THE COURT OF APPEAL

Record Number: 2021/95
High Court Record Number: 2018/667P

Noonan J.

Faherty J.

Binchy J.

BETWEEN/

IRENE NOLAN

PLAINTIFF/APPELLANT

-AND-

BOARD OF MANAGEMENT OF ST. MARY'S DIOCESAN SCHOOL

DEFENDANT/RESPONDENT

JUDGMENT (*Ex Tempore*) of Mr. Justice Noonan delivered on the 11th day of January, 2022

1. The appeal before the court today concerns an application by the plaintiff for the renewal of a personal injuries summons that has expired. The plaintiff appeals against the refusal of the High Court to renew the summons.

2. This is a bullying and harassment claim that arises out of the plaintiff's employment as an art teacher at the defendant's school in Drogheda. In her very detailed summons, the plaintiff alleges that she was subjected to various instances of bullying by other teachers at the school on various dates between the 30th April, 2008 and the 24th October, 2017, a period

of nine and a half years. The conduct complained of did not occur continuously during that period because between 2011 and 2014, the plaintiff was out of work as a result of a repetitive strain injury to her hand. That also appears to have been the subject of litigation.

3. In the context of this claim, the plaintiff appears to have consulted her general practitioner on the 3rd October, 2017, who diagnosed that she was suffering from depression and furnished a medical report to her then solicitor, who instructed counsel to draft the summons. That summons was drafted and contained very detailed allegations against the plaintiff's four colleagues concerned. The plaintiff's former solicitors appear to have submitted a claim form to PIAB on the 22nd December, 2017 and PIAB issued an authorisation to proceed on the 3rd January, 2018.

4. In the months that followed, the plaintiff appears to have decided to instruct her current solicitor, Mr. Tony Donagher, and on the 31st May, 2018, the plaintiff's former solicitors transferred her file to Mr. Donagher. The plaintiff was already embroiled in issues with her school which appear to have included the bullying complaints. Those complaints, insofar as they concerned one of the teachers identified in the summons, was the subject of a prior investigation report in 2016 which appears to have concluded in the plaintiff's favour in relation to most of her complaints.

5. On the 14th June, 2018, the school principal threatened the plaintiff with disciplinary proceedings, the nature of which is unknown. On the 23rd July, 2018, the summons was issued by Mr. Donagher in the form it had been drafted by counsel previously instructed. Shortly thereafter on the 16th August, 2018, a second personal injuries summons issued but ultimately did not proceed. In the same month, on the 22nd August, 2018, Terms of Agreement were signed between the plaintiff and the defendant and although the details of that are not available, counsel for the plaintiff informed the High Court that it related to the

threatened disciplinary process and some form of arrangement appears to have been reached whereby the disciplinary process would be discontinued and the school would support the plaintiff's application to be permitted to retire on grounds of ill health. These events do however have some relevance in the context of the plaintiff clearly being in a position to give instructions in relation both to the second personal injuries summons and the terms of agreement.

6. Thereafter, it appears that efforts focused on processing the plaintiff's retirement claim. That apparently entailed the plaintiff undergoing various medical assessments which she found stressful. On the 3rd December, 2018, her application for retirement was refused and she appealed. Again, the refusal was upheld on appeal on the 30th January, 2019 and at that stage, apparently the plaintiff considered seeking judicial review of the decision but was advised that as she had not exhausted all the internal remedies available to her, it would be inappropriate to pursue judicial review at that stage. Accordingly, she sought a review of the decision by the Department on the 5th June, 2019 and on the 22nd July, 2019, the Department again upheld the refusal. Coincidentally, this was also the date on which the summons expired on its first anniversary.

7. On the 7th November, 2019, the plaintiff lodged an *ex parte* docket with the High Court seeking to renew the summons. The application was heard by Murphy J. on the 18th November, 2019 who ordered that the summons be renewed for a period of three months. As required by the new rule, the order also stated the reason for the renewal as being "in circumstances where a delay occurred as a result of a change in solicitors". The summons was subsequently served on the defendant who then successfully applied to the court (Barr J.) to set aside the renewal.

