Neutral Citation Number: [2007] IEHC 38

THE HIGH COURT

[2002 No. 1636P]

BETWEEN

JOHN O'GRADY

PLAINTIFF

AND
THE SOUTHERN HEALTH BOARD AND
TRALEE GENERAL HOSPITAL

DEFENDANTS

Judgment of Mr. Justice O'Neill delivered on the 2nd day of February, 2007

1. This is an application pursuant to O. 8, r. 2 of the Rules of the Superior Court to set aside the order of McKechnie J. made the 13th day of June, 2005 whereby the plenary summons herein was renewed for a period of six months from the date of the order.

2. The facts relevant to the matter are as follows:

3. On the 18th April, 1999 the plaintiff suffered a rupture injury to his patellar tendon from a fall off a bike, as a result of which he had to undergo surgery on his knee in Tralee General Hospital. In this surgery a repair of the tendon was carried out by the insertion of wire sutures. After the surgery the plaintiff avers, in his affidavit, that he suffered excruciating pain, and he felt as if his kneecap had exploded. He says he requested that the plaster cast be taken off but that this was refused and he says that his wife requested that an x-ray be done at the time and that this was also refused. He says he was heavily sedated. He avers that notwithstanding his significant pain in the immediate post-operative period he was given physiotherapy in the form of quadriceps exercises. After 3 weeks the wound was examined, the clips taken out and the cast replaced. After about 12 weeks the cast was removed and further physiotherapy and exercises ordered, after which his knee became very swollen and painful. He says that an x-ray taken at this time confirmed that the wires had broken and that the tendon had re-ruptured. On the 29th July, 1999, a second operation was carried out to remove the broken wires.

4. The plaintiff believes that the excruciating pain that he experienced immediately after the initial surgery was as a result of the broken wires. He says that had an x-ray been taken then, as his wife had requested the broken wires would have been diagnosed and the problem remedied immediately. As a result of all this the repair to his patellar tendon failed and as a consequence of the delay in diagnosis together with premature physiotherapy treatment, he suffered months of severe pain, swelling and immobility.

5. On the 12th January, 2001, the plaintiff attended Mr. F.G. Kenny, Consultant, General Orthopaedic Surgeon who gave his report on the 31st January, 2001 in which he recommended that the plaintiff see a knee expert and he recommended two experts in knee pathology, Mr. Brian J. Hurson, Consultant Orthopaedic Surgeon in the Blackrock Clinic, Dublin and Mr. Raymond Moran, Consultant Orthopaedic Surgeon, Beaumont Private Clinic, Dublin.

6. Early in 2001, the plaintiff's solicitor wrote to Mr. Hurson with a view to obtaining an examination and report, but by letter dated 21st March, 2001, Mr. Hurson declined that request. The plaintiff's solicitor then wrote to Mr. Moran, but he by letter dated the 1st May, 2001 likewise declined to act.

7. In the month of January, 2002, the plaintiff instructed his solicitor Holmes O'Malley and Sexton to institute these proceedings and the plenary summons, the subject matter of this application, was issued on the 5th February, 2002.

8. In the meantime, starting with a letter of the 1st December, 2000 the plaintiff's solicitor entered into correspondence with the defendants with a view to obtaining all of the plaintiff's relevant medical records, for the purposes of obtaining a medical opinion on the standard of care of his treatment in Tralee General Hospital. Under cover of a letter dated the 19th January, 2001, medical records were sent by the defendants, but the plaintiff avers that these records were not complete and the plaintiff's solicitor wrote a further letter dated the 11th April, 2001 requesting copies of x-rays. The defendants wrote back on the 19th April, 2001 seeking clarification as to what x-rays were sought and this was responded to on the 8th May, 2001 saying that the x-rays sought were in relation to his accident on the 18th April, 1999 when he was first admitted to the defendants' hospital. Copies of these x-rays were supplied on the 21st May, 2001. On the 1st February, 2002 the plaintiff's solicitor wrote a further letter to the defendants complaining of the incompleteness of the medical records previously supplied, stating that the nursing notes, admission entries and pathology reports *inter alia* were missing from the file and requesting copies of these. This letter of the 1st February, 2002, received no reply and the plaintiff's solicitor wrote again on the 13th March, 2002. It would appear that this letter was responded to on the 20th March, 2002 enclosing requested medical records, but the plaintiff's solicitor was dissatisfied with the completeness of the records supplied and a further letter was written on the 4th June, 2002 complaining that the medical notes for the period of the plaintiff's hospitalisation in April, 1999 had been omitted. On the 6th June, 2002, the defendants wrote to the plaintiff's solicitor clarifying what would constitute medical notes and on the 24th June, 2002 the plaintiff's solicitors requested copies of these notes to complete the records. It would appear that no additional material was furnished by the defendants after the 20th March, 2002 by which time the defendants contend that the plaintiff was in possession of all of the relevant records.

