Neutral Citation Number: [2008] IEHC 453

THE HIGH COURT

2002 15811 P

BETWEEN

BERNARD BINGHAM AND VIOLA BINGHAM

PLAINITFFS

AND

MARTIN CROWLEY, TIMOTHY LYNCH, BARRY COSGROVE, JAMES O'RIORDAN, BRIDGET EGAN, JOE WILEY, GERALDINE SWIFT, JOHN LENNON AND DIANE BERGEN

DEFENDANTS

Judgment of Mr. Justice Feeney delivered on the 17th day of December, 2008.

1. Introduction

Applications have been brought in these proceedings by the first and second named defendants seeking orders setting aside orders of the High Court renewing the plenary summons. The second named defendant seeks to set aside an order of the High Court made the 19th February, 2007, renewing the summons as against the second named defendant. In the alternative the second named defendant seeks an order setting aside an earlier order of the High Court made the 21st November, 2005, renewing the summons as against all defendants for a period of six months from that date. The first named defendant seeks an order setting aside the order of the High Court made the 21st November, 2005.

2. The applications brought by the first and the second named defendants are made pursuant to Order 8, rule 2 of the Rules of the Superior Courts. 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".

Neither the first nor the second named defendants have entered an appearance and both parties seek orders setting aside orders renewing the summons.

3. The summons was renewed pursuant to Order 8(1) of the Rules of the Superior Courts which provides inter alia:-

> 1. "No original summons shall be in force for more than twelve months from the … date thereof, … but if any defendant therein named shall not have been served therewith, the plaintiff may apply … for leave to renew the summons. The Court … if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original … 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".

4. Background

The proceedings herein relate to a claim for damages arising out of the death of Mirek Bingham who died on the 31st December, 1999 at the Mater Hospital. The plaintiffs are the mother and father of the late Mirek Bingham. The first named defendant is identified in the general endorsement of claim of the plenary summons as being sued as the nominee of the Mater Misericordiae Hospital. The second named defendant is a registered medical practitioner and a Consultant Neurologist. The third to ninth named defendants are other persons who were allegedly involved in the treatment of the late Mirek Bingham but they have not been served with the proceedings. The Court has been informed that it is not the intention of the plaintiffs to serve the proceedings on any of those defendants.

5. Mirek Bingham was born in May, 1983 and had a history of neurological problems. Up to 1999, Mirek Bingham was investigated and treated by a number of different medical practitioners. In August of 1999, Mirek Bingham first saw the second named defendant, Dr. Timothy Lynch, who reviewed his condition. Mirek Bingham was admitted to the Mater Hospital on the 15th September, 1999 and he remained in the hospital until his death on the 31st December, 1999. During that period, Mirek Bingham was under the care of a number of consultants, including Dr. Lynch.

6. Following the death of Mirek Bingham, his parents, Bernard Bingham and Viola Bingham, acting through their then solicitors, MacGuill & Co., made a complaint to the Gardaí relating to the treatment of their late son. They claimed that their son died as a result of criminal negligence on the part of medical personnel involved in his treatment from 1992 to 1999. One of the persons in respect of whom complaint was made was Dr. Timothy Lynch. Complaints were also made in respect of other medical personnel working in the Mater Hospital between September and December, 1999. A comprehensive Garda investigation was carried out and Dr. Lynch furnished two detailed statements to the Gardaí in relation to his involvement in the review and treatment of Mirek Bingham. In or about May, 2005, the Gardaí informed the coroner that the Director of Public Prosecutions had determined that there would be no prosecution arising out of the death of Mirek Bingham.

7. Arising out of the death of Mirek Bingham, an inquest was held. The matter was first listed for mention in the Coroner's Court on the 28th September, 2000 and it was initially adjourned at the request of the solicitor acting on behalf of Mr. and Mrs. Bingham. Thereafter it was adjourned on a number of occasions as a result of applications by the Gardaí due to the ongoing criminal investigation. Following the notification that the Director of Public Prosecutions did not intend any prosecution, the inquest proceeded. Ultimately, the inquest concluded with a record of verdict of the Coroner's Court for the County of the City of Dublin dated 12th November, 2007. The record of verdict identified the medical reasons for the death of Mirek Bingham.

8. In March, 2005, Mr. and Mrs. Bingham made complaint to the Medical Council in respect of seven named medical practitioners alleging professional misconduct. The complaint was accompanied by a 42 page document which was identified as "a detailed document containing the main issues relating to our son, Mirek's treatment and complaints against each of … Doctors" who were identified in the letter of the 14th March, 2005. The Court has not been informed as to what occurred in relation to the complaints made to the Medical Council. There is no evidence before the Court to suggest that the Fitness to Practise Committee of the Medical Council determined to proceed to hold an inquiry into any of the seven Doctors.

9. Procedural Background

Bernard Bingham and Viola Bingham issued the plenary summons on the 10th December, 2002. The summons contained a general endorsement of claim which stated:-

> "The plaintiffs' claim is for damages arising out of the death of Mirek Bingham from personal injuries received by him due to the negligence and breach of duty of the defendants or one or other of them, their respective servants or agents".

Nine defendants were named. The first named defendant being identified as an nominee of the Mater Misericordiae Hospital and the other eight defendants being medical personnel who were all identified as having an address care of the Mater Hospital. The summons was issued on behalf of the plaintiffs by their then solicitor, MacGuill & Co., three weeks prior to the third anniversary of the death of Mirek Bingham. That summons was not served on any of the defendants. No warning letter was ever written. Neither the first nor the second named defendants were aware of the existence of proceedings until May, 2006.

