THE HIGH COURT

[2015 No. 10056 P.]

BETWEEN

LISA LAWLESS

PLAINTIFF

AND

BEACON HOSPITAL, BEACON HOSPITAL SANDYFORD LTD, MO'IAD ALAZZAM, ROBERT HANNON AND ADMAN HAFEEZ

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 14th day of December, 2018

1. By this application the plaintiff seeks the following orders:-

> "1. An order pursuant to O. 8, r. 1 of the Rules of the Superior Courts renewing the personal injuries summons herein for such period as this honourable court shall deem fit.
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> 2. An order for liberty to amend the personal injuries summons duly issued herein on the 2nd day of December, 2015 in the terms underlined in the draft amended personal injury summons, exhibited in the affidavit of Mark Tiernan, duly sworn herein and
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> 3. An order dispensing with the service of the amended personal injuries summons."

Background and chronology of events

2. The plaintiff, who was born on 15th February, 1981, received treatment at the Beacon Hospital between 3rd December, 2013 and 16th December, 2014. That hospital is owned, occupied and managed by the second named defendant herein. I am given to understand that the first named defendant is a business name only, and may not be a legal person, but nothing turns on this issue for the purpose of this application. The third to fifth named defendants are, or were, at the relevant times consultants operating out of the Beacon Hospital. The personal injuries summons describes the specific specialties of the third to the fifth named defendants as follows: the third named defendant is an obstetrician and gynaecologist, the fourth named defendant is a colorectal surgeon and the fifth named defendant is a general surgeon. The personal injuries summons in the indorsement of claim, also refers to a sixth named defendant, a urologist, but there no sixth named defendant in the title proceedings.

3. It is the plaintiff's claim in these proceedings that she was caused to suffer and sustain severe personal injury, loss and damage owing to the negligence, breach of duty and breach of contract on the part of the defendants.

4. It is claimed that the plaintiff was received into the care of the first/ second named defendant's hospital initially on 3rd December, 2013, under the care of the third named defendant who performed a diagnostic laparoscopy and, thereafter, diagnosed the plaintiff with extensive endometriosis. He advised her to undergo a colonoscopy and referred her to the fourth named defendant for further assessment and/or advice. She was admitted to the same hospital for this purpose on 7th January, 2014. It is claimed that the plaintiff was admitted (for reward) by the first and second named defendants to hospital again on 1st April, 2014, where she underwent surgery performed by the third named defendant. Her appendix was removed and endometriosis was removed from the ovaries and pelvis and the bowel was resected in two places. Subsequently, the plaintiff became very unwell and was in considerable pain and discomfort. On 5th April, 2014, the plaintiff was attended by the third named defendant who diagnosed the plaintiff with a possible perforation and investigated and considered her for further surgery. She underwent an operative procedure on 5th/6th April, 2014, during which a perforation of the bowel was repaired. Thereafter, the plaintiff developed septicaemia and required treatment in intensive care for approximately a week. She convalesced for six months and was readmitted on 16th September, 2014, in order to conduct a reversal of previous procedures. Thereafter, she became very unwell again and developed pneumonia. She again developed septicaemia and her kidneys ceased to function. She required dialysis for five days and treatment in the intensive care unit for eight days and was treated as an inpatient for almost four weeks. She required further admission to hospital owing to dehydration and was subsequently referred to St. Vincent's Hospital owing to difficulties retaining fluids. It is apparent from all of this that the plaintiff claims to have suffered very severe injuries at the hands of the defendants. Disregarding liability, assuming that all those events occurred, it is also apparent that the plaintiff had what can only be described as a torrid time between the beginning of December 2013 and May 2015, and perhaps even later.

5. The personal injury summons was issued on 2nd December, 2015. At para. 20 thereof it is stated that the summons was issued to avoid any difficulties arising under the Statute of Limitations Act 1957 and it is stated that the pleas therein contained are subject to review and/or amendment "*when a formal medical liability report comes to hand.*" At para. 21 thereof it is stated "*details of negligence and breach of duty will be particularised when the said medical liability reports come to hand*."

