APPROVED **[2026] IEHC 532**

THE HIGH COURT

2020 4637 P

BETWEEN

DANIEL COLEMAN

PLAINTIFF

-AND-

DEPUY INTERNATIONAL LIMITED, PEI SURGICAL UNLIMITED COMPANY, EURO CARE HEALTHCARE LIMITED AND TADHG O'SULLIVAN

DEFENDANTS

THE HIGH COURT

2018 7195 P

BETWEEN

PATRICK GILMARTIN

PLAINTIFF

-AND-

DEPUY INTERNATIONAL LIMITED, PEI SURGICAL, EURO CARE HEALTHCARE LIMITED AND PATRICK CARTON

DEFENDANTS

JUDGMENT of Mr. Justice Nolan delivered on the 29th day of July 2026

Introduction

1. These two motions come before the Court seeking the same relief in circumstances that are similar, though not identical. Nevertheless, the parties have agreed that the Court's determination of both motions may be delivered in a single judgment, as the legal issues arising in each case are substantially the same.

2. Both Plaintiffs maintain actions against the Defendants in respect of personal injuries allegedly sustained following hip replacement surgeries involving the First Named Defendant's defective DePuy ASR hip product. Both actions were struck out for failure to comply with an unless order of the Deputy Master requiring discovery of medical records within specified timeframes.

3. Consequently, each Plaintiff seeks an order pursuant to Order 27, rule 15(2) of the Rules of the Superior Courts (the "Rules") and/or pursuant to the Court's inherent jurisdiction, setting aside the dismissal of their claims resulting from non-compliance with the relevant unless order. The unless order was made on 6 February 2025, in the case of Mr. Coleman and on 16 January 2025, in the case of Mr. Gilmartin. In the alternative, the Plaintiffs seeks an order extending the time for compliance with the discovery ordered.

The Coleman Background and Procedural History

4. Mr. Coleman's claim arises from a left hip resurfacing performed on 25 November 2009. This was revised by way of a total hip replacement on 8 January 2010 and he underwent a further revision on 3 February 2020. A Personal Injury Summons was issued on 30 June 2020. A request for discovery was made on 23 August 2021 and a consent order was made by the Deputy Master on 24 May 2023. All Defendants are now represented by the same solicitors. Discovery was not made and thereafter the Defendants issued a motion seeking dismissal of the proceedings for want of prosecution. Following a contested hearing, an unless order was

made on 6 February 2025. The order provided that unless the Plaintiff made discovery within 12 weeks of the date of the order, the proceedings would stand dismissed without the need for any further application. In fact, the discovery was delivered in May which would be approximately 3 to 4 weeks after the expiry of the period prescribed by the order.

The Gilmartin Background and Procedural History

5. Mr. Gilmartin's claim arises from a right hip replacement performed on 25 May 2009, followed by revision surgery on 2 February 2018. A Personal Injury Summons was issued on 8 August 2018. A request for discovery was made before and after the commencement of proceedings, in mid-2018, and the Defences for all the Defendants were delivered between June 2019 and July 2020. The Defendants are now represented by the same solicitors. The Plaintiff's claim is pleaded in negligence, breach of duty, breach of contract, and pursuant to the Liability for Defective Products Act 1991.

6. A consent order for discovery was made on 8 May 2024, after certain discovery documents were delivered to the Defendants but the order was not complied with. Thereafter, the Defendants brought a motion to dismiss the proceedings. The Deputy Master, after a contested hearing, made an unless order, giving, what Mr. Keating SC for the Defendants put as "*an indulgence*", that unless the discovery was delivered within 16 weeks the proceedings would be struck out. It is that order which is the subject of this application.

The Rules

7. Order 27, rule 15(2) RSC (as amended) of the Rules of the Superior Courts ("Rules") – the rule relied upon by the Plaintiffs – provides: -

> *"Any judgment by default, whether under this Order or any other Order of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court*

may think fit, if the Court is satisfied that at the time of the default special circumstances (to be recited in the order) existed which explain and justify the failure, and any necessary consequential order may be made where an action has been set down under rule 9."