10. In 2003, there was correspondence between a second firm of solicitors, McCourt & Co., who were in contact with the plaintiffs, and the solicitors on record, MacGuill & Co. Ultimately in March, 2005, MacGuill & Co., were granted liberty by the Court to come off record and a different solicitor from the solicitors who had corresponded with MacGuill & Co., namely Cynthia Lennon of Lennon Solicitors, came on record by service of a notice of change of solicitors dated the 2nd November, 2005. On the 11th April, 2006, Barry Sheehan, solicitor, came on record for the plaintiffs by service of a notice of a change of solicitor. Barry Sheehan currently has a part heard application before the Court to come off record as the solicitor for the plaintiffs.

11. The summons which was issued on the 10th December, 2002, expired on the 9th December, 2003. Order 8 expressly provides that no original summons shall be in force for more than twelve months. Notwithstanding that the summons expired in December 2003 and that there had been no notification of the existence of any civil proceedings, no application was made to renew the summons until the 21st November, 2005. An order renewing the summons was made on that date. It is in respect of that order that the first named defendant seeks relief pursuant to Order 8, rule 2. The second named defendant makes an alternative claim for the same relief. No attempt was made to serve the summons which was renewed by *ex parte* order on the 21st November, 2005 until the month of May 2006. On the 18th May, 2006, the summons was served personally on the first named defendant. That was the date upon which the first named defendant first became aware of the existence of the civil proceedings herein.

12. On the 17th May, 2006, the plaintiffs' then solicitor acting through a summons server, Denis O'Leary, endeavoured to serve the summons on the second named defendant. He attended at the second named defendant's consultation rooms at Suite No. 6, the Mater Private Hospital, Eccles Street, Dublin. There was a conversation between him and the second named defendant's secretary. No proceedings were served nor were copy documents left on that date. There is a dispute between the summons server and the secretary as to precisely what was said. On the 18th May, the plaintiffs' then solicitor, Barry Sheehan, sent a letter by post to Arthur Cox, the solicitors who were assisting the second named defendant in relation to the criminal investigation, requesting that Arthur Cox Solicitors accept service on behalf of Timothy Lynch. That letter was received on the 19th May, 2006 and was replied to on the 1st June, 2006 by Arthur Cox indicating that they had received instructions from the Medical Defence Union to act on behalf of Dr. Timothy Lynch in respect of the medical negligence proceedings which were issued in 2002, and indicating that they had no instructions to accept service of same and that if it was the plaintiffs' solicitors intention to apply for a further renewal of the plenary summons, that they should be provided with notice of such application. It was on the 19th May, 2006, that the second named defendant first became aware of a civil claim. A copy of the plenary summons, together with the order of the High Court made on the 21st November, 2005, were sent by post from the plaintiffs' solicitors to Arthur Cox on the 30th May, 2006.

13. The plenary summons which had been renewed by order of the Court on the 21st November, 2005, was renewed for a period of six months which expired on the 20th May, 2006. On the 19th February, 2007, the plaintiffs' solicitor made an *ex parte* application pursuant to Order 9, Rule 15, seeking a declaration that the service allegedly effected on the second named defendant was sufficient. Order 9, Rule 15 provides:-

> "In any case the Court may, upon just grounds, declare the service actually effected sufficient".

The Court having considered the matter deemed the application to be an *ex parte* application for the renewal of the plenary summons pursuant to Order 8, Rule 1 and made an order that the said summons be renewed as against the second named defendant for a period of six months from that date. It was further ordered that the service of the originating summons be effected on the second named defendant by serving a copy thereof, together with a copy of the order of the 19th February, 2007, by ordinary pre-paid post addressed to Arthur Cox & Co., at their offices and that the second named defendant was to have five weeks from such substituted service within which to enter an appearance to the summons. By letter dated the 11th May, 2007, Barry Sheehan, the plaintiffs' solicitor, effected service on Arthur Cox in compliance with the order of the High Court made on the 19th February, 2007. That letter was received on the 14th May, 2007 and was responded to on that day by Arthur Cox requesting a copy of the plaintiffs' motion and grounding affidavit and all documents that were before the Court at the time that the order renewing the summons was made on the 19th February, 2007. They were forwarded by the plaintiffs' solicitors by letter dated the 17th May, 2007, and on the 15th June, 2007, Arthur Cox wrote to the plaintiffs' solicitor, Barry Sheehan, indicating that they had instructions to issue a motion pursuant to Order 8, Rule 2 of the Rules of the Superior Courts and that motion was issued on the 24th July, 2007.

14. On the 4th June, 2008, the plaintiffs' solicitor issued a motion seeking to come off record and that motion together with the second named defendant's motion pursuant to Order 8, Rule 2, came on for hearing before the High Court on the 13th June, 2008. On the 25th September, 2008, the first named defendant's solicitors issued a motion seeking to set aside the order made on the 21st November, 2005. All three motions have come on for hearing. As indicated above the plaintiffs' solicitor's motion seeking to come off record has been part heard and has been adjourned for further hearing pending the Court's determination in relation to the two motions brought pursuant to Order 8, Rule 2.