6. The summons was not served on the defendants at the time. This is because, according to Mr. Mark Tiernan, the solicitor acting on behalf of the plaintiff, expert reports were awaited. Nor were any letters before action served upon the defendants at this time in case that might result in unnecessary adverse consequences for the defendants. In this regard Mr. Tiernan explained in his second affidavit that the defendants might be required to notify their insurers of such correspondence, with resulting adverse consequences that would be unnecessary if the proceedings did not progress.

7. In his affidavit of 20th February, 2018, grounding this application, Mr. Tiernan says that following on the issue of proceedings, the plaintiff procured medical reports on the issue of liability and causation from a consultant urogynaecologist and a colorectal surgeon, and following upon that it was necessary to ask counsel to draft amended proceedings. According to his second affidavit, Mr. Tiernan engaged a gynaecologist on behalf of the plaintiff in January, 2016, but in spite of reminders, did not receive a report until 4th July, 2016. He avers that that report was strongly supportive of the plaintiff's case that she had received substandard care and that as a result she had suffered a significant injury. However, he also avers that the gynaecologist advised obtaining an opinion from a surgeon in respect of "certain aspects of the treatment that were outside his area of expertise." A report was then commissioned from a colorectal surgeon in the United Kingdom which I was informed at the hearing of this application was not received until July, 2017.

8. In the meantime, however, an amended personal injuries summons was received from counsel on 24th October, 2016. Initiating letters were then sent to the first to fifth named defendants on 4th May, 2017, enclosing copies of the original personal injuries summons and the proposed amended personal injuries summons. This was the first that any of the defendants knew about these proceedings.

9. On 30th May, 2017, Messrs. Hayes Solicitors on behalf of the third to fifth named defendants wrote to the plaintiff's solicitor asking him for proof of service of the personal injuries summons. They also asked whether or not any application had been made to renew the personal injuries summons. This letter appears to have resulted in a reply dated 13th June, 2017 providing particulars of service, but nothing in relation to an application to renew the personal injuries summons. Accordingly, Hayes Solicitors stated that they were proceeding to enter an appearance under protest on behalf of the third to fifth named defendants. On the same date, Hayes Solicitors purported to enter an appearance "under protest" and "*without prejudice and solely to contest the jurisdiction of the court.*"

10. The solicitors for the first and second named defendants entered an unconditional appearance on 1st September, 2017.

11. In their letter serving the proceedings on the defendants of 4th May, 2017, Messrs. Tiernan & Co., solicitors for the plaintiff, had asked the defendant to provide a letter consenting to the amendment of the proceedings in the terms of the draft amended summons. This request was replied to by Hayes Solicitors in the following terms on 12th July, 2017:-

> "We confirm consent on behalf of the third, fourth and fifth named defendants to you issuing an amended High Court personal injuries summons in accordance with the draft sent to us under cover of letter dated 29th May, strictly subject to the date of service of the personal injuries summons being effective date for service."

12. On 5th September, 2017, Hayes Solicitors served a notice of particulars and a request for further information on the solicitors for the plaintiff. This notice was addressed specifically to the amended personal injuries summons, and not the personal injuries summons as originally issued. The notice is very detailed, comprising six pages, containing 51 separate requests for information, some of which are broken down into a number of subsidiary requests.

13. Eversheds Solicitors, acting on behalf of the first and second named defendants, served a notice for particulars on 4th October, 2017.

14. The solicitors for the plaintiff replied to the notice for particulars of the third to fifth named defendants, firstly on the 15th January, 2018 and secondly on the 16th day of February, 2018. The difference between the two sets of replies is that in the first set of replies, a great number of the replies given were stated as being "*not a proper map for particulars*", whereas detailed replies are given to most of these queries in the second set of replies. The solicitors for the plaintiff also replied to the notice for particulars of the first and second named defendants on the same dates.

15. On 15th September, 2017, the solicitors for the plaintiff wrote to Hayes Solicitors again inviting them to accept service of the amended personal injury summons, and to enter an appearance (by implication, an unconditional appearance) on behalf of those defendants. They went on to state that failing such a response, it would be necessary to apply to renew the summons and to effect service thereafter. In the same letter they stated that the plaintiff would be relying upon the fact that it was necessary to go to the extent of obtaining an independent medical opinion on liability and thereafter to amend the proceedings, as a substantial reason grounding the application to renew the summons. They refer specifically to the difficulties in obtaining records and expert reports for the purposes of medical negligence actions. Hayes Solicitors replied to this correspondence on 12th October, 2017, repeating what they had said in earlier correspondence, and stating that they had not been provided with any details in relation to any application to renew the personal injuries summons. There was a further exchange of letters in December, which is not of any consequence to this application. The solicitors for the plaintiff sent "O'Byrne" letters to the third to fifth named defendants on 16th February, 2018, and on 22nd February, 2018 they caused the issue of this motion.

