



**UNAPPROVED
THE COURT OF APPEAL**

Record Number: 2020/6

Neutral Citation Number [2022] IECA 132

Whelan J.

Faherty J.

Binchy J.

BETWEEN/

FRANK CHANDLER

**PLAINTIFF/
APPELLANT**

- AND -

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

**DEFENDANTS/
RESPONDENTS**

Judgment of Ms. Justice Faherty dated the 9th day of June 2022

1. This is an appeal against the judgment and Order of the High Court (Barrett J.) setting aside the renewal of the plaintiff's personal injuries summons.
2. The procedural framework relevant to the appeal is found in Order 8, r.1 of the Rules of the Superior Courts ("RSC") (as it stood prior to its amendment under S.I. 482/2018, which came into operation on 11 January 2019). It provides:

"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 may 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...”

3. Order 8, rule 2 provides:

“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.”

Background and procedural history

4. The substantive proceedings allege that the plaintiff worked for the defendants in the Irish Naval Service from 1983 and was stationed in Cork. As part of his employment he underwent regular medical assessment (including for, the plaintiff says, his risk for cardiovascular disease). The plaintiff alleges that his medical advisors all of whom are servants or agents of the defendants became aware that he was suffering from very high blood pressure but that notwithstanding same they failed to provide him with an appropriate or acceptable standard of care with regard to his medical condition. The plaintiff suffered a heart attack on 7 December 2013 and he alleges that he sustained the said injury because of the aforesaid failure on the part of the defendants, their servants or agents. As a result of his injury the plaintiff was out of work from December 2013 to July 2015. He retired from the Naval Service in or about July 2016. According to the affidavit sworn by the plaintiff’s solicitor Mr. Kevin O’Keeffe for the purposes of the *ex parte*

application to renew the personal injuries summons, the plaintiff did not have knowledge that his personal injuries were attributable in whole or in part to any act of the defendants until sometime after the plaintiff returned to work in July 2015.

5. On 5 February 2017, prior to the issuing of proceedings, the plaintiff's medical records were requested from the first defendant and same were duly provided. Thereafter, on foot of advices received from senior counsel separately on 17 February 2017 and 2 March 2017 regarding the issuing of proceedings, a personal injuries summons issued on 13 March 2017. It appears therefore that the proceedings were issued on a precautionary basis to preserve the plaintiff's right to litigate the dispute having regard to the Statute of Limitations. According to Mr. O'Keeffe, the advice given to the plaintiff was to issue the proceedings but not to serve same pending the carrying out of appropriate medico-legal investigations.

6. It appears that Dr. A.S. Kurbaan, Bart's Heart Centre, St. Bartholomew's Hospital, West Smithfield, London was initially approached in April 2017. He agreed in August 2017 to act in the case and was duly engaged on 25 August 2017 for the purposes of providing a medico-legal report. Albeit initially said by Mr. O'Keeffe in his affidavit of 7 September 2018 to have been received on 25 September 2017, in his later replying affidavit in response to the defendant's motion, Mr. O'Keeffe avers that Dr. Kurbaan's report was procured on 23 November 2017.

7. Some two months or so prior to receiving Dr. Kurbaan's report, and some six months post the institution of the proceedings, on 26 September 2017 the plaintiff's solicitor wrote to the first defendant at the Naval Base in Cork in the following terms:

"We act as Solicitors on behalf of the above named who has instructed us concerning a cardiac difficulty which has arisen during the currency of his employment with you. It is clear from our client's instructions that our client has suffered personal

injuries, loss and other damage as a result of the failure to adequately treat his cardiac difficulty over the years of service with you notwithstanding the evidence to support hypertension and other clinical issues. The purpose of this letter is to call upon you to admit liability for the injuries suffered by our client and to undertake to adequately compensate him for the loss and damage suffered as a result of same. May we respectfully suggest that you arrange to pass this letter on to your insurers/legal advisors. We await hearing from you”.

8. The letter of 26 September 2017 was duly passed on by the defendants to the State Claims Agency. On 13 November 2017, the State Claims Agency requested further details. These were forwarded by the plaintiff’s solicitors by way of letter and enclosure marked “without prejudice” on 29 November 2017. That correspondence was duly acknowledged by the State Claims Agency on 29 November 2017 advising that the matter was receiving attention.
9. By letter dated 30 November 2017, the State Claims Agency wrote to the plaintiff’s solicitors in the following terms:

“Thank you for your recent correspondence in relation to the above matter. Please note our reference number as indicated above and we would be obliged if you could quote this on all future correspondence.

In view of the nature of the complaints being made by your client we anticipate that we will require full discovery of all his medical records. Presumably you have no difficulty providing us with consent in this regard. You might at this stage consider forwarding us on a copy of a signed authorisation from the client authorising the release of his Defence Force medical records. Of course we will require your client’s Non – Defence Force medical records at a later stage.”

10. That letter was not replied to by the plaintiff's solicitors and it is common case that the requested authorisation from the plaintiff did not materialise.

11. The personal injuries summons which issued on 13 March 2017 was not served on the defendants within the requisite twelve-month period. The reason for the non-service was explained by Mr. O'Keeffe at para. 13 of his affidavit grounding the *ex parte* application:

"I say that by reason of inadvertence the Summons was not served within the twelve – month period. I say that this office only discovered that the Summons had not been formally served (despite correspondence and engagement with the issues in cases with the State Claims) on the 4th day of September 2018.

12. Mr. O'Keeffe goes on to aver that the defendants were not prejudiced by the failure to serve the proceedings "in circumstances where there has been communication in respect of the complaint which has gone as far as issues in respect of discovery as can be seen from the correspondence..." He further avers:

"14. I say and believe that the Defendants are not prejudiced in any way by the Court renewing the Summons and that no injustice would be done to the Defendants by the granting of the renewal. I say conversely the Plaintiff, if he had to reissue proceedings would have difficulties in respect of the Statute of Limitations. I say that this would be entirely unfair in circumstances where the Plaintiff has already initiated proceedings in 2017 and where the Defendants are aware of the nature of the proceedings and indeed have themselves taken a practical approach to the litigation by seeking discovery at an early stage of the litigation.

15. I say that if the Court is prepared to renew the Summons this firm is aware of the necessity of progressing this action speedily and acknowledges its responsibility to progress the proceedings in an efficient manner."

13. By Order of the High Court (Barr J.) of 12 September 2018, the High Court acceded to the application and the personal injuries summons was renewed for a period of six months from the date of the Order. The Order was perfected on 14 September 2018.

14. The Order was served on the State Claims Agency on 26 November 2018 following which the State Claims Agency wrote to the plaintiff's solicitors on 3 December 2018 seeking a copy of Mr. O'Keeffe's affidavit grounding the application to extend and advising that Ronan Daly Jermyn ("RDJ") Solicitors had been nominated to accept service of the proceedings on behalf of the defendants. Service of the summons was duly effected on the defendants' solicitors on 13 December 2018 and a copy of Mr. O'Keeffe's grounding affidavit was furnished on the same date to the State Claims Agency. Following a request dated 4 January 2019, the grounding affidavit was served on RDJ on 11 January 2019.

The application to set aside the renewal

15. The defendants' motion to set aside the Order of Barr J. issued on 10 April 2019. It is grounded on the affidavit of Fergus Long solicitor with RDJ who avers, *inter alia*, as follows:

"5. I say and believe that the said Summons ought not to have been renewed and furthermore that the Order providing for the renewal of the Personal Injuries Summons should be set aside on the grounds that greater hardship will fall upon on the Defendants due to the Plaintiff's delay in prosecuting the within claim.