15. Preliminary Legal Matter:
The first issue which the Court must consider is the nature of the application brought by a defendant under Order 8, rule 2. In particular, the Court must consider the nature of the onus which is on a defendant in such an application. The plaintiffs' solicitor submitted that the onus on a defendant is exclusively as set out by Morris J. in *Behan v. Bank of Ireland* (Unreported, High Court, Morris J. delivered on the 14th December, 1995) as applied by O'Neill J. in *O'Grady v. Southern Health Board* [2007] 2 I.L.R.M. 51. In those two judgments the Courts held that a defendant could not seek to persuade the Court to reach a different conclusion on the same evidence adduced at the *ex parte* hearing but had the onus to adduce new evidence, which, had it been available at *ex parte*, would have persuaded the Court to have refused the renewal. In both cases the High Court held that a defendant could not treat an application under Order 8, rule 2 as an appeal and seek to persuade the Court to reach a different conclusion on the same evidence as adduced on the *ex parte* application. That obligation placed an onus on a defendant. Counsel who appeared for the second named defendant, supported by counsel for the first named defendant, submitted that it was open to a defendant, by submission in an Order 8, rule 2 application to seek to demonstrate to the Court that, even on the facts before the Judge hearing the *ex parte* application, on a proper application of the relevant legal principles the order for renewal should not be made. Counsel relied on the decision of Finlay Geoghegan J. in *Chambers v, Kenefick* [2007] 3 I.R. 526. In *Chambers v, Kenefick* the Court held that not only could a defendant moving an Order 8, Rule 2 application demonstrate that facts exist which significantly alter the nature of the plaintiffs'

application to the extent of satisfying the Court that, had those facts been known at the original hearing, the order would not have been made, which was the approach identified by Morris J. in *Behan v. Bank of Ireland*, but that it was also open to a defendant, by submission, to seek to demonstrate to the Court that, even on the facts before the Judge hearing the *ex parte* application, upon a proper application of the relevant legal principles the order for renewal should not have been made. Finlay Geoghegan J. stated in relation to that approach as follows (at p. 529):-

> "This appears to me to be necessary having regard to the purpose of an application under Order 8, Rule 2. It only relates to orders which have been made *ex parte*. On any *ex parte* application by a plaintiff, a defendant has not had an opportunity of making submissions to the court as to why the court should not exercise its discretion under Order 8, rule 1 to renew a summons. It appears to me that the purpose of including Order 8, Rule 2 is to accord to a defendant fair procedures in the High Court, and to permit a defendant where he considers it necessary to make submissions to a Judge, even on what might be described as an agreed set of facts, that the court should not exercise its discretion to renew a summons, and that therefore, I propose considering this application from the defendant on that basis."

This Court agrees with the reasoning identified by Finlay Geoghegan J. in *Chambers v, Kenefick* and that a correct interpretation of Order 8, rule 2 requires the application of fair procedures and that such procedures include the right on a defendant in an Order 8, rule 2 application to make submissions, that even on the facts originally before the Court that the Court should not exercise its discretion to renew a summons. The Court is satisfied that the purpose of Order 8, rule 2 is to allow and permit an *inter partes* application on notice as to the issue of whether a Court should exercise its discretion to permit a summons to be renewed prior to any appearance. The need to apply such an approach is illustrated by the facts in this case. The second named defendant's counsel argues that a proper interpretation of Order 8, rule 2 is that the Court should not have exercised its discretion on the 19th February, 2007 as such application was made other than during the currency of a renewed summons. That issue was not raised and was not considered at the *ex parte* application. Dealing with this application in the manner identified in *Chambers v, Kenefick* is not to treat the hearing as an appeal from the original order. What the rule provides is that there is a process, which in recognition of fair procedures, provides, that before a defendant who is affected by the renewal of a summons made *ex parte* enters an appearance that such defendant has an entitlement to be fully heard. There is no doubt but that the second named defendant is potentially affected by the order renewing the summons. The application of fair procedures should ensure that all questions and issues including facts, question of prejudice, the balance of hardship and any legal argument be ventilated at an *inter partes* hearing as to why the Court should or should not renew the summons.

16. Following the approach in *Chambers v, Kenefick*, it is open to the second named defendant to demonstrate to this Court that, on a proper application of the relevant legal principles to the facts outlined to the Court on the *ex parte* application, that the order for renewal of the summons should not have been made. It is also open to that defendant to demonstrate additional facts over and above those identified at the time of the making of the *ex parte* order.

17. Having adopted the above procedure, Finlay Geoghegan J. identified an approach for the Court to take in exercising such a discretion under Order 8, rule 1. That approach is set out (at p. 530) where the judgment states:-

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

That approach was applied and adapted by O'Sullivan in *Allergan Pharmaceuticals (Ireland) Limited v. Noel Deane Roofing and Cladding Limited and Ors*. (Unreported, High Court, O'Sullivan J. delivered on the 6th July, 2006) where he identified that in considering whether there is good reason to renew a summons the Court must consider such matter by reference "to the overall interests of justice as between the parties" (p. 10). That approach was identified as being consistent with the judgment of Finlay Geoghegan J. where the Court in considering whether there is good reason to renew had stated that the reason "need not be referable to the service of the summons". Other reason has been identified as any reason "which might move the Court, in the interests of doing justice between the parties, to grant the renewal". (see Walsh J. in *Baulk v. Irish National Insurance Co. Ltd.* [1969] 1 I.R. 66 (at p. 71).

