Neutral Citation: [2017] IEHC 637

THE HIGH COURT

[2014 No. 7479 P.]

BETWEEN

GERARD BYRNE

PLAINTIFF

AND

STRYKER IRELAND LIMITED, MAURICE NELIGAN AND UPMC BEACON HOSPITAL

DEFENDANTS

JUDGMENT of Mr. Justice Eagar delivered on the 20th day of October, 2017

1. This is a judgment in respect of a notice of motion dated the 21st of November, 2016 on behalf of the first named defendant seeking:-

> (1) An order pursuant to O. 8, r. 2 of the Rules of the Superior Courts 1986 (as amended) setting aside the *ex parte* order of this Court dated the 9th of May, 2016 renewing the within personal injury summons; and
>
> (2) an order setting aside the *ex parte* order of this Court made on the 4th of July, 2016 granting leave to the plaintiff to seal and serve a duplicate of the within personal injury summons in lieu of the origin.

2. The history of the proceedings is as follows: a personal injury summons was issued on the 20th of August, 2014 on behalf of Gerard Byrne, the plaintiff in which he seeks damages against the three named defendants. The summons was issued on the 20th of August, 2014 and the summons was to be served within twelve calendar months from that date unless the time for service was extended by this Court. The first named defendant is a company limited by shares involved in selling, supplying and provision of prosthetic devices to be used in implants.

3. The plaintiff claimed that on or about the 21st of October, 2009 he underwent a total right hip replacement under the care of Dr. Maurice Neligan in which a Stryker implant was inserted into his person. On or about the 20th of September, 2012 the plaintiff visited his General Practitioner, insert name here, complaining of an unusual sensation in his right knee. His GP referred him to the second named defendant who had previously performed the plaintiff's hip replacement on both sides. The second named defendant examined the plaintiff on the 8th of October, 2012 and reported that he had developed the unusual complication of squeaking of his right hip which he identified as a problem unique to Stryker implants. In light of this complication, it was necessary that the plaintiff, under the care of the second named defendant, undergo total right hip revision for the squeaking components on the 28th of September, 2012 on which the socket was replaced. As a result of this the plaintiff alleges that he sustained severe personal injuries, loss, damage and inconvenience.

4. On the 6th of May, 2016 by way of *ex parte* docket the plaintiff applied to the High Court seeking an order granting leave to renew the plenary summons pursuant to O. 8, r. 1 of the Rules of the Superior Court and an order providing for the extension of time for making the application for leave to renew the within plenary summons pursuant to O. 8, r. 1 of the Superior Court.

5. This was grounded on the affidavit of James Flynn who is the principal in the firm of J.T. Flynn solicitors and he referred to the proceedings. He stated that the matter relates to a personal injury/medical negligence action resulting from the alleged negligent insertion of a defective product namely a Stryker hip prosthetic system into the plaintiff's right hip and he says that the proceedings were issued by the plaintiff's former solicitors Flynn and O'Donnell solicitors on the 20th of August, 2014. At the time of issuing the proceedings an appropriate specialist medical legal opinion was not to hand in respect of the plaintiff's injuries and for the purpose of protecting the plaintiff's position and interest the personal injury summons was issued by Flynn and O'Donnell solicitors in accordance with Order 1A of the Rules of the Superior Courts.

6. He then averred that a medical specialist opinion from a consultant orthopaedic surgeon Mr. Antoni Nargol was emailed to Flynn and O'Donnell solicitors on the 24th of January, 2015 with the report indicating that the plaintiff's injuries were attributable in the main to the wrongs of the first named defendant. He says that the medical opinion was placed on the client's file. He then stated that for reasons that are not fully within his knowledge, Flynn and O'Donnell solicitors started to experience problems with the management of the legal practice in January 2015 and that as a result the management of Flynn and O'Donnell decided that the practice was not able to continue to operate from the same office premises due to a breakdown in communications and relations within the management and that a second premises was retained in or around July 2015 to allow the practice to continue to operate as a single entity.