9. On the 5th November, 2002 the plaintiff's solicitor wrote to the Physiotherapy Department of Tralee General Hospital requesting a medical report on the plaintiff's condition and physiotherapy treatment while in hospital. The Physiotherapy Department responded promptly saying that they did not supply medical reports.

10. The plaintiff avers that until he had obtained a complete set of medical records he was not in a position to seek a medical opinion on the adequacy or otherwise of the surgical or medical care given to him by the defendants.

11. The plaintiff avers that having completed the medical file, his solicitor then sought advice from Senior Counsel in March, 2003 regarding a specialist in the U.K. and these advices were received in October, 2003. As a result of this the plaintiff's solicitor contacted Mr. Neville Kay of the Claremont Hospital in Sheffield. On the 11th November, 2003 and the plaintiff received an appointment to see him on the 23rd February, 2004. He was unable to keep this appointment because of having to go into hospital for an unrelated medical problem, but he did see Mr. Kay on the 19th April, 2004. On his advice he had an ultrasound scan carried out in Sheffield and on the 16th September, 2004 Mr. Kay furnished his final report. The plaintiff avers that it was only after receipt of Mr. Kay's report that he was in possession of the necessary medical evidence which would have justified proceeding with the claims made in these proceedings. He had a further consultation with his solicitor in November, 2004 in regard to Mr. Kay's conclusions at which point he gave instructions to his solicitor to proceed with the claim. In January, 2005 papers were sent to counsel with instructions to draft the appropriate motion and affidavit to seek an order renewing the plenary summons. He swore the necessary affidavit for that

application in February, 2005 and the application was made for the renewal, ex-parte before McKechnie J. on the 13th June, 2005, when the order was made renewing the summons.

12. Finally, on the 11th July, 2005 the renewed plenary summons was served on the defendants accompanied by a letter stating the plaintiff's claim. The defendants contended that this was the first clear intimation to them of the plaintiff's claim, six years after the events, the subject matter of the proposed claim.

13. Order 8, rr. 1 and 2 read as follows:-

> "Renewal of Summons'
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> 1. No original summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons. After the expiration of twelve months, an application to extend time for leave to renew the summons shall be made to the Court. The Court or the Master, as the case may be, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed summons. The summons shall in such case be renewed by being stamped with the date of the day, month and year of such renewal; such stamp to be provided and kept for that purpose in the Central Office and to be impressed upon the summons by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in the Form No. 4 in Appendix A, Part 1; and a summons so renewed shall remain inforce and be available to prevent the operation of any statute whereby a time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original summons.
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> 2. In any case where a summons has been renewed on an ex-parte application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order."