This Court is satisfied that the approach identified by Finlay Geoghegan J. and as applied by O'Sullivan J. represents a correct approach.

18. On the facts of this case two additional matters fall for consideration. Firstly, the second named defendant contends that a proper interpretation of Order 8, Rule 1 means that an order for renewal of the plaintiffs' summons as against the second named defendant could not have been made on the 19th February, 2007 as such application was not made at a time during the currency of the previously renewed summons. Secondly, it is contended on behalf of the solicitor for the plaintiffs that a proper interpretation of Order 8, Rule 1, is that if the Court is satisfied that reasonable efforts have been made to serve a particular defendant, the Court is obliged to renew the summons and is not permitted to consider any other matter.

19. Second Renewal of summons within the currency of the renewed summons:
The original summons was in force for twelve months from the date of the summons and therefore expired on the 9th December, 2003. Order 8, Rule 1, permits of an application for a renewal of a summons after such expiration to be made to the Court. Where such application is made, the Court can, pursuant to Order 8, Rule 1, exercise its discretion to renew such summons for a period of six months and such summons is renewed for such period by being stamped with the date of such renewal. An *ex parte* order renewing the summons was made on the 21st November, 2005 and the six month period for which it was renewed expired on the 20th May, 2006. By that date no service had been effected on the second named defendant. The solicitor for the plaintiffs then applied to Court *ex parte* and an order was made pursuant to Order 8, Rule 1 on the 17th February, 2007, renewing the summons as against the second named defendant. That was a second renewal as against the second named defendant, the first renewal having been against all defendants. Such renewal is therefore subject to the words contained in Order 8, Rule 1, being a second or subsequent renewal, namely "and so from time to time during the currency of the renewed summons". It is contended by counsel for the second named defendant that those words mean that a second or subsequent renewal can only be applied for and granted during the currency of the renewed summons, which on the facts of this case was on a date within six months from the 21st November, 2005. In other words, the second named defendant contends that on the 19th February, 2007, the application was made not within the currency of

the renewed summons. The solicitor for the plaintiffs argue that a correct interpretation of Order 8, Rule 1 is that the Court retains a discretion to renew the summons and that since the word currency is not defined, that the currency of the renewed summons can be taken to apply to any date after the first renewal of the summons.

20. This Court is satisfied that the interpretation contended for by the second named defendant's counsel is correct. If such interpretation was not correct it would mean that the words "during the currency of the renewed summons" had no additional meaning or effect and that the sentence in the rule could have concluded at "from time to time". The Court is obliged to give effect and meaning to the wording of Order 8, Rule 1 and that includes the words "during the currency of the renewed summons". The only interpretation which can be given to the words "the currency of the renewed summons" is the period identified as being the six month period of renewal provided for in an order to renew the summons. The rule provides a more stringent requirement in relation to a second or subsequent renewal in that after the first renewal, a summons will be incapable of further renewal unless an application to renew is made within the currency of the renewed summons.

Currency does not and cannot be interpreted as equating to the existence of the summons. Order 8, Rule 1 provides that no original summons shall be in force for more than twelve months and insofar as the words "shall be in force" are used, that does not mean that the summons becomes a nullity, merely because it cannot be validly served after the date of its expiry without leave. The Courts have recognised this by the use of terms such as 'lapse' (see *Cavern Systems Dublin Limited v. Clontarf Residents Association and Dublin Corporation* [1984] I.L.R.M. 24). In effect a summons which has not been renewed is not a nullity but it cannot be validly served after the dates of its expiry without leave of the Court. This Court is satisfied that the currency of the renewed summons refers to the period when the summons can be validly served. If the word currency did not have such meaning it would have the effect of rendering the word "currency" as used in Order 8, Rule 1 as meaningless.

21. It follows from the above interpretation of Order 8, Rule 1 that on the 19th February, 2007, the summons could not be renewed under Order 8, Rule 1 as that date was not during the currency of the renewed summons. Therefore the *ex parte* order granting such renewal as against the second named defendant must be set aside.

In the event that the Court is incorrect in relation to its interpretation of Order 8, Rule 1 and as to the nature and extent of a hearing under Order 8, Rule 2, it is appropriate that this Court should also consider the further matters which were argued before the Court in relation to the second defendant's application.

22. If the Court is satisfied that reasonable efforts have been made to serve a defendant, is it obliged to renew the summons:
The solicitor for the plaintiffs contends that if the Court is satisfied that reasonable efforts have been made to serve the defendant, that a proper interpretation of Order 8, Rule 1 is that thereafter it is both unnecessary and impermissible for the Court to consider any other matter. Counsel for the second defendant contends that Order 8, Rule 1 must be read so that reasonable efforts to serve the defendant is to be considered in the same manner as other good reasons and that it is one of the good reasons potentially available. Counsel for the second defendant argues that the Court must proceed to consider whether, it is in the interests of justice between the parties an order for the renewal of the summons should be made. The solicitor for the plaintiffs contends that this is not so and that the Court should and must not proceed to the second limb if satisfied that there were reasonable efforts to serve.

23. This Court is satisfied that a correct reading of Order 8, Rule 1 is that the making of reasonable efforts to serve a defendant is within the category of a good reason. The use of the word "other" within the Rule has the effect of identifying reasonable efforts to serve as being a potential good reason subject to the interests of justice between the parties. The approach identified in *Chambers v, Kenefick*, and expressly approved of earlier in this judgment, is that the Court should firstly consider whether there is a good reason to renew the summons but a good reason must be considered in the context of the overall justice between the parties. There is therefore an overlap between the first and second steps identified in *Chambers v, Kenefick*.