8. Order 27, rule 15(1) of the Rules however – the rule governing the setting aside of a dismissal – provides: -

"Any order dismissing the plaintiff's action for want of prosecution, whether under this Order or any other Order of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit, if the Court is satisfied that at the time of the failure special circumstances (to be recited in the order) existed which explain and justify the failure"

9. While Order 27, There is one other rule which is relevant to the application. Order 27 rule 18(4) governing default of pleadings provides: -

"*The defendant shall serve on the plaintiff a copy of any order of the court dismissing an action for want of prosecution within 28 days from the passing and perfection of such order"*

<u>The Caselaw</u>

10. I am grateful to Mr. Fitzpatrick SC for the Plaintiff and Mr. Keating SC for the Defendants, together with their respective junior counsel, for their comprehensive submissions and books of authorities. While many cases were referred to in submissions, it seems to me that the decision of Woulfe J. in the Supreme Court in *Power v CJSC Indigo Tajikistan, Telia Company AB and AGA Khan Fund For Economic Development SA* [2025] IESC 55 ("*Power*"), is the most definitive case to point.

11. The central issue in that appeal concerned the interpretation of the phrase "*special*

circumstances" in Order 8, rule 1(4) of the Rules, particularly in relation to the so-called "*gateway*" requirement and the test governing the renewal of a summons. While the orders made in these cases were under a different rule, it must be the case that the Supreme Court's view on "*special circumstances*" in whatever rule the term appears, is determinative of the issue. The Court applied the test to the unusual facts of that case, which involved the renewal of two separate summonses, one being a personal injury summons, the second is described as protected disclosure proceedings commenced by plenary summons, issued against three foreign defendants.

12. Woulfe J. outlined how the Courts had approached Order 8, to date, referring to three decisions of the Court of Appeal in *Murphy v HSE* [2021] IECA 3, Haughton J, *Nolan v. Board of Management of St. Mary's Diocesan School* [2022] IECA 10, Noonan J. and Butler J. in *Kearns v. Evenson* [2023] IECA 297.

13. Following his analysis of the Court of Appeal authorities, and he said the following: -

> *"95 …Firstly, I endorse the statement of Butler J. in Kearns that the test for renewal of a summons is not a two-stage process, and is certainly not a process of which different tests apply at each stage. It seems to me that O. 8, r. 1(4) provides for one test or one question: are there special circumstances which justify an extension? While it is clear that a plaintiff must identify special circumstances, in my opinion it is probably not helpful to speak of a "gateway requirement", at least in the sense of some form of separate requirement that a party seeking renewal must establish that special circumstances exist taken alone. Instead, the Court should view the special circumstances put forward in conjunction with the balance of the test in O. 8, r. 1(4) as a single overall assessment as to whether it is in the interests of justice that the summons be renewed. In other words, do those special circumstances justify an extension, having regard to all other background factors such as the interests of justice, prejudice to*

either party and the balance of hardship?

Secondly, I would highlight and endorse para. 77 of Haughton J.'s judgment in Murphy. I agree that whether inadvertence on the part of a plaintiff, or a plaintiff's solicitors, can ever amount to special circumstances is very fact dependant, and that it is probably not helpful to speculate in a vacuum. Notwithstanding same, I also agree with the view expressed by Haughton J. that, as far as legal advisors are concerned, inadvertence or inattention, for example in effecting service of the summons, will rarely constitute special circumstances, given that such inadvertence or inattention would not normally have reached the former threshold of "good reason" under the previous version of O. 8. That is not to say that inadvertence or inattention can never amount to special circumstances, but it would take something exceptional or extraordinary to amount to same."