14. For the defendants it was submitted by Mr. McGrath S.C. as follows:-

> 1. That notwithstanding the fact that the defendant were the moving party on this application, the onus was nonetheless on the plaintiff to show good reasons why the summons should be renewed.
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> 2. That because the initial application to renew the summons was made ex-parte, in an application under r. 2 a defendant is at large to make any case which might persuade the court to refuse a renewal and is not confined to adducing evidence as to non-disclosure on the ex-parte application or evidence of prejudice, such that, had such evidence been lead before the court on the ex-parte application, it would have persuaded the court to refuse the renewal. In this regard it was submitted that the case of *Behan v. Bank of Ireland* (Unreported, High Court, 14th December, 1995) was wrongly decided. It was submitted that on an application under r. 2 of O. 8 the court must approach the matter as a hearing de novo with the onus of the proof on the plaintiff.
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> 3. The plaintiff had not demonstrated "good reason" for the renewal and had been guilty of inordinate and inexcusable delay, in particular a delay in excess of four years, from the accrual of the alleged cause of action until the engagement of a services of an expert medical practitioner, Mr. Kay, to give an opinion on whether there was a want of the appropriate standard of care in the treatment of the plaintiff by the defendants.
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> 4. Although no specific prejudice could be pointed to by the defendants, in the conduct of their defence, it was submitted that having regard to the lapse of time involved from July 1999 to the likely date of trial, namely, ten years, and where oral evidence would be required to meet the likely allegations of the plaintiff, prejudice was to be presumed and in this regard the defendants relied upon the cases of *Allergan Pharmaceuticals (Ireland) Limited v. Noel Dean Roofing and Cladding Limited* (Unreported, High Court, 6th July, 2006), and *Martin v. Moy Contractors Limited* (Unreported, Supreme Court, 11th February, 1999).
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> 5. It was submitted that the judgment of Hardiman J. in the Supreme Court in the case of *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 indicated that a stricter approach is to be adopted to inordinate delay, in the light of the jurisprudence of the European Court of Human Rights, exemplified in cases such as *Mulhall v. Ireland* ECHR 422 97/98, July, 29, 2004.

15. For the plaintiff it was submitted by Mr. Richard Keane S.C. as follows:-

> 1. There was no inordinate or inexcusable delay on the part of the plaintiff and the facts as set out in the affidavits demonstrate this.
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> 2. That the plaintiff was entitled to issue the plenary summons and not serve it, to stop the statute of limitation running and to continue to investigate the medical evidence to establish if there was a sound basis for the claim. In this regard reliance was placed on part of the judgment of McGuinness J. in *Cunningham v. Neary* [2004] 2 I.L.R.M. at 498.
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> 3. In an application under r. 2 a defendant had to be able to point to material that had not been disclosed to the court on the ex-parte application, which would have moved the court to refuse the renewal, or otherwise to adduce evidence of prejudice to the defence which, had it been before the court on the ex-parte application would have persuaded the court to refuse the renewal. In this regard reliance was placed by the plaintiff on the case of *Behan v. The Bank of Ireland* (Unreported, The High Court, 14th December, 1995). Neither category of evidence was lead in this application by the defendant.
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> 4. The defendant has not demonstrated any specific or actual prejudice to his defence, and it was submitted that presumed prejudice is not sufficient on an application of this kind to deny a plaintiff renewal of the summons. In this regard reliance was placed on the judgment of Barrington J. in *O'Brien v. Fahy* (S.C. Ex Temp. March 21, 1997).
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> 5. It was submitted that the defendant was on notice of the claim by virtue of the extensive correspondence since December, 2000 seeking the plaintiff's medical records and also were aware of the complaints of the plaintiff in hospital, and, of necessity, were aware of the second operation and of the reasons for it. It was submitted that the correspondence about the medical records did as much as any initiating letter could have done namely to have given the

defendants notice of a potential claim. Having regard to the obligation on the plaintiff and his legal advisors to ensure that there was a sound basis for a claim before initiating same, the plaintiff was not in a position to do any more than give an intimation of a potential claim prior to receiving advices from Mr. Kay in September, 2004. In this regard the correspondence concerning the records did as much as it was possible for the plaintiff to do.

6. There was delay on the part of the defendants in furnishing all of the plaintiff's medical records.

7. The balance of justice lies in favour of renewing the summons because not to do so would render the plaintiff's claim statute barred.

8. The plaintiff experienced considerable difficulty getting an expert report and there was no want or diligence on his part or the part of his solicitor in that regard.

16. The first issue which arises is whether the defendant is confined on this application to adducing evidence of non-disclosure or prejudice such that if it were available on the ex-parte application the court would have been persuaded to refuse the renewal.