24. A correct reading of Order 8, Rule 1 is that a reasonable effort to serve is one of a number of potential good reasons. However, good reason need not be referable to the service of the summons. If the Court is satisfied that there are facts and circumstances which constitute a potential good reason, including reasonable efforts to serve such summons, the Court must consider whether it is in the interests of justice between the parties to make an order for the renewal of the summons.

25. The Court is satisfied that the contention made by the solicitor on behalf of the plaintiff, that it is unnecessary and impermissible to proceed to consider whether or not it is in the interests of justice between the parties to make an order for renewal where it has been established that reasonable efforts were made to serve, is an incorrect interpretation of Order 8, Rule 1. The Court will proceed on the basis that even if it is satisfied that there is a potential good reason, it must also consider whether it is in the interests of justice that such summons be renewed.

26. Order for renewal of summons 21st November, 2005:
It was conceded by the plaintiffs' solicitor that if the Court determined that the order of the 21st November, 2005 renewing the summons should be set aside, that not only would the first named defendant be entitled to the relief sought but it would follow that the second named defendant would be entitled to similar relief. If the Court were to conclude that the facts and circumstances were such that it was appropriate to set aside the order of the 21st November, 2005, then it would follow that the facts and circumstances as of the 19th February, 2007, would lead to the same conclusion. The Court will consider whether or not the *ex parte* order under Order 8, Rule 1 of the 21st November, 2005, insofar as it affects both the first and second named defendants, should be set aside.

27. In doing so the Court will apply the approach identified above and will as part of its consideration permit the defendants to seek to demonstrate to the Court that upon a proper application of the relevant legal principles to the facts outlined to the Court on the *ex parte* application on the 21st November, 2005, that the order for the renewal of the summons should not have been made. The Court will first consider whether there was good reason as of the 21st November, 2005 to renew the summons having due regard to the overall interests of justice as between the parties.

28. In the *ex parte* application of the 21st November, 2005, the first named plaintiff swore an affidavit on the 3rd November, 2005. That affidavit identified a number of factors in support of a claim that there were good reasons to renew the summons. No attempt had been made to serve the summons and therefore any entitlement under Order 8, Rule 1 would be dependent upon the plaintiffs establishing to the Court that there was "other good reason" for the renewal of the summons. The reasons identified by the plaintiffs, for consideration by the Court, were the fact of the criminal complaint made by the first named plaintiff and his wife which resulted in various medical personnel being interviewed, the fact of an ongoing inquest, the need to source expert evidence for use at any hearing before the coroner, the need to obtain medical records and thereafter to obtain expert medical reports concerning the treatment of their late son and the time involved in such process, the requirement on receipt of expert medical reports to seek further

reports from medical consultants practising in different areas of medicine, the necessity to change solicitors with the resulting delay and the cost involved. The first named plaintiff concluded his affidavit by averring that he anticipated obtaining an additional expert medical opinion in the short term and that on receipt of same, the plaintiffs together with their solicitors could then take such steps as are appropriate including "if necessary arranging to serve the plenary summons issued herein on the defendants named thereon". The plaintiffs' solicitor contends that the averments contained in the affidavit of the first named plaintiff sworn on the 5th November, 2005, demonstrate sufficient good reasons to permit the granting of an order renewing the summons on the 21st November, 2005. It is also contended by the plaintiffs' solicitor that the Court should not refuse to renew a summons where it would otherwise be statute-barred unless the defendant demonstrates to the satisfaction of the Court actual prejudice. The plaintiffs' solicitor also raises the issue of delay and I will return to that later in this judgment.

29. The Court is satisfied that as of the 21st November, 2005, the date upon which the summons was first renewed, there was no good reason identified on the application before the Court to justify the renewal of the summons. The Court arrives at this decision not only on the basis of the averments which were before the Court on that date but also in the light of the Court having heard the defendants' counsel as to the proper application of the relevant legal principles to the facts outlined to the Court at the *ex parte* application.

30. The Court is satisfied that neither the existence of a criminal complaint nor an ongoing inquest could amount to a good reason to renew the summons. The criminal complaint was an entirely separate matter from any civil proceedings and the existence of same could in no way amount to a good reason as to why a plenary summons should not be served. That position equally applies to the fact of an ongoing inquest. In any event, it is apparent from the first named plaintiff's affidavit that the preparation of expert reports and the gathering of information necessary for the civil proceedings were taking place notwithstanding the existence of the criminal investigation or the inquest. Neither of those two factors could in any way have been relevant to the non-service of the plenary summons or amount to a good reason to justify an order for renewal.

31. Another ground claimed as a good reason to justify the renewal of the summons is the fact that the plaintiffs required further and additional expert medical opinion. The Court is not satisfied that the same could be a justification for the non-service of the plenary summons. The plenary summons was issued in December, 2002 and by that month the plaintiffs had already carried out substantial preparatory work in relation to the prosecution of a potential civil claim. They had obtained the medical records by the end of 2001. By December, 2001 a consultant neurologist had been retained and a report had been obtained from him, in May of 2002. The plaintiffs had also engaged health care consultants in the U.K. to carry out an assessment. By October, 2002, those consultants had furnished an interim report and thereafter the plaintiffs obtained a nursing care report. A further neurological report was available by December, 2002. The information available as of December, 2002 was the information relied upon by the plaintiffs when they made their complaint to the Medical Council in 2005. It is apparent from the document attached to the letter of complaint that the plaintiffs were in possession of detailed expert medical opinion and advice by December, 2002. The fact that a further medical report was being sought from an expert in a different area of medical practice cannot amount to a justification for the non-service of the plenary summons.