6. I say and believe that there has been a substantial delay incurred by the Plaintiff in serving the within proceedings. I further say that there is no justification for the said delay and that the Plaintiff has not established any reason why the said Summons was not served earlier save that same occurred due to inadvertence.

7. I say that whilst it is provided at paragraph 7 of the Affidavit of Kevin O'Keeffe that Dr. A.S. Kurbaan was instructed for the purpose of providing a medico- legal

report, that the date upon which he was so instructed has not been provided in the said Affidavit. I further say that the said report was provided on or about the 25th day of September 2017, some six and a half months post the issue of the said Summons herein and accordingly the Plaintiff had a further period of some five and a half months remaining to serve the within proceedings, however, it failed to do so within the time period prescribed by this Honourable Court.

8. I say that it is further averred in the said Affidavit that it was only discovered that the Summons was not served on the 4th day of September 2018.

9. I say that the Defendants will suffer undue hardship in dealing with the substance of the allegations made in the claim herein. I say that such delay is clearly prejudicial to the ability of the Defendants herein to defend the case against them and that the delay has been substantial in nature given the circumstances of the case whereby the Plaintiff alleges that during his employment with the Defendants from 1983 that the Defendants failed to provide the Plaintiff with an appropriate and/or acceptable standard of care with regard to his medical situation such that he was caused to sustain a heart attack on or about the 7th day of December 2013. It is claimed that the Plaintiff did not have knowledge that [the] alleged personal injuries were attributable in whole or in part to any act of the Defendants until sometime after he returned to work in or about July 2015.

10. I say that whilst the Plaintiff has referred to certain inter-partes correspondence in the said Affidavit it is not alleged therein that the Plaintiff was induced by any alleged representation on the part of the Defendants not to serve the said proceedings.

16. Mr. O’Keeffe’s replying affidavit was sworn on 23 May 2019. At para. 8, he asks the court to note the defendants’ delay in bringing the application to set aside the renewal in

the context of the proceedings having been served in November 2018. He thus asserts at para. 13 that in respect of any delay in serving the proceedings between March 2018 and September 2018, “this period is unlikely to have caused any particular hardship” and thus asserts that this delay might be looked at “in the context of the Defendants only bringing this motion ...on the 10th day of April 2019 (seven months after the making of the Order renewing the summons)”.

17. At para. 9, he disputes that the defendants have been caused hardship by the proceedings in circumstances where Mr. Long has not identified any specific prejudice by reason of the proceedings not having been served in the period between March 2018 and the renewal of the summons in September 2018

18. At para. 10, he avers that the defendants “were formally put on notice of a personal injuries claim on the 26th day of September 2017”. In the context of the defendants’ letter of 30 November 2017, in particular their request for access to the plaintiff’s Defence Force medical records and their intimation of requiring his non-defence force records “at a later stage”, Mr. O’Keeffe goes on to state:

“I say having regard to the circumstances...it is difficult to understand how the Defendants suffered any hardship in the Defence of the proceedings in the period between the expiry of the Summons and the renewal when issues such as discovery had been discussed prior to the service of the proceedings. I say in that regard that prior to the service of the proceedings both parties were actively engaged in the preparation of their various positions and therefore, as regrettable as it was, the fact that the Summons was not served within 12 months did not (in the relevant time period) cause any particular hardship to the Defendants and it is notable that no specific hardship during that period has been identified by Mr long in his affidavit.”

19. Insofar as the defendants assert prejudice by reason of “general delay” he avers that the proceedings had issued in March 2017 on a precautionary basis following advices from Senior Counsel. He goes on to state:

“16. I say that when the Court reviews the basis of the claim put forward by Dr Kurbaan it is important to note that the claim itself is not predicated on a particular action or treatment on a specific date in time which might fade or diminish with the passage of time. I say that the central issue in the case are the medical notes and records (the notes and records used by Dr Kurbaan in his report) and whether the information in those reports (the contents of which cannot be in dispute) should have caused the Defendant’s medical staff to have advised the Plaintiff in respect of treatment. I say that the Plaintiff’s medical records are not diminished by reason of delay and certainly not by reason of the period of delay identified in this application.”

20. At para. 17, Mr. O’Keeffe refutes the contention that there was no justification for not serving the proceedings in March 2017, stating that “it would have been entirely inappropriate for me to have served professional negligence proceedings until I had in my possession an expert medical report indicating that the Defendants were negligent...” It should be said at this stage that, in her submissions to this Court, counsel for the defendant quite properly did not take issue with the plaintiff’s position in this regard, being conscious of the obligation that was on Mr. O’Keeffe and the plaintiff’s other legal advisors to obtain appropriate medical opinion before serving such proceedings alleging medical negligence.

21. Mr. O’Keeffe goes on to refute Mr. Long’s contention that no warning letter and describes the correspondence of 26 September as such a letter. He avers that as is clear from his Office’s correspondence and the responses of the State Claims Agency of 29 and 30 November 2017, “the parties were actively engaged in issues relevant to the progression

of the within case and therefore the inadvertence in not serving the summons between March 2018 and the 12th day of September 2018 should be seen in this contest (sic). I say furthermore that having regard to the contents of the above identified letter, discussing discovery, it is hard for the Defendants to suggest that they were not aware that proceedings being served on them was inevitable...” He further avers:

“I say that Mr Long in paragraph 9 of his affidavit identifies issues of delay which are relevant to the proceedings themselves which relate to historic record and treatment. I say that these are all issues which the Defendants would have to deal with if the Summons was served on the 13th day of March 2018 and I say that none of the issues identified by Mr. Long in paragraph 9 ...were caused by the Summons not being served in the period between March 2018 and when the Court renewed the Summons on the 12th day of September 2018.”

The High Court Judgment

22. The application to set aside the Order of Barr J. came on for hearing before Barrett J. on 18 November 2019. Having set out the provisions of Order 8, r.1 and the relevant chronology, and observing that the application before him was focused on whether there was “other good reason” for renewal, Barrett J. opined:

“Here, unfortunately for Mr Chandler, no “*good reason*” has been identified for the renewal of his summons.”

23. Barrett J. considered that four Supreme Court decisions constituted the ultimate decisions in the area, namely *Baulk v. Irish National Insurance Co. Ltd.* [1969] IR 66, *McCooey v. Minister for Finance* [1971] IR 159, *O’Brien v. Fahy T/a Greenhills Riding School* (Unreported, Supreme Court 21 March 1997) and *Roche v. Clayton* [1998] 1 IR 596. According to the Judge, all four decisions appeared to be consistent with one another albeit he noted that in *Monahan v. Byrne* [2016] IECA 10, Hogan J., referencing the

decision of the High Court in *Moloney v. Lacey Building and Civil Engineering Ltd.* [2010] 4 IR 417, opined that *Baulk* and *McCooley* had been “*effectively qualified*” albeit that neither *Baulk* nor *McCooley* had been “*formally overruled*”. Thus, these decisions remained extant and constituted, along with *O’Brien* and *Roche* the “ultimate authorities” in this area. Barrett J. went on to state:

“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 had been aware of a claim, can constitute “*good reason*” for renewal of a summons; or, as Hogan J. succinctly puts matters in *Moloney* at para. 31, effectively summarising the outcome of the Supreme Court precedents referenced above, ‘*the fact that the action might otherwise by 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.”