Order 8, Rule 1 of the Rules of the Superior Courts 1986 (the "RSC")

16. Order 8, rule. 1, of the RSC states, *inter alia:-*

> "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 a summons so renewed shall remain in force and be available to prevent the operation of any statute whereby a time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original summons."

17. It is apparent that this application to court is necessary because the personal injuries summons issued on the part of the plaintiff on 2nd December, 2015 was not served within the period of twelve months from its date of issue. It is not contended by the plaintiff or her solicitors that any efforts were made to serve the defendants until 4th May, 2017. Accordingly, this application depends upon the plaintiff establishing that there was "other good reason" for not serving the summons before that date. Just one reason was given by Mr. Tiernan in his grounding affidavit of 20th February, 2018 for not serving the personal injury summons any sooner: that is that following upon the issue of proceedings, which were issued to protect the plaintiff's position with respect to the statute of limitations, it was necessary for the plaintiff to obtain expert medical reports in support of the plaintiff's case, and thereafter to have the proceedings as issued amended. Mr. Tiernan further avers that the personal injuries summons was not served pending the availability of that medical evidence in order to observe the principles set forth in the decision of the Supreme Court in *Cooke v. Cronin & Neary* [1999] IESC 54, and subsequent decisions. It will be recalled that in that case the Supreme Court made it clear that there must be a proper basis for the institution of professional negligence proceedings, and in particular that an expert report confirming that there was at least a *prima facie* case that a professional has been negligent must be obtained prior to the institution of proceedings.

18. A replying affidavit in opposition to this application was sworn by Mr. Steven McGuinness of Hayes Solicitors on 6th April, 2018. He points out that no narrative or chronology is given in relation to the steps taken on behalf of the plaintiff to procure the necessary expert evidence. He says that it is unclear when the experts instructed on behalf of the plaintiff were initially instructed, and when the same experts provided the plaintiff with their opinion that there was a stateable case against the third to fifth named defendants. He also says it is unclear when papers were sent to counsel.

19. He avers that the third to fifth named defendants were not aware that professional negligence proceedings had been commenced against them until the proceedings were served on the 4th May, 2017. He avers that there is no good reason why those defendants could not at least have been informed that proceedings had been issued, even if only on a protective basis, prior to 4th May, 2017. He further avers that no explanation was given as to why application was not made to the Master within the original twelve months' duration of the summons.

20. In his replying affidavit of 28th June, 2018, Mr. Tiernan raises one additional argument in favour of this application and that is that the third to fifth named defendants have no entitlement to object to this application in circumstances where they have not only entered an appearance, but they have also raised a notice for particulars and received replies to the same. Mr. Tiernan points out that this notice for particulars was raised on the amended personal injuries summons, and not on the original summons. He then argues that by raising this notice for particulars, the third to fifth named defendants have, in effect, accepted service of the proceedings, as amended. He also argues that it would be unjust to let the third to fifth named defendants to escape liability for their alleged substandard care of the plaintiff, in circumstances where the case will proceed against the first and second named defendants, who may wish to claim indemnity and contribution from the third to fifth named defendants.

21. In this affidavit, Mr. Tiernan says that he engaged a gynaecologist to provide an expert report in January 2016, but this was not received until 4th July, 2016. While this report supported the plaintiff's case that she has received substandard care and as a result had suffered a significant injury, that surgeon advised obtaining a further report from a surgeon in respect of certain aspects of treatment that are outside of his area of expertise. Mr. Tiernan avers that an amended personal injury summons was received from counsel on 24th October, 2016. He also avers that a report was commissioned from a colorectal surgeon in the United Kingdom, but he does not say when the report is commissioned. He avers that it was not received until July, 2017. He concludes by submitting that since the plaintiff has received reports from two respected consultants in the United Kingdom, supportive of her case, it would be gravely unjust if this application were to be refused, and, as a result, her proceedings effectively become statute barred.