7. The affidavit of Mr. Flynn further stated that a number of the files were transferred to the new and second premises situated in Temple Bar, Dublin 2. The file relating to Mr. Byrne was one of the files that was transferred to the second premises and due to the fact that the second premises primarily dealt with issues relating to legal costs and the preparation of bills of costs, the file was placed into a storage box and retained in the second premises. It was submitted that it was not obvious or prominent to either partner in the firm as to who retained what files and the within file was assumed by both partners to be with the other partner and being progressed in the usual fashion.

8. He then averred that relations in the practice of Flynn and O'Donnell solicitors completely broke down in March 2016 with the partnership ceasing to operate in respect of any litigation files, with all active files being distributed to other legal practices. He says that it was during this distribution process that Mr. Byrne's file was unearthed and transferred to his practice. He says that the plenary summons had expired on the 20th of August, 2015 and following receipt of the file Mr. Flynn immediately issued a notice of change of solicitor and, from a perusal of the file and the medical opinion furnished by Mr. Antoni Nargol, it was his intention to issue a notice of discontinuance in respect of the second and third named defendants and progress the case as against the first defendant only namely Stryker Ireland Ltd.

9. It was contended that no prejudice will be caused to the first named defendant whom it is intended to pursue exclusively by the within summons being renewed. If in due course the first named defendant seeks to raise a defence relating to the delay or seeks to rely on the statute of limitations, it was submitted by Mr. Flynn that the first named defendant could not be prejudiced in any way following on or on notice of the within action since the 24th of June, 2014 following a letter of claim being sent to them by the plaintiff's former solicitors outlining the plaintiff's claim and its nature. Mr. Flynn referred to this letter which was addressed to Stryker

Ireland Ltd., Arthur Cox Building, Earlsfort Terrace, Dublin 2 dated the 24th of June, 2014 which sets out the claim of Mr. Byrne. It was submitted that the balance of justice lies in favour of the application to renew the plenary summons being granted. On the 9th of May, 2016 McDermott J. ordered that the time for applying for the renewal of the personal injury summons be extended to that date and that the summons be renewed for a period of six months from the 9th of May, 2016.

10. By *ex parte* notice of motion, the plaintiff applied for an order pursuant to O. 8, r. 4 of the Rules of the Superior Courts granting leave to the plaintiff to replace the lost personal injury summons and this was grounded on the affidavit of James Flynn of J.T. Flynn solicitors currently on record for the plaintiff and he outlined the history. He referred to the order of McDermott J. on the 9th of May, 2016 and stated that he made multiple copies of the original summons for the purposes of that application. He says that on being granted leave to renew the summons by McDermott J., he walked straight from the Four Courts complex to his office situated in Dublin 2 and he did not leave the papers associated with the renewal application out of hand or sight until the papers were filed back in his office.

11. Following a period of a week Mr. Flynn instructed his legal secretary to recover the file for the purpose of having the renewed personal injury summons stamped by the Central Office but it became apparent that the original personal injury summons was not in the file. He said that since that occurrence he has with his staff searched his whole office from top to bottom on a number of occasions over the course of a number of weeks and has not been able to find the original personal injury summons.

12. Mr. Flynn states that he had cause to redraft the original summons by reason of McDermott J. requesting that a typo in the form of "please insert" be deleted from the original summons which was left in the original summons by omission. He then referred to the newly drafted personal injury summons and he says that he did not believe that any prejudice would be caused to the first named defendant by personal injury summons being sealed and served as if the original summons was filed and renewed by the order of the court.

13. On the 4th of July, 2016 McDermott J. heard the *ex parte* application and ordered that pursuant to O. 8, r. 4 of the Rules of the Superior Courts that the plaintiff be at liberty to seal and serve a duplicate summons in lieu of the origin.

14. By notice of motion dated the 21st of November, 2016 and returnable for the 12th of December, 2016 the first named defendant applied to this Court for the following reliefs:-

> (1) an order pursuant to O. 8, r. 2 of the Rules of the Superior Courts 1986 (as amended) setting aside the *ex parte* order of the court made on the 9th of May, 2016 renewing the within personal injury summons; and
>
> (2) an order setting aside the *ex parte* order of the court made on the 4th of July, 2016 granting leave to the plaintiff to seal and serve a duplicate of the within personal injury summons in lieu of the origin.