8. The judgment of Barr J. sets out in some detail the relevant parts of the various affidavits that were before the court so that it is unnecessary to recite these in detail. The *ex parte* application before Murphy J. was grounded upon Mr. Donagher's affidavit sworn on the 6th November, 2019. The relevant averment appears at para. 6: -

> "I say that an application was made by the plaintiff to the Department of Education seeking early retirement due to ill health. I say that this application required submission of reports and the plaintiff had to attend for examination by doctors appointed by the Department. I say that this was a very stressful procedure for the plaintiff and your deponent took the decision not to serve the personal injury summons herein to avoid adding to the stress the plaintiff was under in having to deal with two separate matters."

9. That was the sole and only reason given for seeking the renewal and clearly, it was quite unrelated to the plaintiff's change of solicitor. It must be assumed therefore that the reference in the order of Murphy J. to the reason being delay as a result of a change of solicitors is incorrect.

10. The defendant's motion is grounded on the affidavit of its solicitor, Ms. Laura Prendiville of Mason Hayes & Curran. She emphasises the fact that Mr. Donagher himself took the decision not to serve the summons and it is not clear if he had obtained instructions from the plaintiff in this regard. That averment went unanswered in Mr. Donagher's subsequent replying affidavit and I must assume therefore that this decision by Mr. Donagher was taken without instructions. If that is so, it is a matter of some concern. It has not been suggested that the plaintiff was at any relevant time incapable of giving instructions and Mr. Donagher's decision is thus surprising, and all the more so because of its very serious implications for the plaintiff's case.

11. In his replying affidavit, Mr. Donagher, in addition to the reason given in his original affidavit for not serving the summons, provides two additional reasons. He repeats the original reason, albeit in slightly different terms at para. 6 as follows: -

> "Your deponent took the view that it was preferable to conclude the application for early retirement prior to progressing these proceedings as a measure of attempting to limit the scope of this litigation and also to protect the emotional health of the plaintiff, your deponent's client."

12. This in fact suggests two reasons, the first to limit the scope of the litigation and the second to protect the emotional health of the plaintiff. Mr. Donagher appears to suggest at para. 10 that he had decided not to progress the plenary proceedings while the retirement application was in being and it was only when this was finally refused that he considered reactivating these plenary proceedings. Evidently, following the final refusal, Mr. Donagher wished to consult with counsel again in relation to the proposed judicial review matter but as this was the end of the legal year, he sought to arrange a consultation with counsel for the commencement of the new term.

13. Of note however, in para. 10 Mr. Donagher says that he quite wrongly understood that he should not properly bring a motion to renew the summons during the long vacation. There was some dispute between the parties as to whether this was being advanced as a reason grounding the application for renewal but it is difficult to understand its relevance in the affidavit if it is not. Mr. Donagher also refers to prejudice issues in his affidavit, suggesting that no real prejudice accrues to the defendant, again which is disputed, as against the very significant prejudice to the plaintiff if the summons is not renewed as her claim will likely be statute barred.

14. After a detailed analysis of the facts and law, the High Court judge expressed the view that he was not satisfied that the reasons advanced by the plaintiff's solicitor for not serving the summons constituted special circumstances. He considered that, in the absence of medical evidence, there was no factual basis for Mr. Donagher's decision not to serve. Despite those findings, he went on to consider the issue of prejudice in any event, holding that there was in fact prejudice to the defendant. He accepted that the plaintiff would naturally be prejudiced by the fact that her claim might become statute barred if renewal was refused but that it was well settled that this alone could not justify renewal of the summons.