Submissions of the parties

Submissions of the Plaintiff/Applicant
22. Apart from the submissions made by applicants in the affidavits of Mr. Tiernan, to which I have referred above, the applicant submits that the delay in notifying the defendants of the issue of these proceedings is far less significant in this case than in any of the authorities to which the respondent refers. The applicant was in intensive care (by reason of the matters giving rise to these proceedings) just two years and seven months prior to the notification or service of these proceedings on the defendants. It is submitted that there is no precedent for declining an application such as this where a period of that duration is involved.

23. While acknowledging that it has been the practice on the part of defendants to enter conditional appearances such as was entered in this case, where a defendant wishes to protest jurisdiction, the applicant argues that there is in fact no provision under the RSC for the entry of such an appearance. But where a party does enter such an appearance, it should not then take further steps in the proceedings as the respondent did in this case by raising a detailed notice for particulars on the amended personal injuries summons. By doing so, the third to fifth named defendants accepted the jurisdiction of the court. The appropriate course which the respondent could and should have taken was to make an application under O. 12, r. 26 of the RSC to set aside the service of the proceedings on the defendant. It is argued on behalf of the plaintiff that there has been a delay on the part of the defendants in challenging service of the summons upon them, and that there has been no delay on the part of the plaintiff. It is argued that if the defendant had a difficulty as regards the service of the proceedings upon them, they had an obligation to set aside service of the proceedings within reasonable period of time. In this regard the plaintiff relied upon the case of *McK. (F.J.) v. B.(M.)* [2005] IEHC 164 a decision of Finnegan P. of 26th May, 2005. In that case, Finnegan P. found that the proceedings had been served in accordance with an order of the court well within the twelve month period, but he went on to say:

> "Accordingly Order. 8 Rule 1 of the Rules of the Superior Courts had no application. If this were not indeed the case, I would be prepared to deem the service actually effective good pursuant to Order 9 Rule 15 being satisfied that the proceedings were brought to the attention of the defendant. In any event service outside the period of 12 months from the date of issue is not a nullity but an irregularity: *Sheldon v. Brown Bayleys Steelworks Ltd* [1953] 2 QB 393: Accordingly, Order. 124 Rule 1 applies. Order 124 Rule 2 also applies – an application to set aside any proceedings for irregularity shall not be allowed unless made within a reasonable period of time."

24. It is further submitted on behalf of the plaintiff that it will be unjust to let the third to fifth named defendants to escape liability for their alleged substandard care, in circumstances where the case will proceed against the first and second named defendants, where the third to fifth named defendants worked, and in circumstances where the first and second named defendants may wish to claim indemnity and contribution.

Submissions of the Defendants/Respondents
25. It is argued on behalf of the defendants that the affidavits sworn on behalf of the plaintiff are very short on detail as to when medial reports were sought. While acknowledging that protective writs are often issued, the defendants argue that the authorities are clear: the delay in obtaining medical reports will only be excused where a plaintiff can satisfy the court that a report is required to demonstrate a causal link between the conduct of a defendant and an injury allegedly sustained by the plaintiff. Moreover, such reports must be requested and obtained within a reasonable period of time.

26. In this case a report supportive of the plaintiff's case was delivered to the plaintiff's solicitors on 4th July, 2016. While the author of that report advised that another report, from a colorectal surgeon should be obtained, no details were given as to when that report was sought or obtained. In spite of that, an amended personal injury summons was received from counsel on 24th October, 2016, which was still within time for serving the summons as originally issued. It has not been suggested that the amended summons received from counsel at that time was any different to that eventually served.

27. In any case, the plaintiff could have applied at that time or within twelve months from the date of issue of the original summons, to renew the summons, and no explanation has been given as to why she did not do so. Nor has any explanation been given as to why it took as long as it did, either to serve the proceedings (on 4th May, 2017) or to issue this motion (on 22nd February, 2018).