15. This application was grounded on the affidavit of Juliana Flavia Schwietzer Mia van Boekhout. She describes herself as the legal lead coordinator in Stryker Europe. She refers to the affidavit of James Flynn and the various issues summarised as follows:-

> (1) Pleadings were issued in the absence of an appropriate specialist medical legal opinion.
>
> (2) The medical legal opinion was received by the former solicitors on the 24th of January, 2015. The legal opinion was placed on the client file, problems arose in relation to the management of Flynn and O'Donnell and the file was transferred to the second premises in a storage box.
>
> (3) The practice of Flynn and O'Donnell ceased to operate in respect of any litigation files from March 2016 and the file was discovered and transferred to the practice of J.T. Flynn and Company solicitors.

16. She says that despite the reasons put forward by Mr. Flynn in respect of the failure to serve the personal injury summons this did not constitute good reason to grant renewal of the summons and she says that it appears that James Flynn was a consultant in the firm of Flynn and O'Donnell solicitors – the plaintiff's former solicitors.

17. She says that as the plaintiff's medical opinion was received on the 24th of January, 2016 and this was placed on the client's file, the file must have been reviewed at this time and it was incumbent on the plaintiff's former solicitors to serve the proceedings. She says the balance of justice lies in favour of setting aside the renewal of the summons. She said that the plaintiff's solicitors had all requisite details as of January 2015 to proceed with the plaintiff's claim should the plaintiff wish to do so. No action was taken until May 2016 when the plaintiff's solicitors moved the *ex parte* application. She then refers to the *ex parte* application to serve a duplicate summons in lieu of the original. She also states that the amended personal injury summons is not an exact duplicate of the original insofar as the authorisation number from the Personal Injury Assessment Board was not inserted in the original summons that has been included in the amended summons and she seeks the courts relief sought in the notice of motion.

18. The next affidavit is that of James Flynn who states that he was a former consultant in the plaintiff's former solicitors Flynn and O'Donnell. He says that the firm of Flynn and O'Donnell commenced practice in 2012 and was in a somewhat unique position of being a traditional legal practice together with being a legal cost accountancy practice that comprised of two solicitors – Jonathan Flynn and Shane O'Donnell with a small support staff. His involvement and role with the practice was extremely limited, the primary reason for his involvement being to provide whatever guidance and advice he could in relation to legal costs of the business, given his former position as Taxing Master of the High Court. Mr. Flynn retired as Taxing Master in 2011 following eighteen years in that position and following his retirement he did not wish to take on any full-time role legal or otherwise nor would he have any daily involvement in the running of Flynn and O'Donnell.

19. He said he was not listed on the role of solicitors over the course of a previous number of years and he was only reassigned onto the role in 2015 and received his practicing certificate on the 1st of September, 2015. He refers to the issues which he averred to in his affidavit grounding the applications to the court.

20. He also states that at no point prior to the second premises being retained by Flynn and O'Donnell was either partner informed as to the receipt of the email by Ms. Byrne legal secretary regarding Mr. Nargol's opinion. He said that no blame was being placed on Ms. Byrne's door in circumstances where the medical opinion was sent to Flynn and O'Donnell in a very unorthodox fashion. He submitted that the balance of justice lies with the court permitting the summons as currently reflected to stand.

21. He states that the level of hardship that the parties would face further supports the premise that the summons as it currently reflects should be let stand. He relies on the fact that the defendant was on notice as of the 24th of January, 2014, four months

before the summons was originally issued by the Central Office that the plaintiff was bringing the action.

22. He says that on the other hand the plaintiff will experience extreme hardship should the summons as it currently reflects not be allowed to stand. The plaintiff had endured much discomfort and pain over the course of the last number of years as a direct result of a product furnished to him by the defendant to the point that his health had deteriorated significantly. Furthermore, the plaintiff had endured much stress, anxiety, inward frustration and anger as a result of the actions of the defendant.

23. He said that in a very unfortunate turn of events the plaintiff was in 2016 diagnosed with cancer, and he refers to a medical report by Professor Susan McKiernan consultant hepatologist. He further states that Ms. van Boekhout has not demonstrated any prejudice that the defendant will have suffered.