14. In *Bowe v Sherriff & others* [2025] IECA 14 Whelan J. in making a similar order to that sought in these proceedings, noted the observations of Ferriter J. in *De Souza v Liffey Meats (Cavan) Unlimited Company & Ors* [2023] IEHC 402 where he considered that the test for "*special circumstances*" is a higher test than good reason, at para. 52 he said: "*While this does not raise the bar to "extraordinary", it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present*."

15. Whelan J. also dealt with the other part of the test, namely the interest of justice. Quoting from *Cropper v Smith* (1884) 2 Ch. D. 700 and the words of Bowen L.J.: -

"…it is a well established principle that the object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their right…. I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the

sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace..."

16. She went on to say: -

"It is clear in light of decisions such as the Supreme Court in Desmond that the court in assessing the interests of justice is bound to have regard to the substance of what is at stake for either party if the order sought is granted or refused. Desmond concerned an application to strike out a libel suit on grounds of undue delay. The disputed article had been published over nine years previously in January of 1999. However, the plaintiff had elected to await the deliberations of the Moriarty Tribunal before deciding whether to advance the suit to trial. Due to the importance of the issue for the plaintiff, the Supreme Court upheld the decision of the High Court refusing to strike out the proceedings despite the defendants having established on the facts that the delay in question was in all the circumstances both inordinate and inexcusable."

17. This last judgment is an important one because it is one of the few examples of the court bringing together the various tests relating to the interests of justice, in different procedural applications, under one banner or heading. It certainly is to be commended, because in various applications before the High Court, different tests can be applied, depending upon different rules, notwithstanding that the interests of justice should be the same throughout.

18. Mr. Fitzpatrick places a significant emphasis on the decision of Mr. Justice Oisin Quinn in *Everyday Finance and others v White and others* [2023] IEHC 624, emphasising that each case is fact specific, in that a case falls to be determined on its own facts and circumstances, in order to do justice to the parties (Murray J. in *McGuinn v Commissioner of An Garda Siochana & others* [2011] IESC 33). In particular, he brought the Court to para. 34 where Barrington J., in *Murphy v J. Donoghue* [1996] 1 IR 123, noted that "*[The] rules of procedure exist to serve the administration of justice and must never be allowed to defeat it*".

19. Mr Justice Quinn set out a number of principles, which this Court agrees with, in particular (i), (ii) and (vi). He said: -

> "*From the foregoing cases, the following principles emerge:*
>
> *(i) The courts in the interests of justice, lean in favour of a determination of litigation on the merits of the issues between the parties rather than preventing a party from having access to the courts, when his or her rights or obligations are being determined, for procedural reasons including culpable delay, per Murray J. in McGuinn;*
>
> *(ii) It is well established that the object of the courts is to decide the rights of the parties, and not to punish them for mistakes, see Bowen LJ in Cropper v Smith, adopted in this context in Emo Oil…*
>
> *(vi) The court has an inherent jurisdiction to set aside a default judgment obtained in default of appearance due to accident, mistake or inadvertence when 'it is just and equitable to do so' and to achieve 'justice between parties' and the RSC are additional to this and not 'substitutive' per Barrett J. in Bank of Scotland plc v McDermott [2017] IEHC 77, as approved of by Whelan J. in AIB v Forde at para 38."* (See also Ms. Justice Irvine in *Emo Oil -v- Willow Rock* [2016] IECA 200).

20. While Mr. Fitzpatrick submitted that the Court should look to merits of the case in order to assess whether it is a strong case, I tend to agree with Mr. Keating's submission that the issue which Quinn J. was looking at in *Everyday* was fact specific to that case. It does not seem to me that the Court should embark on an assessment of the strength and weaknesses of either side of a case, at the interlocutory stage.

21. From the above discussion it seems to me that the following propositions can be stated:

- The onus is on a plaintiff to establish that there are special circumstances which may potentially justify the omission.
- It is not helpful to speak of a "*gateway requirement*".