28. The defendants rely on a number of authorities, but in particular the decision of Clarke J. in *Moloney v. Lacy Building and Civil Engineering Ltd* [2010] 4 I.R. 417 and Kelly P. in *Whelan v. Health Service Executive & Anor* [2017] IEHC 349 In *Moloney* Clarke J. observed at para. 19:-

> "On the basis of the judgment of Feeney J. in *Bingham v. Crowley* [2008] IEHC 453, (Unreported, High Court, Feeney J., 17th December, 2008), it seems clear that the absence of an appropriate expert report may provide, in certain

circumstances, a "good reason" for not serving a plenary summons pending the receipt of such a report. However, it is clear that the absence of an appropriate expert report will only justify a failure to serve a plenary summons where the existence of the report concerned would be reasonably necessary in order to justify the commencement of proceedings in the first place."

29. Later, in the same judgment, Clarke J. said at para. 20:-

> "In summary, therefore, insofar as the absence of an appropriate expert report may be put forward as a good reason for not serving a plenary summons, it seems to me to follow that the expert report concerned must be reasonably necessary in order to justify the decision to responsibly maintain proceedings in the first place, rather than be necessary in order to take further steps in the proceedings (such as the drafting of a statement of claim or bringing the case to trial) and it must also be established that any delay occasioned by the absence of the expert report concerned was reasonable in all the circumstances, such that appropriate expedition was used by the party placing reliance on the absence of the expert report concerned in attempting to procure same."

30. At para. 23 of the same judgment, Clarke J. went on to say:-

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

31. In *Whelan*, Kelly P. gave consideration to the meaning of "other good reason" in O. 8, r. 1 of the RSC. He noted that at one time it had been considered that the mere fact of a plaintiff's claim becoming statute barred constituted "other good reason" to justify the renewal of a summons, and referred to the decision of the Supreme Court in *Baulk v. Irish National Insurance Co. Ltd.* [1969] I.R. 66, a case upon which the plaintiff also relies in these proceedings. However, he also noted that subsequent decisions of the Superior Courts had departed substantially from the line of reasoning underpinning *Baulk*, to a position which takes account of the injustice which may be visited on a defendant in having to defend a stale claim, the underlying policy of the statute of limitations and the obligation on the court to ensure that proceedings progress with reasonable speed. Kelly P. quoted *in extenso* from the decision of Peart J. in *Moynihan v. Dairygold CoOperative Society Ltd* [2006] IEHC 318 where he said:

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

32. In *Whelan*, Kelly P. found the reasons advanced for failing to serve the proceedings within the twelve month period to be vague and unconvincing. He stated that:-

> "Indecision or tardiness individually or in combination do not amount to 'other good reason' for renewing a summons. They were both present here in substantial measure".

In that case, the statute of limitation period for the issue of proceedings expired in the early part of 2014. A consultant's report was received in March, 2013 and the personal injury summons issued on 16th October, 2013. Accordingly, that summons had to be served not later than 15th October, 2014, but no effort was made to serve the summons during that period. The application to renew the summons was not made until 21st December, 2015, fourteen months after the expiry of the summons with no explicit application made or granted by reference to O.122, r. 7 of the RSC. He therefore declined the application.

33. Insofar as the applicant relies on the facts that the third to fifth named defendants' solicitors issued a notice for particulars, notwithstanding the conditional appearance entered on behalf of those defendants, it is submitted that that notice for particulars was issued against the background of the conditional appearance, and previous correspondence in relation to the service of the summons. It is further submitted that the raising of a notice for particulars cannot of itself cure an irregularity in the summons arising by reason of its expiration.

34. In conclusion, it is submitted on behalf of the third to fifth named defendants that the applicant has failed to establish any good reason to renew the summons. Moreover, it is not in the interests of justice to do so for four reasons:-

> 1. The applicant has failed to explain her failure to apply to renew the summons before it expired;
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> 2. The applicant delayed in bringing this application. It was incumbent on the applicant to bring this application forward as soon as it became apparent that the third to fifth named defendants were raising objections in relation to the expiration of the summons, and were entering a conditional appearance only;
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> 3. There was no pre-litigation notification of the claim given by the applicant; and
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> 4. If the summons is renewed, the third to fifth named defendants will be prejudiced by its renewal because they will be deprived of their entitlement to rely on the statute of limitations. It should be pointed out that this is the only prejudice relied upon by the third to fifth named defendants on this application. In particular, it has not been pleaded that those defendants will have any difficulty in defending these proceedings by reason of delay.