24. The next affidavit is the supplemental affidavit of Ms. van Boekhout sworn on the 12th of January, 2017. She says that despite Mr. Flynn's affidavit in respect of his work with the firm, she says that the responsibility for dealing with the particular client or file rests with the firm as a whole and not with any individual solicitor. She makes a number of points: the email report of Mr. Nargol was exhibited in redacted form and that no explanation or justification was provided for the redaction.

25. She notes that Mr. Flynn states that at no point prior to the second premises being retained by Flynn and O'Donnell solicitors was either partner in Flynn and O'Donnell informed as to the receipt by Ms. Geraldine Byrne of Mr. Nargol's email of the 24th of January, 2015. Mr. Flynn says that no blame was being placed on Ms. Byrne in circumstances where the medical opinion was sent to Flynn and O'Donnell in a very unorthodox fashion. She did not accept that medical opinion sent by email was a very unorthodox fashion.

26. She states that the email appears to have been forwarded from the recipient to Mr. James Flynn, the plaintiff's current solicitor then in his capacity as consultant on the 26th of January, 2015. She says therefore it was incorrect to state that the email was merely placed on the client file and if his role was simply a consultancy role in respect of legal costs the question arises as to why the email was forwarded to him. She also notes that no affidavit had been provided by Ms. Byrne.

27. The next affidavit is that of James Flynn sworn on the 30th of January, 2017 in response to the supplemental affidavit of Ms. van Boekhout. He says that he is not attempting to persuade the court that the use of an email simplicitor is an unorthodox means of communication but rather the fact that the medical opinion was contained in whole in a relatively short email, as opposed to an attached document or report. He said that Mr. Nargol had some months earlier been provided with the relevant reports, scans and other documents on which to base his opinion, in respect of which it was expected a formal report would be the outcome.

28. He refers to the "unorthodox" nature of the opinion by reason of his experience of cases such as the present case, which contained both medical negligence and defect of product elements. At the time, the opinion sought would warrant a formal opinion being drafted by Mr. Nargol.

29. In relation to Ms. van Boekhout's affidavit and to the question of why the medical opinion of Mr. Nargol was forwarded to him by Ms. Byrne, Mr. Flynn states that Ms. Byrne is a long-standing personal friend of his spanning thirty years and she was also the wife of the plaintiff. He had recommended Ms. Byrne for her role as office secretary to the management of Flynn and O'Donnell solicitors in 2011, having worked with Ms. Byrne prior to taking office as Taxing Master of the High Court. He said that the forwarding of the email should not be interpreted as anything more than Ms. Byrne keeping him abreast of the progress of her husband's case.

30. The next affidavit is the second supplemental affidavit of Ms. van Boekhout. She refers to Mr. Flynn's averment that the email from Mr. Nargol was forwarded to him by Ms. Byrne as a result of his personal friendship with Ms. Byrne and to keep him abreast of the progress of her husband's case. She also refers to Mr. Nargol's opinion as against the second and third named defendants where Mr. Flynn says the averment of Mr. Nargol was that "I don't think there is a case for you to pursue". It is in respect of the case against the second and third named defendant.

31. Counsel on behalf of the first named defendant outlined the facts of the background to the proceedings and to the issues that arose and quoted from O. 8, r. 2 of the Rules of the Superior Courts.

32. Order 8, rules 1 and 2:-

> "1. No original summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons. After the expiration of twelve months, an application to extend time for leave to renew the summons shall be made to the Court. The Court or the Master, as the case may be, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed summons. The summons shall in such case 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.
>
> 2. In any case where a summons has been renewed on an ex parte application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order."

Counsel also referred to the decision in *Chambers v. Kenefick* [2007] 3 I.R. 526 where Finlay Geogheghan J. outlined a three stage test for applications made pursuant to O. 8, r. 2:-

> "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... the proper approach by this Court in

> determining whether or not it should exercise its discretion under O. 8, r. 1, where the application is based upon what is referred to therein as "other good reason", is the following. Firstly, the court should consider is there a good reason to renew the summons. That good reason need not be referable to the service of the summons. Secondly, if the court is satisfied that there are facts and circumstances which either do or potentially constitute a good reason to renew the summons then the court should move to what is sometimes referred to as the second limb of considering whether, because of the good reason, it is in the interests of justice between the parties to make an order for the renewal of the summons. Thirdly, in considering the question of whether it is in the interests of justice as between the parties to renew the summons because of the identified good reason, the court will consider the balance of hardship for each of the parties if the order for renewal is or is not made."