24. The Judge next considered the judgment of Finlay Geoghegan J. in *Chambers v. Kenefick* [2007] 3 IR 526 where it was held that in exercising the courts’ jurisdiction to renew a summons the proper approach was to, firstly, consider whether there was a good reason to renew the summons. Secondly, if satisfied that there was or might be a good reason, the court should consider whether it was in the interest of justice between the parties to renew the summons. Thirdly, in considering the interests of justice, the court should examine the hardship for each of the parties if the renewal was not made.

25. Barrett J. did not consider that the sequencing referenced by Finlay Geoghegan J. in *Chambers* was a real issue in the case 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.” He continued:

“It is important not 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”.

26. In concluding that no “good reason” had been offered, Barrett J. considered the following points to be of “especial significance”. While it was accepted that it was prudent for the plaintiff’s solicitors to issue but not serve the proceedings on 13 March 2017, from the date of receipt of Dr. Kurbaan’s report there was no valid reason to refrain from serving the summons. In the view of Barrett J., “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...”

27. Barrett J. did not accept that the letter of 26 September 2017 advanced matters for the plaintiff given that it did not disclose that proceedings were in being. He did not accept that the defendants had suffered no prejudice, noting that the claim appeared from the summons to date back to 1983. Neither could Barrett J. afford weight to the claim that the case was a documents only case in circumstances where Dr. Kurbaan’s report was not before the High Court and given that the plaintiff, to the date of the application, had never given authority for the defendants to take up the relevant records. In the view of Barrett J.:

“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.”

28. While he took cognisance of the defendants’ delay in bringing the application to set aside the renewal, that, Barrett J. considered, had to be viewed “in the context of the bifurcated service of 13.12.2018 [a reference presumably that the summons had been served on the defendants’ solicitors on 13 December 2018 and a copy of Mr. O’Keeffe’s grounding affidavit on the state Claims agency on the same date] 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.” He continued:

“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.

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.”

The appeal

29. In oral submissions to this court, counsel for the plaintiff distilled the plaintiff’s seventeen grounds of appeal to three broad arguments, namely that the trial judge erred (1) in finding that no “good reason” had been advanced to support the renewal of the summons, (2) in finding that the plaintiff’s solicitor’s letter of 26 September 2017

could not assist the plaintiff in refuting the application to set aside the renewal of the summons and (3) in holding that the defendants would be prejudiced by the renewal. The plaintiff asserts that case law supports his argument that Barrett J. was in error in setting aside the renewal. On the other hand, the defendants argue that the approach of the learned Judge was in accordance with the relevant authorities. It is apt therefore, at this juncture to consider the relevant case law, much of which was referred to by Barrett J. in his judgment.

The relevant jurisprudence

30. In *Baulk v. Irish National Insurance Company Limited* [1969] IR 66 the plaintiff's claim was for injuries sustained while a passenger in a vehicle involved in a road traffic accident on 9 August 1962. The driver of the vehicle passed away on 24 August 1962. The summons which issued on 6 June 1964 was not served within the requisite twelve months. There was affidavit evidence that the defendants and the parties to the motion to set aside the renewal of the summons were aware at an early stage of the plaintiff's intention to sue the personal representative of the driver for damages. On 10 September 1962, the plaintiff's solicitor had told the driver's father of the intention to sue and requested the father to forward a letter in that regard to the driver's insurers, which was done, following which the defendants confirmed receipt of the letter on 10 October 1962 and requested an opportunity to have the plaintiff examined by their doctor. Moreover, on 24 April 1964, with consent from the defendants, the plaintiff had been granted an order for leave to institute proceedings against the defendants. As regards the non-service of the summons with the requisite timeframe, on the facts of the case, Walsh J. opined that it could not be said that reasonable efforts were made to serve the defendants within twelve months "because in fact no effort had been made to serve the defendants with the period of twelve months". Thus, "[t]he question for the Court was whether there was any other good

reason for which the Court ought to renew the Summons". In answering that question, Walsh J. described "other good reason" in the following terms:

"While the phrase 'other good reason' may refer to circumstances or factors which throw light on the failure to serve the summons within the twelve months, in my view it is not exclusively referable to the question of service but refers also to any other reason which might move the court, in the interests of doing justice, between the parties, to grant the renewal."

31. Citing his own judgment in *Armstrong v. Callaghan* he indicated that, in his view, the fact that Statute of Limitation would defeat any new proceedings which might be necessitated by the failure to grant the renewal "*could itself be a good cause to move the court to grant the renewal.*" He did not believe that any injustice would be done "*in the wide sense of the term*" to the defendants by granting a renewal in circumstances where the defendants were aware from the beginning of the plaintiff's intention to sue. He opined that if the plaintiff's injuries were caused by the negligence of the deceased driver, and if the proceedings were commenced within the statutory period (which he believed was the case), then it would be no injustice to ask the defendants to pay damages. If no negligence was found, then the defendants would succeed notwithstanding a renewal. If the plaintiff was able to establish negligence, Walsh J. believed that it would be an injustice to the plaintiff to not have his summons renewed.

32. In *McCooey v. The Minister for Finance* [1970] IR 159, the plaintiff had sustained injuries in a car accident on 13 July 1965. At an early stage the plaintiff informed the first defendant and the insurers of the second defendant of the accident and the plaintiff's claim. The plenary summons issued on 4 July 1968. The plaintiff however made no attempt to serve the summons within the requisite twelve months nor was any application made within that period to apply for leave to renew. Such an application was made in October

1970. In allowing the plaintiff's appeal from the refusal of the High Court to renew the summons, the Supreme Court held that the fact that the plaintiff's claim, if made by a fresh summons, would be statute barred and the fact that at an early date the defendants had been aware of the claim, constituted "other good reason" within the meaning of Order 8, r.1 RSC. Writing for the majority, O'Dalaigh C.J. found the case to be "*on all fours*" with *Baulk*.

33. There followed, however, something of a sea change as regards reliance on the Statute as constituting "other good reason". *O'Brien v. Fahy* (Unreported, Supreme Court, 21 March 1997) concerned an accident in a riding school on 24 July 1988. There, the proceedings were issued on 23 July 1991-the last day of the then three-year limitation period. No attempt was made to contact the defendant or to serve the proceedings until some 11 months later on 5 June 1992 when the plaintiff's solicitor wrote intimating proceedings. There was an error in the letter and a corrective letter was then written. The defendant's insurers were informed on 14 July 1992 that proceedings had issued. On 27 July 1992, they nominated solicitors to accept service. The defendants however were not served with the proceedings until 29 July 1992 after the 12 months had elapsed and the summons was no longer in force. Whilst the defendants were aware of the accident which had occurred on their premises, they had no formal notice of the plaintiff's intention to make a claim until nearly four years after the accident had occurred. Barrington J. approached the matter as follows: -

"The good reason which the plaintiff advances is that the Statute has now run and if the summons is not renewed the plaintiff will have lost her right of action and that would be an injustice to her and that is a matter to which it appears the court must give a very great weight. But applying the principle in McCooey v Minister for Finance [1971] IR 159 it is not the only matter to which the court must pay

attention because it is quite clear that in this case the defendant was not told until some four years afterwards that a claim would be brought against her and one of the factors in the McCooey case was that the defendants had known right from the beginning that a claim would be made against them. ...