15. The relevant provisions of the RSC governing the renewal of summonses are to be found in O. 8 which, in its current guise, replaced the previous O. 8 regime on the 11th January, 2019. I think it is fair to say that the new rule was introduced to tighten up and limit the circumstances in which a renewal would henceforth be permitted. Most causes of action, including claims for personal injuries, are subject to statutory limitation periods such as, in this instance, two years from the accrual of the cause of action. When the cause of action accrues is often a complex question, particularly in a case of this nature where the matters complained of extend well beyond the limitation period. Fortunately however, we are not concerned with that issue today.

16. A summons once issued remains valid for a period of one year before it expires unless it has been served. This is in effect an extension of the statutory limitation period as is, of course, any subsequent renewal. As many judgments have commented, a tension therefore arises between the clear policy behind limitation periods to protect parties from stale claims and bring finality to litigation on the one hand, and the court's jurisdiction to, in effect, extend that limitation period by renewing a summons that has expired on the other – see for example *Moloney v Lacey Building and Civil Engineering Limited* [2010] 4 IR 417,

Monahan v Byrne [2016] IECA 10 and *Darjohn Developments Limited (in Liquidation) v IBRC Ltd* [2016] IEHC 535.

17. I think it fair to say that at one time in the past, the bar was relatively low in terms of renewal applications which were frequently granted more or less for the asking. That culture, which in another context has been described as one of "endless indulgence" (see *Gilroy v Flynn* [2004] IESC 98), has changed very significantly in recent years, not least by virtue of the State's, and thus the court's, obligations under Art. 6 of the ECHR. The new O. 8 seeks to address the perceived laxity arising under the old rule where it was not too difficult to surmount the "good reason" hurdle in cases not concerned with difficulties of effecting service. The question of prejudice has, in general, no relevance to limitation periods and its application to the renewal of summonses must be carefully scrutinised.

18. Applications for renewal before expiry of the summons may, as previously, be made to the Master subject to the criteria that previously applied, namely that reasonable efforts had been made to serve the defendant or there is other good reasons for renewal.

19. However, under O. 8, r. 1(4), after the summons has expired, an application for renewal must be made to the court and the court must be satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order.

20. That provision was considered by this court in *Murphy v HSE* [2021] IECA 3, relied on by both parties here. In his judgment, with which the other members of the court agreed, Haughton J. considered the meaning of the expression "special circumstances" in the Rule, noting that it was generally accepted to be a higher test than that of "good reason". However, the use of the word "special" did not in his view raise the bar to "extraordinary", but it did suggest that some fact or circumstance that is beyond the ordinary or the usual needs to be present.

21. Indeed, the word "special" necessarily imports a circumstance that is not normal or common. A "good reason", on the other hand, may well be something that arises commonly or frequently. An applicant for an extension of time has to establish that there are special circumstances and that those special circumstances justify the extension. The prerequisite is that there is a special circumstance which, once established, requires the court to consider whether that circumstance justifies renewal. In *Murphy*, Haughton J. referred with approval to *Brereton v The Governors of the National Maternity Hospital* [2020] IEHC 172, where Hyland J. held that the court was required to consider whether it was in the interests of justice to renew the summons.

22. He went on to say (at para. 74): -

> "I agree with Hyland J. that [*the concept of special circumstances in the security for costs jurisprudence*] applies by analogy to a court deciding whether 'special circumstances… justify an extension'. The court should consider whether it is in the interests of justice to renew the summons, and this entails considering any general or specific prejudice or hardship alleged by a defendant, and balancing that against the prejudice or hardship that may result for a plaintiff if renewal is refused."

23. He then expressly approved the approach taken in *Chambers v Kenefick* [2005] IEHC 402 under the previous O. 8 to whether there was a "good reason" to renew the summons, which he noted had been followed in many other cases. In that case, Finlay Geoghegan J. held that in determining whether the "good reason" criterion had been satisfied, the court should first consider if a good reason had been shown and if so satisfied, then move on to the second limb of considering whether, because of the good reason, it was in the interests of justice to renew. In approaching that question, the court would consider the balance of

hardship, at which point an assessment of the prejudice to each party would be made if the renewal was, or was not, made.