33. He also refers to *Moynahan v. Dairygold* [2006] IEHC 318 where Peart J. said that he regarded an application to set aside a renewal of a summons as a *de novo* hearing:-

> "On these *ex parte* applications, I take a reasonably benign view of delay in service of proceedings, provided that on a *prima facie* basis the affidavit grounding the application reasonably brings the plaintiff within the rule; but in court I have stated my view on many occasions that in the event of a defendant feeling prejudiced by the making of the renewal order, such defendant may of course come to court under O. 8, r. 2 [of the Rules of the Superior Court], and make such submissions as he/she may, as to why the order should be set aside, given that the renewal of the summons has the capacity to affect adversely the rights of the defendant without that defendant having been heard.
>
> The application to set aside the order is not in any sense an appeal against the making of the *ex parte* order. While it is couched as an application to set aside the order. I would characterise it also as being akin to a hearing de novo of the application - this time being on notice, so that each side is heard. In the present case, there is no doubt that the information and facts which the court has heard are more comprehensive in nature as a result of the affidavits filed on the present application, as opposed to the relatively brief factual summary contained in the affidavits filed by the plaintiff when the application was moved *ex parte*."

Peart J. continued:-

> "It is important to note the reference in O. 8, r. 1 of the Rules of the Superior Court to "other good reason" (my emphasis). It does not state simply "any reason". The court must therefore consider whether there is a reason offered as to why the summons ought to be renewed, and whether that is a good reason. That task requires the court in the present case to form a view as to whether the reason offered is one which justifies the inaction which occurred, especially in circumstances where it is now alleged that the delay has caused prejudice to the defendant's ability to defend, and in effect extends the limitation period under the Statute of Limitations from three years to over six years. It follows from the judgment of Barrington J. in *O'Brien v. Fahy*, unreported, Supreme Court, 21st March 1997, as well as that of Laffoy J. in *O'Reilly v. Northern Telecom (Ireland) Ltd.* [1999] 1 I.R. 214 that the mere fact that if the summons is not renewed the Statute of Limitations will defeat the plaintiff's claim is not of itself "other good reason" to renew the summons..."

He continued:-

> "The court is required in my view to reach the conclusion not only as to what is the true reason why the summons was not served within the proper time, but also to conclude that that reason justifies the failure to serve. It is in that sense that the word "good" must be read. Even if the court is satisfied that the reason is a good reason, it must then proceed, where prejudice is alleged, to consider matters such as the length of the delay, the conduct of the proceedings generally to date, whether this defendant was alerted in any timely manner or at all by the plaintiff that a claim might be made, and whether in all the circumstances the prejudice to the defendant in having to defend the proceedings after the length of time involved is such as to outweigh the undoubted prejudice to the plaintiff in being in effect debarred from proceeding with the claim at all, or whether, on the other hand, the prejudice to the plaintiff is in all the circumstances such as to justify depriving the defendant to his/her right to avail of the Statute of Limitations."

34. He also referred to the decision of Hogan J. in the Court of Appeal in *Monahan v. Byrne* [2016] IECA 10. In that case the plenary summons issued on the 7th of June, 2012 and was served on the 3rd of December, 2013, a considerably shorter delay than in this case.

35. He submits that the authorities demonstrate that the delay on the part of the litigants or their legal advisors will no longer be tolerated to the same extent as it once was. This is particularly so in the light of the obligations imposed on the court by the European Convention of Human Rights Act 2003 to ensure proceedings are determined in a reasonable time and he quoted from *Gilroy v. Flynn* [2005] 1 ILRM 290 where Hardiman J. stated:-

> "These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. Cases such as those mentioned above will fall to be interpreted and applied in light of the countervailing considerations also mentioned above and others and may not prove as easy an escape from the consequences of dilatoriness as the dilatory may hope. The principles they enunciate may themselves be revisited in an appropriate case. In particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional adviser, may prove an unreliable one."