On the other hand the defendant did not know nor was she given any warning that a claim would be made against her and her solicitor has sworn an affidavit saying that, as a result, were a claim to be now made the plaintiff (sic) would be greatly prejudiced in the defence of the case as it is now nearly four and a half years since the alleged accident and he says at this stage it is extremely difficult, if not impossible, to investigate all the circumstances surrounding the accident. It appears to me that the lapse of such a time without knowing that claim was going to be made is something which itself implies prejudice and when the defendant and her solicitor are prepared to swear affidavits that in fact it is not a theoretical prejudice but an actual prejudice which the defendant would suffer; one must set that against the loss to the plaintiff, if as a result of a refusal to renew the summons which is out of time, her claim becomes statute-barred.”

34. As can be seen, much emphasis was put by Barrington J. on the defendant’s late state of knowledge, compared with the level of awareness at an early stage of the defendants in *Baulk*. Similarly, in *McCooey*, the defendants knew from the beginning that a claim would be made against them.

35. In *Roche v. Clayton* [1998] IR 596, in acceding to the defendant’s application to have the renewal of the plenary summons in that case set aside (and where, incidentally, as appears from the report, the defendant did not argue that Statute of Limitations could not constitute “good reason” but that rather “the court has a very wide discretion as to the

renewal of the summons” and that the Statute was only one factor in determining whether “good reason” had been shown), O’Flaherty J. opined:

“It is not a good reason in light of O’Brien v. Fahy to renew a summons simply to prevent the defendant availing of the Statute of Limitations. The Statute of Limitations must be available on a reciprocal basis to both sides of any litigation.”

36. In any event, post *O’Brien* and *Roche*, the position of the courts was that the potential consequences for a plaintiff in terms of the Statute if renewal of the summons was not granted of itself no longer constituted “good reason” under Order 8 r. RSC. This was consolidated in *Moloney v. Lacey Building and Civil Engineering Ltd.* [2010] 4 IR 417.

37. In *Moloney*, the plaintiff instituted proceedings against the defendants on 9 January 2004. The summons expired without being served on the defendants. By Order of the High Court (Peart J.) dated 11 May 2009, the summons was renewed. The second and third defendants applied to set the renewal aside and that application was acceded to by Clarke J. He held that in exercising the jurisdiction to renew a plenary summons the court should apply the three-pronged approach set out by Finlay Geoghegan J. in *Chambers v. Kenefick*. He further held that the absence of an expert report could be a good reason for not serving a plenary summons but only if the expert report was reasonably necessary in order to justify the decision to responsibly maintain the proceedings and if appropriate expedition was used in attempting to procure the report.

38. Clarke J. also considered that the stricter approach taken by the courts to delay in the prosecution of proceedings, which could be identified in the jurisprudence on dismissal for want of prosecution, also applied to cases involving an application to renew a summons in the context of whether there may be said to be a “good reason” for the renewal of a summons. He observed that when the first hurdle is surmounted in each case, “*the court*

then has to go on to consider the general justice of the case, which consideration is likely to involve many of the same matters (such as degree of delay, prejudice, and the like) whether a dismissal for want of prosecution case or a renewal case is under consideration”.

39. He went on to state:

“22. I am, therefore, satisfied that the general 'tightening up' of the approach of the courts to delay which can be identified in the dismissal for want of prosecution jurisprudence applies also to cases involving an application to renew a summons, such that the question of whether a reason put forward may be deemed a "good reason" may be looked at with greater scrutiny, and the factors which can properly be taken into account in assessing the balance of justice may need to be looked at from a perspective that places a greater emphasis on the need to move with expedition.

23. ... It seems to me that an application for the renewal of a summons in this court needs to be viewed against the background of the statutory policy that proceedings must be commenced within the relevant limitation period. The purpose behind that policy is to prevent claims from being brought outside what has been determined to be a reasonable period for the category of case concerned. Given that proceedings in this court are said to have been commenced once issued, it follows that it is possible to formally notify a defendant (by service) of the existence of proceedings outside the limitation period. Obviously any summons issued less than six months prior to the expiry of the relevant limitation period can be served outside that limitation period without any renewal. However, it, nonetheless, seems to me that a court in considering an application for renewal should pay significant attention to the fact that the policy behind the statute of limitations is that a defendant be aware

in a formal sense that proceedings have been commenced, either within the statutory period or within a short time thereafter...”

40. Clarke J. next looked at the “good reason” advanced in *Chambers v. Kenefick* where the defendant concerned had been sent a copy of the relevant summons (albeit it had not been served) so that, in the words of Clarke J. “*the defendant was fully aware of the existence of the proceedings even though there had been a technical failure to effect formal service*”. He went on to state:

“It seems to me that a renewal of a summons outside the limitation period so as to further extend the time (by reference to the limitation period) within which service can be effected, amounts to at least a stretching of the principles behind the existence of a statute of limitations in the first place. Such considerations should, in my view, inform decisions relating to both the question of what might be taken to be a ‘good reason’ for the renewal of the summons and also in weighing the factors that might be put in the balance in considering where the balance of justice lies.”
(at para. 23)

41. In the view of Clarke J. (with reference *inter alia* to *Roche v. Clayton* and *O'Brien v. Fahy*):

“it is not a good reason to renew a summons simply to prevent the defendant availing of the Statute of Limitations... the Statute of Limitations must be available on a reciprocal basis to both sides of any litigation”. (at para. 24)

42. He went on to opine:

“To the extent, therefore, that Baulk v. Irish National Insurance Co. Ltd. [1969] I.R. 66, might give rise to a possible argument to the effect that the fact that the plaintiff might otherwise be statute barred can provide good reason on its own, it seems to me that subsequent Supreme Court authority makes it clear that that argument is not

tenable. It follows that the "good reason" must be more than a simple need to renew the summons so as to avoid the defendant being able to rely on the statute. It does seem that the history of events up to the time when the statute might have applied and, in particular, the extent to which the potential defendant knew of the existence of the claim and, most especially, the fact that proceedings had been brought on foot of it, can constitute good reasons for the purposes of the rules." (at para. 24)

43. Clarke J. did not regard a failure to renew a summons as amounting to a penalty for procedural mishap, stating that to do so would *"place little or no weight on the policy considerations behind the statute..."* He went on to state:

"The statute creates a situation where the issuing of proceedings one day after limitation period leaves the relevant defendant with a complete defence, whereas the issuing of the same proceedings two days earlier would allow the proceedings to be considered on the merits. There are, as I have pointed out, very good policy reasons why a threshold is imposed. To regard a failure for no explicable reason, to serve the summons within six months or at least within six months of the date when the statute expires as merely a procedural mishap would seem to me to afford far too little weight to the policy behind the statute." (at para. 25)

44. At para. 26, he opined that having regard to the policy inherent in the Statute of Limitations requiring that proceedings be commenced, and tried, within a reasonable proximity to the events giving rise to the relevant claim, *"in balancing the interests of justice in a renewal application, the court should have regard to any real risk of prejudice"*

45. In *Monahan v. Byrne* [2016] IECA 10 Hogan J. did not demur from the views expressed by Clarke J. in *Moloney* as regards the approach to be taken to the Statute as constituting "good reason" for the purposes of renewal of a summons: He stated, at para.

31, with reference to the *dictum* of Clarke J. at para. 24 of *Moloney*, and the decision of Laffoy J. in *O'Reilly v. Northern Telecom (Ireland) Ltd.* [1998] IEHC 168, 1 IR 214:

“ It follows, therefore, that 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 for the purposes of Ord. 8, r. 1. If it did, then this might have the effect whereby, in the words of Laffoy J. in O'Reilly, the time strictures imposed by the Statute of Limitations 1957 could easily be set at naught. ”

46. Earlier in his judgment, Hogan J. addressed the question of how the court should assess whether the plaintiff had established “some other good reason”. He was satisfied to adopt the test set out by Peart J. in *Moynihan v. Dairygold Co-Operative Society Limited* [2006] IEHC 318. There, Peart J. stated:

“It is important to note the reference in Ord.8, r.1 is 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 extend the limitation period under the Statute of Limitations from three years to over six years...