24. Haughton J. then said the following (at para. 76): -

> "In my view this is not a second tier or limb to the test. The need for the court to consider under sub-rule (4) the interests of justice, prejudice and the balancing or hardship is in my view encompassed by the phrase 'special circumstances [which] *justify* renewal'. Thus there may be special circumstances which might normally justify a renewal, but there may be countervailing circumstances, such as material prejudice in defending proceedings, that when weighed in the balance would lead a court to decide not to renew. The High Court should consider and weigh in the balance all such matters in coming to a just decision."

25. Counsel for the plaintiff submitted that this meant that whether a special circumstance existed was to be considered in tandem with the question of prejudice, there being no second limb to the test, and that the law had "moved on" since *Chambers* was decided. In my judgment, this is incorrect and a misinterpretation of *Murphy*. Haughton J. recognised that special circumstances alone are not enough and placed emphasis on the requirement for those circumstances to *justify* extension. His reference to there not being a second tier or limb to the test refers to the fact that special circumstances and the justification for renewal are not two separate and distinct matters, but fall to considered together in the analysis of whether it is in the interest of justice to renew the summons. Prejudice is a component of that analysis.

26. However, before that analysis can be arrived at, it must be established that there are special circumstances. This follows from the court's approval of the *Chambers* approach and accords with common sense. The plaintiff's contention that the court is required to

consider prejudice from the outset is to put the cart before the horse and would lead to a result diametrically opposed to the clear intent of the new rule.

27. As was pointed out in the High Court, the court's consideration of whether the special circumstances, once established, justify the extension, may be quite different at the *ex parte* stage from that arising when the matter is heard *inter partes*. Of course, at the *ex parte* stage, the court will generally not be aware of any specific matters of prejudice that might arise from the defendant's point of view, save that which may be presumed from the length of the delay in any given case. It is only at the latter stage that the court will have the benefit of evidence and argument from the defendant which, for example in the context of prejudice, may provide cogent reasons against renewal, not available to the court at the first hearing.

28. In general, however, it should not be the case that new and different reasons for the application are advanced by the plaintiff at the *inter partes* hearing which were not available to the *ex parte* judge. It may, for example, raise questions of candour which could influence the court's final decision. It may also give rise to issues concerning the veracity of the new reasons.

29. In the present case, it appears that Mr. Donagher has, in substance, raised three reasons why, at various stages, he elected not to serve the summons. It has to be said however that there is a distinct lack of clarity in his affidavits on these issues, something which the High Court judge commented upon. This is, in my view, quite unsatisfactory in a case where the plaintiff carries the onus of establishing the special circumstances justifying renewal and the court is left to speculate about the matter.

30. In particular, it is far from clear at precisely what stage in the timeline Mr. Donagher decided that he would refrain from serving the summons as it might cause stress to the plaintiff, or at what stage he felt that he should not serve it until the retirement application

was resolved and finally, whether his ignorance of the position about the long vacation was, or was not, a factor in delaying the application for renewal. If it was not a factor, then as I have already said it is somewhat difficult to understand why it is mentioned at all in his affidavit.

31. Taking each of these factors in turn, first the stress to the plaintiff, stress from litigation is nothing new and is an inevitable and unavoidable incident of all litigation. Every party to litigation is subject to a greater or lesser degree of stress necessarily arising from, not least, the public nature of litigation and the uncertainty of the outcome, an outcome which often has huge implications for the parties. I cannot therefore conceive that the stress of litigation, save perhaps in the rarest of cases, could ever amount to a special circumstance within the meaning of O. 8.

32. Nor is there anything particularly unusual about multi-faceted litigation, particularly in the context of bullying and harassment in the workplace claims. It is far from unusual that such cases give rise to internal inquiries, as happened here, claims before the Unfair Dismissals Tribunal, or now the WRC, and claims for damages for personal injury and other losses arising through negligence and breach of contract. Indeed, bullying and harassment claims have, as their very essence, excessive stress to which the plaintiff has been wrongfully subjected by his or her employer.