He also quotes from O'Sullivan J.'s decision in *Allergan Pharmaceuticals (Ireland) Ltd. v. Noel Deane Roofing and Cladding Ltd. & Others* [2009] 4 I.R. 438:-

> "Finally the Supreme Court has made it clear in *Gilroy v. Flynn* that delay attributable to a professional adviser is now something to which the courts will, in effect, assign less weight by way of excusing delay given the courts' own independent obligation to ensure that civil proceedings are dealt with within a reasonable time."

The Need for Expert Reports

36. Counsel for the first named defendant also submitted that a party was not entitled to wait infinitely for an expert report before issuing or serving a summons. Litigants should only be afforded such time as is reasonably necessary. In the case of *Moloney v. Lacey Building and Civil Engineers Ltd.* [2010] IEHC 8 Clarke J. referred to *Bingham v. Crowley* [2008] IEHC 453 :-

"5.6 In *Bingham v. Crowley*, the plaintiffs, parents of a deceased person, sought to renew a summons in respect of a medical negligence claim. The plaintiffs claimed, *inter alia*, that the summons was not served as they were awaiting further expert medical opinion. Feeney J. noted that it was not averred that such opinion impacted on the ability to serve the summons and concluded as follows, at para. 34:-

> "The court is satisfied that the opinion of the first named plaintiff that additional reports were required from further medical experts was not a good reason for the non service of the plenary summons."

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 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."

Solicitor's Responsibility to Prosecute a Case

37. Counsel referred the court to *Mulcahy v. Coras Iompair Éireann* [2011] IEHC 292 where Peart J. made clear that a solicitor is ultimately responsible for ensuring a case has been progressed. In that case a legal executive in charge of the case was on sick leave for twelve months beginning in February 2006. However, during that period she would collect files from the office and work from home. The plaintiff's solicitor averred that he relied on assurances from the Legal Executive that the files were being kept up to date. It transpired that the plaintiff's file was not up to date and that certain sections were missing. A search for the missing files was compounded by the fact that the firm had moved offices. The file was eventually found in 2008.

38. Peart J. stated:-

> "I choose not to take account of the delay, in so far as there was any culpable delay up to the second application for renewal of the summons on the 27th February 2006, since that was something which the court will have considered on the occasion that application was granted.
>
> Thereafter, however, there is a litany of culpable delay. The fact that the plaintiff's solicitor relied upon his legal executive's assurances cannot excuse the delay. She was merely his employee, albeit one for whom he had a high regard. He must be regarded as being in overall charge of the case, and it would be incumbent upon him to ensure, while the matter was being handled outside his office, that it was being dealt with properly."

Breakup of the Firm

39. In *Kerrigan v. Massey Brothers* [1994] WJSC-HC 1172 Geoghegan J. made it clear that a breakup of a law firm does not constitute a good reason for renewing a summons.

> "Independently of whether the defendants would be prejudiced or not, there is no "good reason" within the meaning of the rule for renewing the summons. The matters put forward in the recent affidavits relating to the breakup of the firm of solicitors do not, when analysed, afford any good reason."

40. Counsel submitted that the plaintiff's application to renew the summons fails to satisfy the first limb of the test set out in *Chambers*, namely the need to establish a good reason for the renewal. This is particularly so in the light of the greater scrutiny which courts are now required to apply to the reason being offered by a plaintiff. The courts have made it clear that the plaintiff must show "good reason" and as Peart J. stated in *Moynahan* this is distinct from "any reason". The reason for the delay falls unequivocally at the door of Flynn and O'Donnell solicitors.

41. He submitted that in relation to the Nargol Report such a report was not necessary and ordinary to commence or serve proceedings on Stryker. No claims of professional negligence were pleaded. This does not constitute therefore a valid reason as it is clear from a perusal of Dr. Nargol's email that no substantive report would follow. Flynn and O'Donnell did nothing to pursue the substantive report alluded to in their affidavits.

42. He also submitted that when the secretary of Flynn and O'Donnell received Dr. Nargol's email she simply placed a copy on the client's file but in fact it was forwarded to James Flynn on the 26th of January, 2015 two days after it was received. Therefore, it cannot be argued that the email was simply placed on the file and no one knew about it.