Decision
35. The first point to be made in the consideration of this application is that the plaintiff has issued proceedings against three different hospital consultants, with different areas of expertise. Inevitably, this raises certain complexities, and it is not difficult to see how this could give rise to delay in the issue or progression of proceedings. However, in his grounding affidavit, Mr. Tiernan says (without giving dates) that since the issue of the proceedings the plaintiff had procured medical reports on the issue of liability and causation from both a consultant urogynaecologist and a colorectal surgeon. Although he has not given the dates that those reports were available, he goes on to say that it was necessary (after receiving those reports) to seek draft amended proceedings from counsel. It appears that those draft amended proceedings were available from 24th October, 2016. Although it is not expressly confirmed by Mr. Tiernan, it appears that it was precisely that draft, together with the original summons, that was served on 4th May, 2017.

36. Mr. Tiernan then is somewhat vague as to what happened after October, 2016. He says that the report of the gynaecologist (I assume this is the same person also referred to as the urogynaecologist, although this is not stated), received on 4th July, 2016, advised that the plaintiff obtain an opinion from a surgeon in respect of certain aspects of treatment beyond the expertise of the gynaecologist. He then goes on to say that a report was commissioned from a colorectal surgeon in the United Kingdom, but does not say when it was commissioned and does not aver as to when it was received, although I was informed at the hearing that it was not received until July, 2017. That is as much as he says about that report. Two issues arise from all of this:-

> 1. Firstly, the plaintiff had already obtained a report from a colorectal surgeon that was sufficient to enable the plaintiff to ask counsel to draft an amended personal injury summons which was available from 24th October, 2016. It is unclear why a further report from a colorectal surgeon was required. But assuming that it was so required in order to clarify certain issues, it remains the fact that there was sufficient evidence available to the plaintiff to plead a case in relation to the matters covered by this area of expertise as of October, 2016. If more detail became available at a later date, which required to be pleaded, it would have been possible to make an application to amend the pleadings at that point in time.
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> 2. Secondly, in the event, it has not been suggested that the report commissioned from the colorectal surgeon, and received in July, 2017, made any difference or provided the plaintiff with vital evidence that had hitherto been unavailable. That does not mean of course that the plaintiff was not justified in seeking this report, especially if it had been recommended by the urogynaecologist. But it seems very clear that this report was not required in order to serve the proceedings, and this has not been asserted on behalf of the plaintiff.

37. There is, therefore, an unexplained delay between the period of 24th October, 2016 and 4th May, 2017, and it was during this period that the personal injuries summons expired, on 1st December, 2016. It follows therefore that there has been no good reason (nor, indeed, any reason at all) advanced for the delay in the service of the proceedings in that period.

38. However, a further argument has been advanced on behalf of the plaintiff as constituting a good reason to grant this application. That is that the third to fifth named defendants have acceded to the jurisdiction of the court by raising a notice for particulars and a request for further information on 5th September, 2017, especially in circumstances where replies to that notice had been delivered on behalf of the plaintiff. The plaintiff also places reliance on the fact that this notice for particulars was raised on the amended personal injuries summons. Accordingly, it is submitted that the third to fifth named defendants have accepted service of the summons and have accepted the amendments to the original summons by raising particulars thereon. It is also argued that it would be unjust to let the third to fifth named defendants escape liability for their alleged substandard care in circumstances where the case will proceed against the hospital in which they worked, and that the and second named defendants may wish to claim indemnity and contribution from the third to fifth named defendants.

39. There is authority for the proposition that a party who enters an appearance for the purpose only of contesting jurisdiction to proceedings should take no further step in the proceedings, and that by doing so may be deemed to waive the entitlement to continue to protest the jurisdiction of the court. The most common example of this is where a party enters an appearance under protest to proceedings which that party claims are the subject of an arbitration clause. If the party concerned then takes any further steps in the proceedings, that party may be deemed to have accepted the jurisdiction of the court to entertain the proceedings, notwithstanding the arbitration clause relied upon by that party. However, no relevant authorities were opened to me on this subject.