17. I am not in agreement with the submission made by Mr. McGrath on this issue. In my view the original order having been made the party affected by it, i.e. the defendant cannot treat the application under O. 8, r. 2 as an appeal. Hence, a defendant cannot simply seek to persuade the court hearing the r. 2 application, to reach a different conclusion on the same evidence adduced on the ex-parte application. A defendant, must adduce new evidence which, had it been before the court on the ex-parte application would have persuaded the court to have refused the renewal. In this regard I agree with the judgment of Morris J. in the case of *Behan v. The Bank of Ireland* (Unreported, High Court, 14th December, 1995).

18. The next question which arises is where does the onus of proof rest on an application under O. 8, r. 2.?

19. In my view r. 1 casts on the plaintiff the onus of proving that either reasonable efforts were made to serve the defendant or there is "other good reason" for renewing the summons. Rule 2 casts on the defendant the burden of proof, of such matters as are raised by the defendant.

20. An issue which inevitably arises on this application is the extent to which this court should entertain complaints by the defendant of prejudice due to alleged delay on the part of the plaintiff prosecuting his claim.

21. It is clear from the decisions of the Supreme Court in *Baulk v. The Irish National Insurance Company Ltd* [1969] 1 I.R. 66 and *McCooey v. The Minister for Finance* [1971] 1 I.R. 159 that the phrase "other good reason" in O. 8 r. 1 is not confined to issues relating to service and can embrace a variety of factors affecting both the plaintiff and defendant, for example the fact that a refusal of renewal will render the plaintiff's claims statute barred or from a defendant's point of view, that the renewal of the summons will expose the defendant to a claim in respect of which his defence is impaired by the passage of time.

22. It must be borne in mind that defendant prejudice on this type of ground can even if there is a renewal, be dealt with in an application, subsequently, for a dismissal of the claim for want of prosecution, whereas a refusal of the renewal will in all those cases (the great majority) where the limitation period has expired, result in the irreversible defeat of the plaintiff's claim.

23. In general at this stage of proceedings, the exact nature and extent of the plaintiff's claim will not have been set out, and this will only happen with the delivery of a statement of claim. Thus it is unlikely that a defendant will at this preliminary stage be in a position to state with precision or clarity, what actual prejudice will affect him in defending the claim.

24. In the light of all this, in my view, this court, on an application under O. 8, r. 2 should not refuse to renew, where the case would otherwise be statute barred, unless the defendant demonstrates to the satisfaction of the court, the clearest possible case of actual prejudice, such, that his defence to the claim has been in actual terms substantially impaired.

25. Mere presumptive prejudice should not suffice to cause the refusal of the renewal of a summons.

26. I would echo the following passage from the judgment of Barron J. in *Prior v. Independent Television News Limited* [1993] 1 I.R. 403 as aptly stating what must be fundamental to these applications:

> "It seems to me that the essential principle is that where proceedings have not been heard on the merits, it may be unjust that they should be barred by procedural difficulties."

27. There is, of course, an obligation on the court to ensure that all proceedings are completed in a reasonable time-frame as laid down in recent judgments of the European Court of Human Rights, namely *Mulhall v. Ireland*, above mentioned and *Barry v. Ireland* (E.C.H.R. Judgment 15/12/2005). These cases require, as was alluded to by Hardiman J. in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290 and O'Sullivan J. in *Allergan Pharmaceuticals (Ireland) Limited v. Noel Dean Roofing and Cladding Limited*, a much stricter approach than hitherto applied to all questions where the indulgence of the court is sought, where the primary problem is default of pleading or other form of procedure or lapse of time.

28. I would readily agree that the recent jurisprudence of the European Court of Human Rights does necessitate a stricter approach on procedural default and time issues. The application of such an approach must however take place in the most appropriate procedural setting. Thus, a full and proper consideration of the effects of passage of time on the capacity of a defendant to defend a delayed claim, can best be done, only at that stage in the proceedings, when a defendant knows, with certainty and clarity whether his defence has been impaired by the passage of time. As said earlier, in general this will occur only after the statement of claim is delivered.