43. The third reason he submitted related to a deterioration in relationship between the two partners in Flynn and O'Donnell and the decision to occupy two separate offices. This gave rise to confusion as to which party was charged with prosecuting the proceedings with each partner thinking the other was dealing with it. This does not qualify as a good reason in light of the authorities quoted above.

44. In considering the second limb of the test counsel submitted that the interests of justice dictate that the summons should not be renewed and has been culpable delay in the case. While Flynn and O'Donnell notified Stryker of the plaintiff's claim in June 2014 the summons issued in August 2014 and Dr. Nargol's opinion was received in January 2015, at no stage steps were taken to serve the summons on Stryker.

45. The case appears to have then gone into a stage of inertia until the ex parte application was made in May 2016.

46. Given the length of time it had taken to serve the proceedings he submitted that Stryker had suffered general prejudice in its ability to defend the proceedings. The initiation letter sent in June 2014 like any such letter contains no particulars of claim. Stryker could not be expected to take steps at that stage to defend potential proceedings that it knew very little about.

Counsel for the Plaintiff's Submissions

47. Counsel on behalf of the plaintiff submitted that the general principles that a court should consider in the exercise of its discretion were summarised by Finlay Geoghegan J. in *Chambers v. Kenefick and* the three pronged test which was outlined therein:-

> (1) Was there a good reason offered to the court to renew the summons;

(2) Does the interest of justice support the renewable permitted;

(3) Does the balance of hardship to each party lean in favour of the renewal standing.

48. He submitted that this approach was approved and applied in *Monahan v. Byrne and others (*already cited). He questioned as to how the court should assess whether the plaintiff had established "some other good reason" was examined by Peart J. in *Moynahan v. Dairygold Cooperative Society Ltd.* (previously cited) and he referred to Peart J. describing reference in O. 8, r. 1 to "other good reason". It does not simply say any reason.

49. Counsel submitted that the facts of this case as they relate to the failure to serve the summons as somewhat unique and distinguishable from *Moynahan* when one looks at the facts of the failure to serve in the instance case. In *Moynahan*, the plaintiff issued proceedings in a rushed manner on the last permissible date provided for under the statute of limitations and if so for the purpose of securing a defendant where an alternative defendant was seeking to avoid liability.

50. In this case, no such *ad hoc* ulterior motive existed or exists as demonstrated by the affidavits of Mr. Flynn, the plaintiff's original firm of solicitors issued the summons then shortly after it where the subject of (a) an unnecessary division of premises while continuing to operate under the one title and name due to the divergence of the views between the two partners.

51. He also sought to distinguish this case from *Moynahan* where the first named defendant was being put on notice by way of a formal letter of claim on the 24th of June, 2014, three months in advance of the summons being issued on the 20th of August, 2014.

52. He also said that in *Moynahan*, six years had passed from the date of injury to the notification of the proposed defendant and he submitted that this case experienced no such delay with the first named defendant receiving a letter of claim a number of months prior to the proceedings being issued within the permitted time.

53. He submitted that the question of whether the fault of a solicitor is sufficient to come within the ambit of "good reason" is further considered in the case of *Tangney v. Ring* [2010] IEHC 39 where Ryan J. suggested that there was a sufficient explanation for the failure to serve a summons in that case where two solicitor firms had amalgamated and a subsequent personal rearrangement lead to confusion as to whether a particular file was transferred or not to the new firm. Ryan J. suggested that there was sufficient substance in the explanation as so this came within the ambit of a "good reason". The facts of this case mirror those in *Tangney* in that there was inadvertence of the result of a change/splitting up of solicitors leading to confusion regarding the transfer of a case.

54. Counsel for the plaintiff suggested that oversight or inadvertence will not always constitute an inacceptable excuse for the failure to serve a summons. He suggested that Supreme Court jurisprudence demonstrates that unique circumstances whereby an understandable mistake has occurred which is regarded as sufficiently explained even if not excused will suffice to allow a renewal Order stand. He referred to *Martin v. Moy Contractors Ltd. and others*, an unreported Supreme Court decision of the 11th of February 1999, where Lynch J. on behalf of the Supreme Court held that "it would be wrong to say that mere oversight or inadvertence or carelessness can never be excused as amounting to 'other good reason'".