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.”

47. As noted by Butler J. in a recent decision in *Klodkiewicz v. Palluch* [2021] IECH 67, although *Moloney* marked a turning point in terms of the tightening up the jurisprudence on the Statute as constituting “good reason”, Clarke J. did not exclude the possibility of the consequences of the Statute constituting a good reason. As put by Butler J.:

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

48. In *Klodkiewicz*, Butler J. also made reference to the decision of this Court in *Murphy v. HSE* [2021] IECA 3 (a decision on which both the plaintiff and the defendants here place reliance).

49. *Murphy* (which like the present case concerned alleged medical negligence proceedings) was a case under the now amended Order 8 rather than the provisions in issue in the present case. At paras. 110 – 111 Haughton J. discussed reliance on the Statute as

constituting “good reason” or “special circumstances” for the purposes of renewal of a summons. Referencing Kelly P. in *Whelan v. HSE*, to wit, “[t]hus, the mere fact that a plaintiff’s claim would be statute-barred is not of itself ‘other good reason’ for renewing a summons”, and Hogan J. at para. 31 in *Maloney*, Haughton J. opined that the Statute:

“of itself...will not constitute ‘good reason’ or ‘special circumstances’ justifying renewal. A similar view – that the High Court can take into account the Statute of Limitations – was taken by Finlay Geoghegan J in Chambers. I have also quoted earlier from the decision of Hyland J in Brereton where she took the view that it was appropriate to consider the likely consequences for a plaintiff of a refusal to renew from the point of view of the operation of the Statute of Limitations, and that this was at least potentially relevant. I agree with that view.

111. The trial judge was therefore entitled to take into account the Statute of Limitations point. His view was that if renewal was refused, thus forcing the respondent to issue fresh proceedings, this could significantly strengthen the defence under the Statute of Limitations. Given that the basic period of limitation had already expired by the time the summons was issued, it may be that this overstates the position, but it was a view that the trial judge was entitled to take in the exercise of his discretion. At any rate I am satisfied that the trial judge correctly addressed his mind to the balance of justice, and potential prejudice, and exercised his discretion in such a manner that this court should not interfere with his decision to dismiss the motion.” (emphasis in original)

50. In *Murphy*, albeit upholding the High Court Judge’s refusal to set aside the renewal of the summons, Haughton J. held that the Judge had erred in finding that the plaintiff should have served a courtesy copy of the summons before it lapsed, put the defendant HSE on notice of the claim and explained why the proceedings were not being served.

Haughton J. however did not believe those steps to be justified finding that if such notification had been done, that would have triggered an obligation on the HSE to notify the State Claims Agency of an adverse event and possible claim and to communicate with the medical and administrative staff of the hospital concerned which in turn might have created an obligation on the medical personnel to notify their indemnifiers, with the consequences that that would bring, all of which ran counter to the principle that medical proceedings should not be pursued absent the requisite expert medical report.

51. It should be noted that Haughton J.'s comments were made in the context where sustained efforts were being made by the plaintiff's legal advisors to obtain the requisite medical reports up to the time of the renewal of the summons. I consider that Haughton J.'s comments in the foregoing regard have little bearing on the present case in circumstances where the defendants here do not take issue with the non-service of the summons between March 2017 and 23 November 2017 while Dr. Kurbaan's report was awaited and where it is accepted by the plaintiff that post 23 November 2017, there was no impediment based on the matters just considered in serving the summons as Dr. Kurbaan's report was to hand.

52. Returning to the issue of reliance on the Statute as a basis for renewal of a summons. In *Klodkiewicz* (which concerned Order 8, r.1 in issue here), Butler J., following a comprehensive analysis of the case law, also determined that the plaintiff in that case could not rely *simpliciter* on the fact that her claim would be statute-barred as entitling her to secure renewal of her personal injuries summons. However, Butler J. went on to hold that the plaintiff was not precluded from relying on that fact "*as constituting a good reason or part of a good reason in conjunction with other facts and circumstances relating to her case*" (emphasis added). She went on to state:

"In particular, [the plaintiff] can rely on the extent to which the defendant has been on notice of her claim and has engaged in the various processes relating to it as

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

53. I would endorse the *dictum* of Butler J. in *Klodkiewicz*.

The application of the relevant legal principles to the present case

54. As the more recent case law discussed above demonstrates, the issue of the expiry of the Statute of itself is not sufficient good reason for the renewal of a summons albeit it may be in the mix with another factor of factors that may amount to “good reason”. Here, the plaintiff does not seek to rely on the Statute alone as warranting the renewal of the personal injuries summons but he contends that there were factors which, taken in conjunction with the Statute, properly warranted the refusal of the order sought by the defendants.

55. The plaintiff fairly acknowledges that the reason the summons was not served once Dr. Kurbaan’s report was to hand was due to inadvertence. It is also conceded that there were no other pertinent circumstances, or any circumstance relevant to the defendants, that impeded the service of the summons once the report was to hand.

56. However, it is nonetheless submitted while mere advertence alone may not constitute a good reason to renew a summons, in the instant case the High Court was asked to exercise its discretion to renew the summons (1) in order to avoid issues in respect of the Statute of Limitations being raised in re-issued proceedings, (2) by reason of the fact that the defendants were aware of the plaintiff's intention to institute proceedings against them, (3) in circumstances where the case was predominantly "documents" based and (4) where no specific prejudice was identified by the defendants. Counsel for the plaintiff contends that there was ample evidence before the High Court in support of the foregoing contentions and that, moreover, the reasons identified by the plaintiff had previously been considered, in the case law, as legitimate matters which the court should take into account in determining the interests of justice. The plaintiff thus asserts that the High Court Judge erred in finding that no good reason had been identified for the renewal of the summons.

57. The defendants dispute the arguments the plaintiff advances for the renewal of the summons and submit that he seeks to have the case for the renewal of the summons assessed in the round while ignoring the absence of any good reason for the summons to be renewed. As I have already intimated, in her oral submissions, counsel for the defendants did not take issue with the non-service of the proceedings prior to the receipt of Dr. Kurbaan's report given that what is in issue are medical negligence proceedings. She says, however, that the fact of the matter is that no information was given to the defendants of the existence of the proceedings. The defendants' position is that, at the very least, the plaintiff's solicitor could have written to the defendants stating that proceedings were in being and that a medical report was awaited. Unlike in many of the authorities cited by the plaintiff, the defendants were never told of the proceedings during the currency of the summons. Nor, unlike what transpired in *Chambers v. Kenefick*, was a copy of the proceedings served on the defendants' insurers.

58. The defendants dispute that the letter of 26 September 2017, given what counsel describes as its “vague” terms, was sufficient to put them on alert that proceedings were being intimated. They say that the paucity of information in that letter was the reason why the State Claims Agency in its letter of 30 November 2017 sought the plaintiff’s medical records. Yet, there was no cooperation given to the defendants in this regard between November 2017 and November 2018 when the personal injuries summons was ultimately served on the defendants.