29. To attempt to apply a stricter approach in advance of that stage would in all likelihood result in the imposition of an imprecise policy of strictness, rather than a consideration of the actual merits of the case, to which a higher standard of time observance, could be applied.

30. All this tends to persuade me as indicated earlier, that unless a defendant demonstrates on a r. 2 application the clearest case of actual substantial impairment of his defence, a court should at that stage relieve against the ultimate actual prejudice to a plaintiff, namely the time barring of his claim, unless his summons is renewed.

31. In this case the plaintiff's application for renewal falls to be considered on the basis of whether there is "other good reason" for

the renewal, as distinct from the other potential ground namely "that reasonable efforts have been made to serve such defendant".

32. The plaintiff deliberately choose not to serve the summons until such time as his investigation of the medical evidence to support his case was complete.

33. In my view, where the rules speaks of reasonable efforts to serve a defendant, what is contemplated are difficulties in effecting service on a particular defendant, such as evasion of service, or problems locating a defendant, and not a conscious decision by a plaintiff to withhold service for strategic reasons, however meritorious those reasons might be. In this case it must be taken that the plaintiff did not make reasonable efforts to serve.

34. Hence the plaintiff's explanations for not effecting service must be tested under the "other good reason" heading, and weighed against the defendants contentions in regard to prejudice.

35. Such delay as there was on the part of the plaintiff was apparent to the court on the ex-parte application from the affidavit grounding the application. This court on a r. 2 application cannot reach a different conclusion on whether or not there was inordinate delay unless new evidence is adduced which if put before the court on the ex-parte application would have persuaded the court to refuse renewal.

36. The only new material in the affidavits filed in the r. 2 application relates to the correspondence concerning the disclosure of the plaintiff's medical records by the defendants. This evidence offers an explanation of the plaintiff's delay up to the engagement of Mr. Kay, where none was given in the affidavit grounding the ex-parte application at all. Notwithstanding this, it is open to this court to consider the new evidence in the context of whether there was inordinate delay and whether this new evidence excuses that delay. Manifestly all new evidence both from the defendant and the plaintiff can be thus considered, bearing in mind where the onus of proof lies as discussed above.

37. In the case of *Hogan v. Jones* [1994] 1 I.L.R.M. 512, Murphy J. held that only delay occurring after the issuance of a writ, can be considered as constituting inordinate delay. Time elapsed before the issue of the writ within the limitation period cannot. The following passage from the judgment of Murphy J. illustrates the point:

> "As appears from the calendar of dates set out above more than four years elapsed between the date in which the cause of action arose and the issue of the plenary summons. It may be that that lengthy delay could be explained or excused, if that were necessary, on the basis that remedial work was being carried out during the period by these defendants, be it without admission of liability. However, both parties are agreed that this period of time did not fall to be taken in account in calculating whether or not inordinate delay had occurred but was a material consideration in considering the conduct of the plaintiff subsequent to the institution of the proceedings in accordance with the principles clearly stated by Lord Diplock in *Birkett v. James* [1977] 2 All E.R. 801 at p 808 in the following terms:
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> > "It follows a fortiori from what I have already said in relation to the effects of statutes of limitations on the power of a court to dismiss actions for want of prosecution, that time elapsed before the issue of a writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already have been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of his potential witnesses, their death or their untracability. To justify dismissal of an action for want of prosecution the delay relied on must relate to the time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it the more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner maybe inexcusable in the light of the time that has already passed before the writ was issued."

38. In the light of recent jurisprudence of the European Court of Human Rights, now by virtue of s. 2(1) of the European Convention on Human Rights Act, 2003, introduced into our domestic law, the question of whether the foregoing passage from the judgment of Murphy J. remains a correct statement of the law will have to be considered in an appropriate case. The point was not argued in this case and hence I will adopt the approach as set out by Murphy J. in that case.