- The "*special circumstances*" must be decided on the facts of a particular case,
- "*Special circumstances*" is a higher test than that of '*good reason'*
- "*Special*" suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present.
- In considering the interests of justice, the court should consider any general or specific prejudice, or the hardship alleged by a defendant and balance that against the prejudice or the hardship that may result for a plaintiff, if renewal or the effects of an unless order are refused. The Court should view the special circumstances put forward in conjunction with the balance of the test in O. 8, r. 1(4) as a single overall assessment as to whether it is in the interests of justice that the summons be renewed.
- Inadvertence or inattention, in effecting service of the summons, on the part of legal practitioners will rarely constitute special circumstances.
- Provided the court is satisfied that special circumstances exist, the jurisdiction to grant leave to renew is discretionary.

Discussion- Special Circumstances in the Coleman Case

22. Mr. Fitzpatrick submits that the unless order was never served on the Plaintiff's solicitors. The consequences being that the order did not enter the solicitors' critical dates register and that the Plaintiff was thereby deprived of proper notice of an order carrying the draconian consequence of a strike-out. The solicitors' critical dates register is a register setting out crucial dates for the purposes of the Statute of Limitations or compliance with court orders. As against that, Mr. Keating makes the valid point that the application was contested, with both solicitor and counsel present when the Deputy Master made his order. He submits that this seems more like a failure to appreciate the nature of the order and consequently amounts to a

solicitor's failing which, unless there are exceedingly good reasons, could never amount to special circumstances.

23. Nonetheless Mr. Fitzpatrick points to the import of Order 27 rule 18(4), as I set out above. The significance of non-service is heightened because the Defendants seek to rely upon the self-executing consequence of an order which was not served, despite the severity of the consequence now invoked.

24. The second special circumstance is that the Plaintiff had at all times acted in good faith and endeavoured to comply with his discovery obligations. By itself I struggle to see how this could be regarded as special circumstances. It is no more than the obligation of a party, the subject of a court order, even if the compliance required extensive engagement with hospitals and medical facilities.

25. While I note that Sligo University Hospital apologised for delays in providing records and that follow-up applications were required for radiology and imaging data initially omitted, that fact should have been communicated to the Defendant to see if some further indulgence was forthcoming. But that did not happen. Again, this reason, by itself, does not amount to special circumstances.

26. The third special circumstance is the complexity and breadth of the Defendants' requests, which included nursing notes, microbiology reports, physiotherapy notes, and radiology discs dating back to 2007, many of which were referenced in existing records but not separately paginated. Again, that is part of the discovery process, and no doubt was an argument advanced at the time the order was made. In itself, it does not amount to special circumstances.

27. I shall leave aside the fourth special circumstance for the moment; however, I cannot see how the fifth special circumstance advanced could possibly amount to such. The submission is that the order was made in circumstances where the Plaintiff was represented and opposed the relief sought and where it was contended that discovery had already been

provided in substance and that any issues raised by the Defendants were matters of clarification rather than noncompliance. That is to run the application all over again and, of itself, does not amount to special circumstance.

28. Which brings the Court to the fourth and sixth special circumstance, which seem to me to be interlinked. Mr. Fitzpatrick submits that the Plaintiff had already engaged in discovery in substance, and the remaining issues were not a refusal to discover but disputes as to the scope, adequacy, and existence of particular records and that the Plaintiff continued to engage with discovery, notwithstanding the Defendants' assertion that the proceedings stood struck out. Ultimately, a sworn Affidavit of Discovery was served in or about May 2025.

Decision

29. The gap between the order expiring and the delivery of the discovery ordered was no more than three to four weeks. That is an exceedingly short period of time and is a matter which, if it is to do justice between the parties, the Court must take into consideration. That fact and the failure on the part of the Defendants to serve the copy of the order of the Deputy Master dismissing the action for want of prosecution within 28 days from the passing and perfection of the order, are matters which the Court clearly will has to consider. While the Defendants solicitor did write to the Plaintiff's solicitor, the time had already expired.