33. I find it difficult therefore to understand how anybody who willingly embarks on such litigation can be heard to say that they should not be required to pursue it until such time as they feel emotionally equipped to do so. Everyone is subject to multiple sources of stress and as the trial judge said, that is just part and parcel of life. The fact that the plaintiff may have been diagnosed by her GP as suffering from depression as a result, allegedly, of the matters of which she complains hardly changes matters. In fact, I would go so far as to say

that plaintiffs in personal injury claims of whatever nature who do not suffer some element of depression or psychological upset are very much in the minority.

34. Quite apart from all of this however, I would have difficulty in accepting that any court could reasonably be expected to accept the proposition that a plaintiff is suffering from a psychiatric or psychological condition which is such as to prevent her pursuing her case in the absence of medical evidence to that effect. Here there is no medical evidence but rather a bare assertion by Mr. Donagher that he was worried about subjecting his client to stress. As the trial judge rightly said, Mr. Donagher is a solicitor and not a doctor. I think it is of particular significance that there has never been any suggestion that the plaintiff was unable to give instructions but on the contrary, she appears to have been able to transact other legal business of significance to her during the period concerned.

35. I am therefore quite satisfied that the contention by Mr. Donagher that he wished to protect his client from stress, no matter how well motivated, cannot be viewed as a special circumstance for the purposes of O. 8, r. 1(4).

36. Turning to the second, and possibly overlapping, ground advanced that Mr. Donagher considered that the personal injuries action should not proceed until, first, the retirement claim was disposed of and second, advice was taken on the prospect of reviewing it, again, I find it hard to see how this can possibly amount to a special circumstance. Every party who institutes litigation has a duty to pursue that litigation with reasonable diligence and expedition.

37. In *Darjohn*, which was a renewal application under the previous Order 8, I noted, at para. 14, that "[l]itigation cannot be conducted on the speculative basis of issuing proceedings but not pursuing them until some event favourable to the plaintiff occurs", citing the views of Lord Denning in *Thorpe v Alexander Forklift Trucks Limited* [1975] 1 WLR

1459 which in turn approved the dicta of Lord Goddard in *Battersby v Anglo-American Oil Company Limited* [1945] 1 KB 23 where he said (at p. 32): -

> "It is the duty of a plaintiff who issues a writ to serve it promptly…ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried or to await some future development."

38. In *Darjohn*, the following was said in this regard (at para. 15): -

> "Once proceedings have commenced, the plaintiff is under a duty to prosecute them with reasonable promptness. The courts are increasingly conscious of their obligations under the Constitution and the European Convention on Human Rights to ensure that litigation is disposed of in a timely manner. Where proceedings are issued but not served, the defendant and the court are deprived of the normal control mechanisms that exist to ensure that undue delay does not occur. In general, it is not permissible to issue proceedings and then 'park' them without service in the hope or anticipation, for example, that a change in the law may render them viable or an impecunious defendant may become a mark."

39. Finally, on the long vacation issue, I think it was fairly accepted by counsel for the plaintiff in the High Court, and again not contested in this court today, that Mr. Donagher's mistake in this regard, if it was in fact a reason relevant to the application for renewal, could never constitute a good reason – see the comments of Haughton J. in *Murphy* at para. 77.

40. It is clear to my mind therefore that no special circumstances have been demonstrated by the plaintiff in this appeal, such as would qualify within the terms of O. 8. In that event, it seems to me that the court is not required to go on and consider separately the issue of

prejudice since, as already explained, that would only arise for consideration where a special circumstance had been demonstrated. None has been shown here.

41. For these reasons, I am satisfied that no error has been demonstrated in the judgment of the High Court and I would dismiss this appeal.

42. Faherty J: I have listened with care to the judgment just delivered and I agree with it.

43. Binchy J: I too have listened to the judgment and I am in full agreement with it.