39. Thus only delay after July, 2002 (the expiry of the limitation period), can be considered as inordinate delay.

40. In my view the delay from July 2002 to the engagement of Mr. Kay in October 2003 was inordinate. By March, 2002 the plaintiff, I am satisfied, had all of the relevant medical records. Engaging the services of a U.K. specialist should not have taken that amount of time. Indeed it could be said that obtaining the agreement of such a specialist to act in the case, could have been secured long before this. I do not think it was a necessary prerequisite, that all of the medical records had to be assembled before any attempt was made to engage the appropriate expert in the United Kingdom. Needless to say the expert thus engaged would require the medical records, but his agreement to act could have been secured before the final assembly of these records.

41. The plaintiff knew from May, 2001 that he needed the services of someone such as Mr. Kay. No adequate reason has been advanced as to why no attempt was made to find and engage someone like Mr. Kay until October, 2003.

42. In my view the delay from July, 2002 to October, 2003 when Mr. Kay was engaged was inordinate and inexcusable, when viewed in the context of time lost before the expiry of the limitation period. In this regard, the plaintiff did not see Mr. Kenny until 31st January, 2001, 1 ½ years after July, 1999, when he must have been aware of his grievance, concerning his medical treatment. As of May 1st 2001 he was aware that he required the services of someone, such as Mr. Kay, but did not secure his services until October, 2003, i.e. 2 years and 5 months later or 1 year and 2 months, up to the expiry of the limitation period.

43. I am satisfied that from the time Mr. Kay was engaged, the matter was progressed with acceptable if not commendable expedition, but by then approximately four years had been lost or wasted.

44. I would readily accept that the plaintiff and his legal advisors had an obligation to ensure that there was a sound basis in law for the claim before it was commenced and that it was legitimate for him as said by McGuinness J. in *Cunningham v. O'Leary* [2004] 2 I.L.R.M at 502-503 to issues his plenary summons to stop the statute running and to delay serving it while he investigated the available medical evidence.

45. However, this permission could not amount to a licence to delay. Indeed I would be of opinion that a plaintiff in this situation carried an onerous duty to eliminate all unnecessary delay knowing that some delay in communicating the claim to the proposed defendant would be inevitable because of the need to establish that there was sound medical evidence to support the claim. The

inordinate loss of time as discussed impedes the plaintiff in my view from claiming that his obligation to investigate the medical evidence provides a justification or acceptable excuse for not serving the summons within the time prescribed by the Rules of the Superior Courts.

46. Apart from the correspondence to the defendants seeking disclosure of the relevant medical records there was no other communication to the defendants intimating the claim now made, until the plenary summons was served in July, 2005 accompanied by a letter setting out the nature of the claim. It was submitted for the plaintiff that knowledge of the actual events themselves and the treatment given to the plaintiff would of itself have suggested to the defendants that the plaintiff's claim was probable. In my views such a contention is unsustainable. In the first place the medical personnel involved could not be expected to have a memory of the detail of all treatment given to every patient including the plaintiff. Secondly, the mere fact that the plaintiff's recovery from his initial knee surgery was complicated, could never be said, to indicate to treating medical personnel, that a claim was probable.

47. The correspondence concerning the records would undoubtedly have indicated to the defendants that there was a potential claim pending concerning the treatment in general of the plaintiff by the defendants while in hospital in April and July 1999 but no more.

48. The defendants do not assert actual prejudice, at this stage, confining their complaint to presumptive prejudice due to the passage of time and the difficulty of assembling oral evidence to contest the claim, where the trial would be likely to take place approximately ten years after the accrual of the alleged cause of action. Not having received a statement of claim they cannot point to specific or actual prejudice at this stage in the proceedings.

49. Notwithstanding the inordinate and in my view inexcusable delay on the part of the plaintiff, as so found, I am of opinion that the time barring of the plaintiff's claim by the non-renewal of the plenary summons, in the absence at this stage of evidence of actual substantial prejudice to the defence of the defendants, is a result which would be in the nature of a pure penalty imposed on the plaintiff, and at this stage of the proceedings is not warranted in the overall interest of achieving a just outcome to the dispute between these parties.

50. Accordingly, I will not set aside the renewal of the summons.