32. It was submitted by the plaintiffs' solicitor that since the opinion of a further medical expert was required to establish the claim that it was possible and legitimate to issue a plenary summons and to delay serving it on the proposed defendants while investigating the available medical evidence. Reliance was placed upon the statement from McGuinness J. in the case of *Cunningham v. Neary* [2004] 2 I.L.R.M. 498 (at p. 502). McGuiness J. stated:-

> "It was submitted on behalf of the plaintiff in this court that it would be unwise for a solicitor to embark upon a medical negligence action without convincing or at least persuasive, independent medical evidence to establish the claim. Such a practice, it was argued, would have unnecessary and harmful effects on the medical profession. In general terms this is true but, as was pointed out by senior counsel for the defendant, in a case where there is a danger of the statute running against the plaintiff it is perfectly possible and legitimate to issue a plenary summons and to delay serving it on the proposed defendant while investigating the available medical evidence."

That quotation related to a case which was concerned with the statute of limitations and not the renewal of a summons. Such a suggested approach was being identified as a means of addressing the period of limitation provided for by statute. However, in this case what occurred was that a plenary summons was issued, just before the time limit provided for by the statute, and no attempt or effort was made to serve such summons. The significance of such failure is all the greater in this case where there was no warning letter. By November, 2005, none of the defendants were aware of any civil action. It would have been open to the plaintiffs in this case after they had issued the summons to have served it and at the same time indicated by letter that a further medical report was being obtained and that the statement of claim would be delivered on receipt of same. The fact that further inquiries were being made with an additional medical expert provides no basis for justifying the failure to serve a plenary summons. The requirement to serve a summons without delay is all the greater not only where there has been no warning letter but also where the period provided for in the statute of limitations has already expired.

33. The plaintiffs' solicitor further contended that a good reason for the non-service of the plenary summons was that the Code of Conduct for the Bar of Ireland provided that barristers should not settle a pleading claiming professional negligence without express instructions. The summons in this case had been issued and any question as to a further delay required to draft a statement of claim did not impact on the issue of the service of the summons. The summons was issued and could be served even if there was no statement of claim.

34. The plaintiffs aver that they desired to obtain further expert medical opinion but it is not averred that such expert opinion was required to enable the statement of claim to be completed. Nor is it averred that such opinion impacted on the ability to serve the summons. The affidavit of the first named plaintiff avers that he had concluded that an opinion of a clinical microbiologist and an opinion of a cardiothoracic expert was necessary as of 2003 but there is no link between the first named plaintiff's conclusion as to the necessity of additional expert medical reports and the failure to serve the summons. In fact, what is averred is that in or about the end of September, 2004, whilst the first named plaintiff was attending the offices of his then solicitor for the purposes of examining the file, that it came to his attention for the first time that the plenary summons issued should have been served or renewed within twelve months from its first issue. It appears clear that as of September, 2004, the first named plaintiff identified no reason as to why the plenary summons could not have been served. Notwithstanding the fact that the plaintiffs were aware in September, 2004 that the plenary summons "should have been served or renewed" no steps were taken for fourteen months to apply for the renewal of the summons.

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

36. The Court in considering the question of good reason does so not only by reference to service but also on the basis of whether there is good reason to renew the summons. In considering that matter it does so in the context of the overall interests of justice between the parties. In considering the contention that it was a proper concern of the plaintiffs not to serve proceedings upon a professional defendant without having a sound basis for doing so, the Court adopts the approach identified by O'Sullivan J. in *Allergen Pharmaceuticals (Ireland) Limited v. Noel Deane Roofing and Cladding Limited & Ors*. (Unreported, High Court, 6th July, 2006) where he stated in relation to such contention (at p. 12):-

> "It would be ironic if such a concern could, as it is said to do in this case, lead to service after the expiration of the statutory six year period designed to protect all defendants including professional ones from the very mischief underlying such concern."

The averment of the first named plaintiff that as of the end of September, 2004, when he became aware of the fact that the summons had not been served, that he recognised that it should have been served or renewed is a recognition that the real and actual reason for non-service is simple inadvertence.

37. A further contention on behalf of the plaintiffs is that a good reason for the renewal of the summons is that absent the renewal the plaintiffs' claim will be statute-barred. In the past the Supreme Court emphasised the view that the fact that a plaintiff's claim would otherwise be statute-barred, if a summons was not renewed, was of itself a good reason for granting an application for renewal, (See *Baulk v. Irish National Insurance Company Limited* [1969] 1I.R. 66). However, in more recent decisions, the Supreme Court have identified that the issue of the Statute of Limitations in such cases must be considered in the light of the interests of both the plaintiff and the defendant. In *Roche v. Clayton* [1998] 1 I.R. 596, O'Flaherty J. stated in a case considering the renewal of a summons under Order 8, Rule 1 and having identified earlier authorities including *Baulk v. Irish National Insurance Company Limited* as follows: (at p. 600) -

> "The upshot of these three decisions is clear: that there is certainly a wide discretion in the Judge of the High Court to renew a summons. But there must be some good reason. Here we really have got no good reason at all. The only reason advanced by the plaintiff is that he was let down by Mr. Murphy. That has nothing to do with the defendants. We must make an order that renders justice between the two immediate parties to the litigation. It seems to me that no good reason has been advanced at all. …..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".