59. They also say that while the plaintiff makes much of the fact that the State Claims Agency made a request for voluntary discovery, the fact remains that as of end 2017 (by which time the plaintiff had Dr. Kurbaan’s report) no such consent was forthcoming to make the records available to the State Claims Agency. Nor were the defendants even then told of the existence of the proceedings. That, the defendants assert, remained the position until after the plaintiff’s *ex parte* application in September 2018 which was made some ten and a half months after he received Dr. Kurbaan’s report. They also point to the fact that they were only served with the Order of Barr J. in November 2018, some two and a half months after the making of the Order.

60. In summary, the defendants’ position is that they were not aware that proceedings had been commenced by the plaintiff. While it is accepted that the plaintiff sought to take up his records in February 2017, the defendants’ principal argument is that they did not engage in any process, having no knowledge of the plaintiff’s claim until September 2018. Furthermore, unlike in other medical negligence cases, the defendants here were never told by the plaintiff why the proceedings were not being served.

61. In my view, the salient issue here is the extent to which it can be said that the defendants had knowledge of the proceedings. This was a theme that was explored by Clarke J. in *Moloney* who considered the extent to which the defendant in that case had

notice of the proceedings or, as he put it, “*was aware in a formal sense that proceedings had been commenced*”. As noted by Butler J. in *Klodkiewicz*, commenting on *Moloney*:

“In effect, although the emphasis in [Clarke J.’s] analysis shifts from the effects of the Statute itself to the extent to which the defendant was on notice of the claim, the exercise in which he engages is the same as that carried out by the Supreme Court in Baulk and in O’Brien v Fahy. However, because of the increased importance placed on the policy behind the Statute of Limitations he no longer regards it as sufficient that the defendant had been on notice of the potential claim and the plaintiff’s intention to pursue it. Instead he looked to see whether the defendants were on “meaningful notice of the fact that proceedings had, in fact, been commenced, rather than that the proceedings were being threatened”.

62. While noting the outcome in *Moloney*, and Clarke J.’s concentration there on the necessity of notice of the proceedings in a “*formal*” sense, in my view, having regard to the factual matrix in the present case, the motion Judge took an overly restrictive approach to the engagement that occurred between the plaintiff’s solicitor and the defendants. Clearly, there was no service of the proceedings on the defendants within the requisite twelve-month period and the defendants were never *expressly* advised during that timeframe of their existence. However, in my view, this latter frailty was alleviated to significant extent by reason of the following.

63. Firstly, the letter of 26 September 2017 from the plaintiff’s solicitors to the first named defendant indicated that the plaintiff had sustained personal injuries and called upon the defendants to admit liability. Secondly, previously, the first defendant had been requested to provide the plaintiff’s medical records which were duly provided on 5 February 2017. Thirdly, the response to the letter of 26 September 2017 was an email from the State Claims Agency asking for details of the claim, to which the plaintiff’s solicitor

responded on 29 November 2017. This was followed by an email of 29 November 2017 from the State Claims Agency indicating that the matter was receiving attention. The next day, by letter of 30 November 2017, the State Claims Agency indicated that they anticipated that they would “require full discovery of all of [the plaintiff’s] medical records” and asked for consent to same and indicated that they would also require the plaintiff’s non-Defence Force medical records at a later stage. The State Claims Agency clearly anticipated the imminent commencement of legal proceedings and sought, to their credit, to shorten that process by asking the plaintiff to make discovery of his medical records. Therefore, I do not accept counsel for the defendants’ submission that the response of the State Claims Agency was merely to get further details in respect of a “vague” claim.

64. While I accept that the defendants cannot be said to have been, in the words of Clarke J. in *Moloney*, “*on meaningful notice of the fact that the proceedings had, in fact, been commenced*” (my emphasis), they nevertheless (via the State Claims Agency) entered into meaningful engagement with the plaintiff by virtue of the contents of their letter of 30 November 2017, not least their anticipation that they would require “full discovery” of all the plaintiff’s medical records, their request for the plaintiff’s consent in this regard, their immediate request that the plaintiff would forward them a signed authorisation to take up his Defence Force medical records and their putting the plaintiff on notice that his non-Defence Force medical records would be required at a later stage. Contrary to the argument advanced by counsel for the defendants, I am not persuaded that the State Claims Agency’s letter was written because of any paucity of information in the letter of 26 September 2017, the correspondence of 30 November 2017 clearly envisaged that the plaintiff was invested in litigating the matters alluded to in the letter of 26 September 2017.

65. The fact that the plaintiff did not accede to the defendants' request does not, in my view, diminish the fact that the State Claims Agency clearly anticipated that legal proceedings would be commenced. I agree with counsel for the plaintiff that none of the correspondence to which I have referred supports the conclusion that the defendants were not aware that proceedings were likely to be instituted against them. In all of those circumstances, I consider that the motion Judge took too narrow a view of the letter of 26 September 2017 and the defendants' implicit understanding from that letter of the prospect of litigation by the plaintiff (as evidenced by the State Claims Agency's requests and their intimation of how they envisaged matters would proceed). I would also add that it is worthwhile noting that in *Lawless v. Beacon Hospital* [2019] IECA 256, Peart J. stated (at para. 10) that while it would have been "*prudent*" for the plaintiff's solicitor there to have notified the named defendants that proceedings had issued, he should not be understood "*as stating that it is a requirement that the defendants be put on notice*".

66. There is also some merit to the plaintiff's argument that Mr. O'Keeffe's averment at para. 14 of his affidavit grounding the *ex parte* application, to the effect that the defendants were aware of the nature of the proceedings, was not disputed by Mr. Long, who only makes the case, in para. 10 of his affidavit, that the plaintiff had not alleged that he was induced by any misrepresentation on the part of the defendants not to serve the proceedings.

67. I note that in their submissions, the defendants acknowledge that the plaintiff's case falls within the remit of some notification having been given to them of the plaintiff's intimated proceedings albeit counsel for the defendants described it as falling at the lower end of the scale, or in other words as being at the "margins" of those cases where renewal was permitted, albeit stressing that the plaintiff's case had none of the factors which, in other cases, led to the renewal of the summons.

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

“Clearly, Moriarty J. in his judgment felt that there did exist other good reason, or, more accurately, as appears from his judgment other good reasons. While the learned High Court judge did not rank particularly highly those factors which he identified as reasons supporting the renewing of the summonses, it is nevertheless evident from his judgment that the most compelling reason in his view related to the catastrophic consequences for the plaintiffs if the renewals of their summonses were to be set aside.”

The learned Judge agreed with Moriarty J. that the “other good reason” requirement had been satisfied “*albeit just about reached*”. I consider that, likewise, the plaintiff here has “*just about reached*” the good reason requirement.

69. Here, it was open to the motion Judge to look at matters other than merely at the fact that the summons had not been served within the requisite twelve-month period due to inadvertence. The learned Judge appears to me to be overly concentrated on the admitted inadvertence on the part of the plaintiff’s solicitor without perhaps giving sufficient

attention to the correspondence that passed between the plaintiff's solicitors and the State Claims Agency in the period 26 September 2017 and 30 November 2017. As explained by Walsh J. in *Baulk*, *"while the phrase 'other good reason' may refer to the circumstances or factors which throw light on the failure to serve the summons within the twelve months, in my view it is not exclusively referable to the question of service but refers also to any other good reason which might move the Court, in the interests of justice between the parties to grant the renewal"* (my emphasis). In their written submissions, the defendants quote Peart J. in *Moynihan* to the effect that *"...the court is required in my view to reach the conclusion not only as to what is the true reason the summons was not served within the proper time, but also to conclude that the reason justifies the failure to serve. It is in that sense that the words 'good reason' must be read."* As acknowledged by the defendants, Peart J. qualified those comments in *Lawless v. Beacon Hospital*. At para. 24 of *Lawless*, he expressly disagreed with the High Court Judge's statement in that case that the application for renewal of the summons *"depends on the plaintiff establishing that there was 'other good reason' for not serving the summons..."*. Relying on Walsh J. in *Baulk* and Finlay Geoghegan J. in *Kenefick*, Peart J. acknowledged that the phrase "other good reason" was *"free-standing"* and not linked to the failure to serve the summons within the specified time.