30. I note the submission of Mr. Keating that the Plaintiff's legal team were present at the making of the order and therefore it could not have come as a surprise. But the words of the order are mandatory; "*the defendant shall serve on the plaintiff a copy of any order of the court dismissing an action for want of prosecution"*. It is not an option, even where the order is self-executing.

31. Given the short time frame between the expiry of the order and delivery of the discovery, it would be entirely disproportionate to allow the proceedings to remain struck out.

It is precisely in these circumstances that the words of Woulfe J. are relevant. The Court must see special circumstances in the round and not just as a gateway requirement. Had the order been served within the 28 day period, alarm bells would, no doubt, have gone off and the Plaintiff's solicitors would have immediately taken appropriate steps.

32. There is clearly no prejudice on the part of the Defendants, and to be fair to them, they do not urge one upon the Court. Instead, they rely upon a failure to properly identify special circumstances. However, I am satisfied the special circumstances, taken in the round, do exist and the order therefore will record those special circumstances as being; a failure to serve the original Order in accordance with Order 27 rule 18(4), that because the order was not served, the solicitor's critical dates register was not activated, that the discovery was served within a period of 3 to 4 weeks after the expiry of the order and that it would be disproportionate in all the circumstances to allow the case to remain struck out. These circumstances existed at the time and in my opinion, also explain and justify the failure.

Discussion- Special Circumstances in the Gilmartin Case

33. The Gilmartin case however is quite different. As the caselaw clearly shows each case is fact specific. The first special circumstance proffered by Mr. Fitzpatrick is the Plaintiff's personal and medical conditions. This is also the cornerstone of the second special circumstance proffered, namely the difficulty of obtaining instructions due to the considerable challenges in conducting meetings with him.

34. He submits that it is not challenged that the Plaintiff has faced exceptionally difficult personal and medical circumstances which materially affected his ability to provide instructions. The sworn evidence before the Court is that he suffers from depression, cognitive impairment described as "*fog*", and anxiety. The Plaintiff has also endured marital breakdown,

business failure, and the effects of numerous medications with significant neurological side effects including confusion, memory loss, and hallucinations.

35. It is averred that these matters are directly relevant to discovery because the discovery exercise depended upon his ability to identify treatment history, recall providers, assist with records, and give reliable instructions.

36. However, Mr. Keating argues that the evidence relied upon by the Plaintiff is vague and insufficient, not verified by him on affidavit nor is there any medical evidence.

37. He submits that the affidavits raise more questions than answers and there is only contained fleeting references in the pleadings to psychological sequelae and do not support the severe difficulties now being advanced. Accordingly, he submits that the Court should approach the newly advanced explanation with caution.

38. The third material circumstance advanced is the nature of the discovery exercise itself, which together with his fragmented recollection of his medical history, resulting in a drip-feed of information and GDPR-related obstacles. All of which required extensive follow-up with hospitals and clinics to obtain missing radiology discs, and the requests for records generated half a lever-arch folder of documentation.

39. However, Mr. Keating submits that the Plaintiff's complaints about the complexity of discovery were overstated. He argues that the discovery concerned medical records which would necessarily have been gathered for the proceedings. Either way that would be the role of his solicitor not the Plaintiff to obtain documents, none of which amount to a special circumstance.

40. As far as the fourth special circumstance is concerned, Mr. Fitzpatrick asserts that the failure to comply in time was not a case of wilful default. Nonetheless the Plaintiff did furnish extensive medical records by letter dated 2 May 2024, comprising multiple booklets of documentation and radiology material and delivered a sworn affidavit of discovery on 3 July

2024. The Plaintiff also delivered and filed affidavit of discovery with supporting documentation by letter on 18 October 2024. The submission is that discovery had been furnished in substance and that any outstanding matters were matters of clarification.

41. The fifth material circumstance is non-service of the unless order. The Plaintiff's solicitor has sworn that the unless order was unfortunately never served on his office, which is material where the consequence is draconian.