The necessity of applying such an approach is apparent in cases such as this which is a claim for professional negligence. The Courts have long recognised that a consideration to be applied by the Courts, in assessing overall interests of justice, is that claims relating to professional negligence should be dealt with without unnecessary delay. As O'Hanlon J. stated in *Celtic Ceramics Limited v. I.D.A.* [1993] 1 I.L.R.M. 248 (at p. 258/9):-

> "It seems very unfair and unjust that persons whose professional standing and competence are under attack should be left with litigation hanging over their heads for years by reason of inordinate and inexcusable delay on the part of the plaintiff and I would expressly echo the view expressed by Henchy J. in *Sheehan v. Amond* that it should be possible to invoke "implied constitutional principles of basic fairness of procedures" to bring about the termination of such proceedings."

38. This Court must approach the issue of the Statute of Limitations on a reciprocal basis and cannot conclude that the mere fact that the plaintiffs' claim would be statute-barred if a summons was not renewed is a good reason to renew the summons. The Court must do justice between the parties. When one takes into account the fact that the claim herein is for professional negligence and that the plenary summons was issued within weeks of the period provided for by the Statute of Limitations expiring and that thereafter almost three further years expired before any application to renew the summons was made to the Court in November, 2005, the Court is led to the conclusion that in considering the overall interests of justice as between the parties that the fact that the plaintiffs' claim will be statute-barred absent a renewal is not a good reason to renew the summons. The plaintiffs' summons should not be renewed simply to prevent a defendant availing of the Statute of Limitations. It is also the case that in considering the overall interests of justice the Court must have regard to the delay by the plaintiffs after the issue of the plenary summons. The summons was issued just within the time provided for by the Statute of Limitations thereafter almost three years elapsed before an *ex parte* application was made to renew the summons. The Courts have recognised in cases involving delay a requirement on the party who has made a late start to proceed with due speed. In *Hogan v. Jones* [1994] 1 I.L.R.M. 512, Murphy J., dealing with an application to dismiss for inordinate and inexcusable delay, quoted with approval from a judgment of Lord Diplock in *Birkett v. James* [1977] 2 All E.R. 801 (at p. 808):-

> "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 may be inexcusable in the light of the time that has already passed before the writ was issued."

Even though that quotation relates to an application to dismiss for inordinate and inexcusable delay, it is equally applicable as a consideration to take into account in considering the overall interests of justice as between the parties in this case. Here the plaintiffs issued the summons just within time but notwithstanding that fact, delayed until November, 2005 in bringing an application to renew the summons. There is no real justification for such delay other than inadvertence.

39. The Courts have become increasingly vigilant of the risk of injustice from allowing an action, requiring oral testimony, to proceed long after the accrual of the cause of action. The Supreme Court in *Gilroy v. Flynn* [2005] 1 I.L.R.M. 290, emphasised that the enactment of the European Convention on Human Rights Act 2003 meant that the Courts had an obligation to ensure that actions were determined within a reasonable time. That is a matter which this Court takes into account in considering the overall interests of justice as between the parties.

40. The plaintiffs' solicitor further contends that it is necessary for a defendant in applications such as these to demonstrate in the clearest terms that there is actual prejudice. Reliance is placed upon the judgment of O'Neill J. in *O'Grady v. Southern Health Board & Anor.* [2007] 2 I.L.R.M. 51 (at p. 62), where he stated in relation to an application under Order 8, Rule 2, to set aside the renewal of a summons as follows:-

> "Notwithstanding the inordinate and in my view inexcusable delay on the part of the plaintiff, as so found, I am of the opinion that the time barring of the plaintiff's claim by 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 interests of achieving a just outcome to the dispute between the parties."

Whilst prejudice is a factor to take into account in considering the interests of justice as between the parties, its presence or absence is not conclusive. The Court has already identified that the Statute of Limitations must be available on a reciprocal basis and that it is not a good reason to renew a summons simply to prevent the defendant availing of the Statute of Limitations.

41. In the light of the above determinations the Court is satisfied that the plaintiffs have failed to establish a good reason to renew the summons. Having considered the reasons contended for by the plaintiffs in the context of the overall interests of justice as between the parties, the Court is satisfied that there is no good reason within the meaning of Order 8, Rule 1, for the renewal of the summons as of the 21st November, 2005.

42. Two further matters arise in the light of the above determination. Firstly, as has been herein before identified, in relation to the second named defendant, if there was no good reason present as of the 21st November, 2005, for the renewal of the summons on that date then it is accepted that a similar situation would exist as of the 19th February, 2007. The plaintiffs have identified no matter which occurred between those dates other than the claim that there was a reasonable effort to serve that summons in May of 2006. Given the acknowledgment by the plaintiffs' solicitor that if the Court determined that the renewal of the summons on the 21st November, 2005 should be set aside, that the Court did not have to address the issue of the renewal of the summons on the 19th February, 2007, the Court does not have to consider the issue of whether the attempt to serve the second named defendant in May of 2006 was a reasonable effort or not.

