to the court, are prejudiced by renewal of a summons in circumstances where this requires defence of a stale claim relating to events that date back at least nine years; in this context due weight to the policy considerations underpinning the Statute of Limitations does arise to be applied.

6. As to the alleged delay in the issuance of the within application, any (if any) such delay (and the defendants have to be allowed some time to determine how to proceed) falls, it seems to the court, to be viewed in the context of the bifurcated service of 13.12.2018 and, more significantly, the fact of the greater than one-year delay in Mr Chandler's progressing proceedings which were *prima facie* statute-barred at the time they issued.

7. Even if one brings to the within application the (characteristically fair-minded) approach taken by O'Neill J. in *O'Grady v. Southern Health Board* [2007] IEHC 38, it is notable that O'Neill J. permitted the renewal there in circumstances where the plaintiff was engaged in obtaining expert medical opinion right up to the point of renewal; here, by contrast, Mr Chandler received the necessary opinion a year prior to the renewal being sought.

8. It is very much to be regretted that Mr Chandler finds himself in a position where the claim he seeks to bring, following upon his heart attack, was ever allowed to expire. But the unfortunate truth is that it was allowed to expire and no "*good reason*" has been offered for the renewal of the summons. Absent such "good reason", the within application cannot but succeed.