42. Mr. Keating accepts that Order 27 rule 18(4) requires service of dismissal orders but submits, as in the Coleman case, that the Plaintiff's solicitor was in the Masters Court when the order was being made and must have known precisely the consequences of non-compliance.

43. The order was made on 16 January 2025, and McCann FitzGerald wrote within four days referring to the order. The lack of service did not cause the default; did not create confusion and therefore, cannot amount to a special circumstance.

44. The sixth material circumstance is the seriousness and substance of the Plaintiff's claim and arises in the context of a court-sanctioned ADR process established for DePuy ASR hip implant claims, approved by order of the High Court in 2015.

Decision

45. As I noted above this case is quite different to the Coleman case. It seems to me that the kernel of the issue in this case relates to the Plaintiff's medical and mental condition. Woulfe J. in *Power* specifically decried the concept that special circumstances was a "*gateway*" requirement. The case has to be seen in the round, taking all the circumstances into account and on that basis the Court should determine whether, in the round, the various circumstances could be seen as amounting to special circumstances.

46. In *Bowe*, Whelan J. at page 37, para. 80, cited Hamilton CJ in *Mercantile Credit Corporation of Ireland v Heelan* [1998] 1 IR 81 at page 85, that the power to strike out for

failure to comply with discovery is discretionary and should not be exercised unless the Court is satisfied that the party is endeavouring to avoid giving discovery, and not where the omission or neglect is not culpable, for instance where it might be due to loss of memory or illness. That passage is directly relevant here, where the Plaintiff's medical condition is pleaded as being significant.

47. I agree that in this case the failure to serve the unless order, as required in Order 27 rule 18(4), was not causative of the failure to file the discovery. Indeed, there is no explanation as to how the import of the order was not lodged in solicitors' critical dates register.

48. But if one thing is clear it is that the solicitor, Mr. Bradley, had immense difficulties in getting instructions and clarity regarding the discovery. While on the face of it the discovery process should not have been onerous in this case, it turned out to be.

49. Part of the Court's determination must be to have regard to the fact that an affidavit of discovery had already been delivered and what was sought was further discovery.

50. When considering the balance of justice in the context of special circumstances, Mr. Keating has urged the Court to consider the reputational damage for the surgeon. However, the same solicitors represent all the Defendants. The papers refer to the court-sanctioned ADR process approved by order of the High Court in 2015. In those circumstances it would seem that the vast bulk of these cases are settled through that or other ADR procedures such as mediation, without the surgeons being involved.

51. In my view the nature of the defences is a matter which the court should consider. Mr. Keating points to the nature of the professional negligence proceedings on the surgeon, but the impact of having the proceedings struck out as against the Plaintiff, is far greater. He will lose his cause of action. I agree with Mr. Fitzpatrick that the courts in general lean towards the disposal of actions by trial as opposed to by a procedural failure, unless it has passed the threshold of unfairness.

52. On that basis it seems to me that the far greater injustice would be done to the Plaintiff if the proceedings remain struck out.

53. Therefore, it seems to me that special circumstances do exist, when one takes everything into account, as *Power* mandates the Court to do. The special circumstances which should be recited in the order are Mr. Gilmartin's depression, cognitive impairment, anxiety, medication-related neurological side effects, and resulting difficulty in providing instructions, the nature of the defence filed admitting that the product was defective within the meaning of the Liability for Defective Products Act 1991, and that an affidavit of discovery has already been delivered and that the Plaintiff would lose his cause of action if the action remained struck out, all of which existed at the time and explain and justify the failure to serve the discovery as directed.

54. However as noted above the facts in this are different and call for a different order. I will not simply set aside the order of the Deputy Master. Instead, I shall extend the time for compliance with the discovery ordered by three weeks from the date of the perfection of this order, with the consequence that the unless order remains in place and if the discovery is not made, the case shall stand struck out again.