70. The plaintiff did not and could not offer a good reason as to why following the receipt of the expert report in November 2017, the summons was not served within the four months or so that remained of the currency of the summons save to tentatively suggest that the timeframe within which to serve was short. Counsel for the plaintiff did not really press this argument. Rather he focused on the factors which I have earlier set out above as factors capable of constituting a good reason as to why the summons should be renewed. In my view, those factors were capable of constituting "good reason" subject to the dictates

of the balance of justice. Therefore, the finding of the motion Judge that no good reason had been offered for the renewal of the summons was not supported by the evidence and, furthermore, appears to contradict the Judge's own summary of the legal position namely "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 the renewal of a summons". The Judge erred in focusing too intently on the fact of the plaintiff's inadvertence post 23 November 2017 in circumstances where (as per Walsh J. in *Baulk*) there was no restriction on the Judge in focusing on a "good reason" which was not related to the failure to serve the proceedings.

71. Accordingly, for the reasons I have set out, I am of the view that there was no reasonable basis for the Judge's finding that the correspondence upon which the plaintiff relied did not advance his contention that the defendants could not but be aware of his intention to institute proceedings. Given the contents of their own correspondence of 30 November 2017, the defendants clearly contemplated and in fact operated on the assumption that proceedings were going to be brought against them albeit that they were not told that proceedings had in fact issued on 13 March 2017. Based on the factual matrix in this case, I am satisfied that the defendants' engagement is sufficiently in line with the type of events that Clarke J. at paras. 23-24 in *Moloney* contemplated might be "good reason" for the renewal of a summons and sufficient for inclusion in the factors that might be put in the balance in considering where the balance of justice lies. Accordingly, as the factors to which I have adverted above were capable of constituting the "other good reason" required by Order 8, r.1 RSC, I accept the plaintiff's submission that the approach of the motion Judge amounted to a misdirection in law. In my judgement, the letter of 26 September 2017, and the nature of the defendants' response to that correspondence, constitutes the good reason sufficient for the Court to now consider whether, when the

matter is looked at in the round, the interests of justice (which must factor in the relevant prejudice an adverse outcome will have for each side) warrant the grant or refusal of the renewal of the summons.

72. Before turning to the question of the balance of justice I wish to make one further observation on “good reason”. In the course of her submissions, counsel for the defendants stated that if the Court were to find that the plaintiff had advanced a “good reason” it would effectively be saying that inadvertence constitutes “good reason” contrary to the views expressed in the case law. I cannot agree with counsel’s submission. To paraphrase Finlay Geoghegan J. in *Chambers v. Kenefick*, it is not inadvertence which constitutes good reason, but rather it is that such inadvertence and oversight is the explanation for why the summons was not served on the defendants in the relevant time frame from 23 November 2017 to 12 March 2018. It is the fact, as I have found, that the defendants were sufficiently apprised of the plaintiff’s intention to litigate, coupled with the fact that the failure to formally and properly serve in accordance with the rules in the relevant time frame was simply due to inadvertence, that constitutes the good reason in this case.

73. Turning now to the balance of justice, as can be seen from his judgment, albeit finding that no good reason had been offered by the plaintiff, Barrett J. also did not accept that the defendants would not be prejudiced by the renewal of the summons. Nor did he accept the argument that the claim was a “documents only” claim as Dr. Kurbaan’s report had not been put before the court. Excerpts from the report were however referred to by Mr. O’Keeffe in his affidavits.

74. As recorded in Mr. O’Keeffe affidavit grounding the *ex parte* application, Dr. Kurbaan was of the view that the plaintiff “*had significant modifiable cardio vascular risk factors i.e. elevated BP and cholesterol, for many years prior to his myocardial infarction*”. In his report he opines that “*if these risk factors had been managed in an*

appropriate and timely manner his myocardial infarction may have been prevented". He pointed out that the plaintiff had annual blood tests which consistently showed markedly elevated cholesterol but despite those readings it appeared that no lifestyle advice was provided, nor any medication initiated. Dr. Kurbaan was also of the view that the failure of the plaintiff's medical advisors, servants or agents of the defendants, to control his blood pressure in a timely manner and the failure to control his cholesterol represents substandard care. Mr. O'Keeffe quotes further from Dr. Kurbaan's report, namely: "it is somewhat surprising and concerning that the abnormal blood pressure was correctly diagnosed but left untreated for over two years, and the abnormal cholesterol was diligently recorded for many years but never acted upon. Hence, failure to manage Mr. Chandler's cardiac risk factors represents substandard care."

75. The plaintiff take issue with Barrett J's findings on the issue of prejudice and the nature of the claim. He asserts that that no real prejudice has been identified by the defendants, were the summons to be renewed. It is submitted that the case is by and large a documents case and, thus, the defendants cannot say that they will be prejudiced by lack of recollection on the part of the medical witnesses as to fact given that it is unlikely that their medical personnel will in fact recall the plaintiff save through the medical records. Counsel for the plaintiff further submits that given the matters raised in the State Claims Agency's letter of 30 November 2017, it was open to the defendants to check to see if a personal injuries summons had in fact issued. That being the case, there was no injustice to the defendants sufficient to prevent the renewal of the summons.

76. In disputing the plaintiff's contention that renewal of the summons will not cause the defendants prejudice, the defendants submit that they do not yet know the extent to which they will be prejudiced given that they have only a very short personal injuries

summons and in circumstances where, save the excerpts referred to by Mr. O’Keeffe in his affidavits, Dr. Kurbaan’s report was not put before the court.

77. The defendants also dispute the suggestion that the case will be based on documents. They say that this argument cannot be asserted in circumstances where neither the relevant report nor the records have been put before the court, where the summons has not been amended to reflect the opinion in the medical report, and where the plaintiff failed or refused to provide the defendants with authority to take up the relevant records, despite request. They say that they are prejudiced by reason of the renewal of the summons in circumstances where they are being put to the defence of a stale claim relating to events that, at the time of renewal, occurred between five and thirty-five years previously. Accordingly, they contend that their capacity to rely successfully upon the defence under the Statute of Limitations is potentially diminished by reason of the renewal. They submit that the policy underpinning the Statute must be afforded significant weight in their favour. They accept, however, that the non-renewal of the summons means that the Statute will be pleaded against the plaintiff in any future proceedings.

78. To my mind, the first thing to be said is that the consequences for the plaintiff if the summons is not renewed are extremely serious. He will be put in the position whereby the issuing of any new proceedings will see such proceedings at a considerable further remove in time from the event (his heart attack in 2013) for which seeks to attach liability to the defendants. As indeed the defendants have intimated on affidavit and in their submissions, the Statute will be pleaded against him in any new proceedings. This is in circumstances where the motion Judge has effectively found that the plaintiff is already on the hazard as far as the Statute is concerned in the present proceedings. As opined by Barrett J., the plaintiff’s claim is a “stale” claim “relating to events that date back at least nine years” and in respect of which the plaintiff’s proceedings were “prima facie statute-barred at the time

they issued”. In his notice of appeal and written submissions, the plaintiff takes issue with this finding, arguing that the trial judge erred in making such a finding in the context of the defendant’s motion to set aside the renewal.