40. In any case however the fact is that both at the time when the solicitors for the third to fifth named defendants entered an appearance and raised a notice for particulars, the status of the personal injury summons was that of an expired summons. It may not have been a "*nullity*", but unless and until such time as a court grants an order renewing the same, any steps purportedly taken in those proceedings must suffer from whatever frailty attaches to the summons itself. Even if the party relying upon the expiration of the summons expressly withdraws that objection, the summons still must be renewed, although it is difficult to imagine a court declining an application to renew in such circumstances. But in this case there was no such express agreement. On the contrary, the solicitors for the third to fifth named defendants continued to make it clear that they would only consent to the renewal of the amended personal injury summons, and to accept service of the same on the basis that the date of issue of the summons should be deemed to be the date on which the draft was received by the third to fifth named defendants (they actually put it slightly differently in their correspondence by stating "*strictly subject to the date and service of the personal injuries summons is the effective date of service*", but this does not make any sense and it is clear that Mr. Tiernan fully understood what was intended by this sentence in that at para. 14 of his second affidavit he states:-

> "By letter of 12th October, 2017, the third/fourth/fifth named defendant consented to the amendment of the personal injuries summons but the within application was still required as the consent was conditional upon deeming the date of issue of the summons as the date the draft was received by the defendant."

41. While I do not think that it can be gainsaid that it was inappropriate for the third to fifth named defendants to issue a notice for particulars whilst at the same time protesting the jurisdiction of the court on the grounds of the expired summons, I think it is clear that they at no time intended to waive that objection or stated that they were doing so. Any consequences adverse to the plaintiff by the issue of that notice for particulars can be dealt with by an appropriate order as to costs. For these reasons therefore I do not believe that the service of a notice for particulars on behalf of the third to fifth named defendants can be regarded as being a good reason to grant the application.

42. Nor does the fact that the third to fifth named defendants did not bring forward a motion to set aside service of the summons. The irregularity that had arisen was that service of the summons was not effected while the summons was still live. I do not think

that a party who has been served with an expired summons could be under any obligation to bring forward an application to set aside service. Once the party served raises the issue with the other party, the onus is on that party to take whatever action is necessary to regularise matters, because he or she can hardly be entitled to progress the proceedings on the basis of an expired summons. That is not to say of course that the party served with the expired summons is not entitled to bring forward an application to set aside service of the same; but in my view he or she is under no obligation to do so. It is of course true that the third to fifth named defendants have not identified any prejudice that they would suffer if this application is granted, other than that it would have the effect of depriving them of a defence based on the statute of limitations (always assuming that the proceedings were served within the renewal period). But that is an entitlement conferred on a defendant by statute and, as Clarke J. (as he then was) said in *Moloney*, applications such as these must be viewed against the background of the statutory policy that proceedings must be commenced within the relevant limitation period. On the other hand, while the extreme prejudice caused to a plaintiff who is prevented from pursuing a cause of action by reason of the statute of limitations is obvious, the authorities are clear that this is not in itself a good reason to grant an application pursuant to O. 8, r. 1 of the RSC.

43. While it is clear from the summary of the plaintiff's injuries that I have set out earlier in this judgment that the injuries alleged by the plaintiff in these proceedings are very serious, the plaintiff has not advanced any good reason as to why the personal injuries summons was not served during the lifetime of the summons. No notice of the proceedings was given to the defendants in advance of service of the same on 4th May, 2017. No reason was given as to why an application to renew the summons was not made before it expired. The fact of its expiration was raised implicitly by the solicitors for the third to fifth named defendants on 30th May, 2017 and again expressly on 21st June, 2017, but the application to renew was not made until 22nd February, 2018. The lapse in time between the date of expiration of the summons (1st December, 2016) and the date of the application to renew the summons (22nd February, 2018) was almost fifteen months. While it is true to say, as the applicant has argued, that there are many cases in the authorities where the delay in serving/applying to renew the summons was much greater than in this case, and that the length of the delay is a factor to be taken into account in determining where the interests of justice lies, this is so only if the applicant can first establish a good reason for failing to serve the summons. That this is so is clear from the decision of Peart J. in *Moynihan* which has been repeatedly approved.

44. I should add that the argument that the first and second named defendants will be disadvantaged if the third to fifth named defendants are no longer parties to these proceedings is not, in my view, an argument that the plaintiff is entitled to make in aid of herself on this application.

45. Having regard to all of the forgoing I have come to the conclusion that the plaintiff has failed to establish a good reason to renew the personal injury summons herein, within the meaning of O. 8, r. 1 of the RSC and the application must therefore be dismissed.