55. Again in *Martin* there was a delay of five years which was much longer than the delay in this case.

Interests of Justice
56. He submitted that the length of delay in this case amounts to little over seven months from the date that the summons expired. It is contended that the plaintiff in this case had suffered extensively due to the actions of the first named defendant in the supply of a product that was surgically fitted to the plaintiff under general anaesthetic that subsequently failed. Counsel also submitted that the first named defendant had been put on ample notice of the case before it's commencement and continued to have the full arsenal of tools at its disposal in defending the matter and that the dismissal of the first named defendant's application will in no way inhibit the defending of the case. It is submitted that the justice lies in favour of allowing the matter to go to hearing where both sides went on to make their case to the full.

Balance of Hardship
57. Counsel for the plaintiff submitted that the balance of the hardship lay on the side of the summons being allowed to stand. The plaintiff's action will be time barred should the first named defendant's application to set aside the summons be exceeded to and he referred to Peart J. in *Gannon v. The Minister for Finance* [2011] IEHC 156 where Peart J. dismissed as irrelevant to an action to set aside the renewal summons the possibility that the plaintiff might have a claim in negligence against her previous solicitor.

58. He also submitted that the case had also the unique element of the plaintiff's health to be considered. The plaintiff had recently been diagnosed with cancer and his health is not in a condition that would be conducive to the commencement of legal proceedings as against any defendant.

59. The court notes the timeline in relation to these issues:

(1) On the 21st of October, 2009 the plaintiff underwent a total right hip replacement in which a Stryker implant was inserted into his person.

(2) On or about the 20th of September, 2012 he visited his GP complaining of an unusual sensation in his right knee. His GP referred him to the second named defendant who examined the plaintiff on the 8th of October, 2012 and reported that he had developed the unusual complication of squeaking of his right hip which he identified as a problem unique to Stryker implants.

(3) He underwent total right hip revision for the squeaking components on the 28th of September, 2012 when the socket was replaced.

(4) On the 24th of June, 2014 a letter was sent by Flynn and O'Donnell solicitors to Stryker.

(5) On the 20th of August, 2014 the personal injury summons issued.

60. He acknowledged that the delay in this case was not as in many of the cases which were submitted to the court.

61. While it is undoubtedly true it is correct to say that the letter from Flynn and O'Donnell dated the 24th of June, 2014 did not contain details such as would be likely to appear in a personal injury summons nevertheless the first named defendant was put on

notice of the proceedings. The main cause of delay was the unfortunate dispute that arose between the partners in Flynn and O'Donnell such as which lead them to come to the conclusion that the practice was not able to operate from the same office due to a breakdown in communications. A complete breakdown of communications in March 2016 occurred regarding the discovery of the plaintiff's file and it seems that the former Taxing Master and subsequent consultant to Flynn and O'Donnell acted promptly to deal with the issues which have arisen.

62. The court has taken into account how quickly Mr. Flynn took on the issue when the file was discovered. It is noted that he received his practising certificate on the 1st September, 2015.

63. The court therefore finds that the plaintiff had established good reason to make the application before the High Court.

Interests of Justice
64. In respect of the interests of justice there is no doubt but that the plaintiff has complained of suffering extensively through the actions of the first named defendant in the supply of a product which Dr. Neligan indicated as being a problem unique to Stryker implants. Dr. Neligan is a very experienced surgeon and I am sure does not make comments like this lightly. Further the court is satisfied that the first named defendant had been put on notice of the case before it's commencement.

The Balance of Hardship
65. The balance of hardship in this case lies firmly on the side of the summons being allowed to stand in the view of this Court. While it is clear that the plaintiff's case would, in the event of the first named defendant succeeding in this application, be statute barred, the court is satisfied that there has been negligence on the part of the partners in Flynn and O'Donnell, but the court is satisfied that the plaintiff's health has to be considered in respect of the consideration of hardship.

66. In all of these circumstances the court will refuse the relief sought by the defendant in relation to this motion.