43. The plaintiffs' solicitor raises the issue as to whether a defendant's entitlement to bring an application under Order 8, Rule 2 is subject to a time limit. It was suggested in relation to the second named defendant's application that such application should have been brought within the 35 day period allowed in the order of the 19th February, 2007, for entering an appearance. There is no time limit provided for in Order 8. The Court does not accept that the time limited for an appearance is or can operate as a fixed time limit in which to bring an application under Order 8, Rule 2. The second named defendant was served with the summons and a copy of the order of the 19th February, 2007, by letter dated the 12th May, 2007. By the 15th June, 2007, the second named defendant's solicitors had written indicating that they were going to bring a motion pursuant to Order 8, Rule 2 and on the 24th July, 2007, that motion issued. The Court is satisfied that the second named defendant was entitled to bring and pursue an application under Order 8, Rule 2 within that timeframe.

44. In relation to the first named defendant there is a considerable period of delay between the service of the summons on the first named defendant and the commencement of the motion seeking an order setting aside the order renewing the summons. The motion was issued on the 25th September, 2008. In *Chambers v, Kenefick*, Finlay Geoghegan J. stated in relation to the issue of delay (at p. 532):-

> "I want to add one final comment just in case my silence might be misunderstood. The defendants sought to rely upon the observation of Laffoy J. in *O'Reilly v. Northern Telecom (Ireland) Limited* [1999] 1 I.R. 214 in relation to the absence of any time limit for bringing an application under Order 8, Rule 2. By reason of the conclusion I have reached in this application, it is not necessary for me to consider this matter and it seems appropriate that it should be left over, with simply an observation that I do not necessarily accept that in the scheme of the Superior Court Rules there is no time limit. The application has to be brought before entering an appearance, and when one looks at the overall scheme it may well be that there are limits to the period in which a defendant should be entitled to bring and pursue an application under Order 8, Rule 2."

45. There is no time limit provided for in Order 8. It is therefore difficult for the Court to identify a basis for an express identifiable time limit. There is no doubt but that in considering applications pursuant to Order 8, Rule 2, the Court should and must take into account any delay by a defendant in bringing its application. It is one of the factors which the Court must take into account in considering whether or not there is good reason to renew a summons and in considering the overall interests of justice between the parties. It is therefore necessary to look to the facts of this case in considering the issue of delay. An order for the renewal of the plenary summons was made on the 21st November, 2005 and it was served personally on the first named defendant on the 18th May, 2006. The solicitors acting for the first named defendant wrote to the plaintiffs' solicitor by letter of 14th July, 2006, requesting a copy of the affidavit of the first named plaintiff filed on the 8th November, 2005, which had grounded the *ex parte* application for renewal. The plaintiffs' solicitor replied indicating that until the first named defendant's solicitors came on record he was not in a position to take instructions from his client in relation to releasing the information sought. Notwithstanding certain further correspondence that remained the position on the date when the first named defendant brought his motion under Order 8, Rule 2. He had not been furnished with a copy of the affidavit of the first named plaintiff grounding the application to renew the plenary summons. It is averred in para. 13 of the affidavit of Katie McAuliffe, solicitor for the first defendant, sworn on the 25th September, 2008:-

> "That as of the date of the swearing of this application, this firm has not been furnished with a copy of the affidavit of the first named plaintiff, grounding the application to renew the plenary summons herein and, accordingly, it is not possible for me to comment on the contents thereof."

At no time prior to the first named defendant issuing his motion for an order pursuant to Order 8, Rule 2, had he sight of the affidavit upon which the renewal had been made. The Court is satisfied that it is an essential requirement, in according a defendant fair procedures, that a defendant has access to the affidavit upon which the application to renew was moved. A defendant cannot properly or adequately consider the issue as to whether or not to bring an application to set aside an order renewing a summons unless that defendant has sight of the grounding affidavit. On the facts of this case, the first named defendant and his solicitors were not provided with a copy of the grounding affidavit. It was also the case that as and from the date of service in May, 2006 up to the first named defendant bringing his motion under Order 8, Rule 2, that the plaintiffs did not take any steps to prosecute or proceed with the claim against any defendant. During the course of argument before this Court it was indicated by the plaintiffs' solicitor that even as of now the plaintiffs do not have a final statement of claim and that it is merely in draft form. That acknowledgment provides at least in part, an explanation as to why no steps to proceed were taken by the plaintiffs. On the facts of this case the Court is satisfied that there was no delay on the part of the first named defendant such as would disentitle him from pursuing his application under Order 8, Rule 2 nor has the delay been such as to cause the Court to refuse his application.

46. The Court has come to the conclusion that there was no good reason within the meaning of Order 8, Rule 1 for the renewal of the summons herein on the 21st November, 2005 and therefore the Court must accede to the applications on behalf of the first defendant to set aside the order of the High Court of the 21st November, 2005 as against the first named defendant. As regards the second named defendant, the Court has held that the plaintiffs were not entitled to a renewal of their summons as of the 17th February,

2007 as such renewal was not sought within the currency of the renewed summons. Even if the Court is wrong in that finding, the Court is satisfied that no good reason has been established for the renewal of the summons, as against the second defendant on the 21st November, 2005 and that order should be set aside. The first and second defendants are entitled to the reliefs sought setting aside the renewals of the summons.