79. As this aspect of the appeal was not pursued in oral argument, I do not propose to comment on the view expressed by Barrett J. Nor is the disposition of this issue necessary, in my view, for the resolution of this appeal. In any event, as contended by counsel for the plaintiff, the personal injuries summons purports to plead (at para. 5) that the plaintiff’s date of knowledge meets the requirements of s. 2 of the Statute of Limitations (Amendment) Act 1991. Para. 5 reads:

“At all material times hereto the Plaintiff’s date of knowledge of the matters specified in Section 2 of the Statute of Limitations (Amendment) Act, 1991 were within a period not later than two years prior to the date of the institution of the herein proceedings”.

As the plaintiff’s counsel explained, para. 5 contains an error in that the word “later” as appears in the paragraph should read “earlier”. He says that if the summons is renewed, that error will be addressed either by way of the plaintiff’s Reply or by application to amend the summons. For present purposes, I will take it that the intent of para. 5 is to plead that the plaintiff’s date of knowledge meets the requirements of s.2.

80. In my view, for present purposes, the real hazard that confronts the plaintiff if renewal of the summons is not granted, is that the above plea may not be available to him if new proceedings have to be instituted. This is a weighty factor in assessing where the balance of justice lies in this case.

81. There is a further factor relevant to the Statute at play here. In their written submissions, the defendants freely acknowledge that as regards the within proceedings, they intend to rely on the Statute, contending as they do that the plaintiff’s claim is statute-

barred as “is clear from the fact the alleged acts or omissions giving rise to the plaintiff’s claim all occurred prior to 7 December 2013 while the summons was issued on 13 March 2017. It is clear from the fact that the summons was issued without the benefit of an expert medical report and not served. It is clear from the summons itself, which acknowledges that the claim is prima facie statute barred and asserts a later date of knowledge...” In those circumstances, the hardship for the plaintiff, if the Order of Barrett J. is not reversed, is clear and obvious. His claim will be at an end and he will be constrained to issue new proceedings. (I note that he has in fact issued such proceedings on 20 November 2019) Undoubtedly, any new proceedings will be met with the plea that his claim, reliant as it is on a date of knowledge, is “unquestionably and inarguably statute-barred”, to borrow the defendants’ own words. On the other hand, if the Order of Barrett J. is reversed, the plaintiff, albeit still likely to face a plea that his claim (being a date of knowledge claim) is statute-barred, will at least be in a better position to more successfully counter the Statute argument than he would be if forced to rely on new proceedings.

82. It is of course the case, as said by Barrington J. in *Roche v. Clayton*, that the Statute “*must be available on a reciprocal basis to both sides of any litigation*”. This theme is further explored in by Clarke J. in *Moloney*, at para. 26, where he opined that the policy inherent in the Statute that proceeding be commenced and tried with within a reasonable proximity to the event giving rise to the proceedings was a matter to be considered by the court in balancing the interests of justice. Thus, regard must be had to the extent to which the defendants here might be prejudiced in their defence of the proceedings if the renewal of the summons is granted.

83. The plaintiff counters any suggestion of prejudice or hardship to the defendants by contending that the claim is a “documents only” claim. By and large, I accept that to be the case. There is therefore some force in Mr. O’Keeffe’s contention on affidavit that the

plaintiff's medical records "are not diminished by reason of delay..." In fairness, the defendants do not really dispute that the plaintiff's medical records will be a central feature in the litigation. I accept however that if the case is to proceed, the defendants' medical personnel will be required to give oral evidence. However, as put by Haughton J. in *Murphy*:

"the reality is that treating medical or other hospital staff will very often not recollect the particular treatment of a particular patient, even after a relatively short time, and frequently witnesses as to fact in medical negligence cases will be wholly reliant on the medical notes in giving their evidence."

84. That being the most probable scenario in the present case, I cannot attach too much weight to the difficulties the defendants' medical witnesses as to fact might encounter if the Order of Barret J. is reversed and the case proceeds. The conclusion I have reached in this regard accordingly addresses the concerns expressed by Mr. Long at para. 9 of his affidavit. I also consider it worthwhile recalling that the first defendant, *qua* the plaintiff's employer, already has a body of medical information in relation to the plaintiff that would have, to some extent at least, countered any perceived information deficit as to the nature of the plaintiff's claim, that might have arisen upon receipt of the letter of 26 September 2017. As I have already observed, the contents of the letter of 26 September 2017 were sufficient for the defendants to embark upon the process of seeking voluntary discovery of his Defence Force medical records and to put the plaintiff on alert that they would be seeking access to his non-Defence force medical records.

85. I turn now to the actual delay *vis a vis* the summons at issue in this case. A period of eighteen months elapsed between the issuing of the proceedings and the *ex parte* application that was made to Barr J. on 12 September 2018. The time for service of the summons expired on 12 March 2018. In his submissions, the plaintiff takes issue with

Barrett J.'s finding of a "delay of approximately one year" (elsewhere described in the judgment as a "greater than one- year delay") on the part of the plaintiff in progressing matters. Counsel argues that the plaintiff had twelve months in which to serve the proceeding and, accordingly, the relevant period for consideration was the six months period between the expiry of the summons on 12 March 2018 and the *ex parte* application to renew in September 2018. I would observe that there is little merit in the plaintiff relying on the fact that he had twelve months to serve the summons in circumstances where through pure inadvertence the summons went unserved in the four months post 23 November 2018 when it palpably ought to have been served. As we now also know, it was that same inadvertence that led to a period of six months passing before the non-service of the summons was discovered. In fairness, the plaintiff's solicitor has put up his hands in these regards. Nevertheless, this delay has to be factored into the assessment of where the balance of justice lies. It is also the case that the defendants only applied to set aside the Order renewing the summons some five months after the Order was served on them on 26 November 2018. Albeit that in his notice of appeal the plaintiff asserts that the trial judge erred in failing to find the defendants' delay sufficient to refuse the relief sought, in oral submissions the plaintiff wisely did not pursue this argument with any great force.

86. The question to be addressed is the extent to which the delays on the part of the plaintiff to which I have just adverted have or are likely to cause prejudice or hardship to the defendants. The defendants' concerns are addressed at para. 9 of Mr. Long's affidavit. I would observe (and I agree with the view expressed by Mr. O'Keeffe at para. 22 of his replying affidavit in this regard) that none of the concerns (which relate to historic records and treatment) identified by Mr. Long were caused by the failure to serve the proceedings after Dr. Kurbaan's report came to hand on 23 November 2017, or indeed by the failure between March 2018 and September 2018 to seek to extend the time for service. Based on

what Mr. Long contends, those concerns would arise even if the within proceedings had been served within the requisite timeframe. As I have already said, the defendants' concern regarding their ability to defend the proceedings is alleviated to some significant regard by the likelihood that their medical witnesses as to fact will be largely reliant on their medical notes.

87. In all the circumstances of this case, and for the reasons set out in this judgment, the interests of justice in this case require that the Order of Barrett J. be set aside together with an order renewing the personal injuries summons for a period of six months from the date of the order of this Court.

88. The plaintiff has succeeded in his appeal. It follows that he should be entitled to his costs. If, however, either party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within twenty one days of the receipt of the electronic delivery of this judgment, and a costs hearing will be scheduled, if necessary. If no indication is received within the twenty-one-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

89. As this judgment is being delivered electronically, Whelan J. and Binchy J. have indicated their agreement therewith and the orders I have proposed.