

THE HIGH COURT

2006 4352 P

BETWEEN

MICHAEL TANGNEY AND SUSAN TANGNEY

TRADING AS SHIVILING CONSTRUCTION

PLAINTIFFS

AND

**DONIE RING, MICHAEL O'DONOGHUE, DARA DUB LIMITED AND SHAWCOVE LIMITED (BEING THE COMPANY HOLDING
THE SAID LICENCE FOR THE KILLARNEY PLAZA HOTEL)**

DEFENDANTS

JUDGMENT of Mr. Justice Ryan delivered the 15th day of February, 2010

1. This is an application by the defendants pursuant to O. 8, r. 2 of the Rules of the Superior Courts to set aside an order made by this court on 18th February, 2008 renewing the plenary summons dated 19th September, 2006 for a period of six months. The jurisdiction to extend time is exercised when a plaintiff satisfies the court that unsuccessful but reasonable efforts have been made to serve the summons or, alternatively that there is other good reason for renewing it. That application is made ex-parte but the defendants can apply to set aside the extension of time, as has happened here.
2. The plaintiffs claim to be entitled to payment for building work that they did for or at the request of the defendants during the period ending in December, 2001. The plenary summons was issued on the 19th September, 2006 but it was not served during the twelve month period allowed, which expired on 18th September, 2007. The ex-parte application to renew was granted on 18th February, 2008. For a number of reasons the renewed summons was not served until a date in July, 2008 but we are not concerned in this application with the delay between the date of renewal and actual service because counsel for the defendant/applicants accepts, correctly in my view, that this delay has been explained. In any case, the renewal was for a period of six months and service was effected within that time.
3. The defendants seek to have the renewal overturned, first because they say that there was no good reason for the court to make the order on the 18th February, 2008 and, secondly, they contend that it would be unjust in all the circumstances to permit the claim to go ahead because they would inevitably be seriously prejudiced. If I come to the conclusion that there was good reason for renewing the summons, I have to go on to weigh in the balance the interests of the plaintiffs and the defendants to see whether justice lies in permitting the claim to go ahead or in refusing to do so.
4. Counsel had referred me to the authorities which I list at the foot of this judgment. I think that the following principles emerge from these cases, particularly, the more recent one, in so far as they are relevant to this application.
 - In considering whether there is good reason, this court is not restricted to new material that was not before the court on the original application on the 18th February, 2008. It would as Ms. Justice Finlay Geoghegan points out be unjust that the party who was not present at the original hearing was bound by a finding made ex-parte and was not permitted to submit that the original decision ought to be overturned. This is important in this case because the defendants/applicants rely heavily on the contention that there was not good reason for renewing the summons and to a lesser extent on an allegation of prejudice, which in the circumstances is necessarily and understandably of a fairly general nature. Feeney J. adopted the same approach as Finlay Geoghegan J.
 - The fact that proceedings will be statute barred is a relevant circumstance but is not of itself sufficient to trump the interests of the other parties, according to the most recent Supreme Court judgment on this matter.
5. The plaintiffs' case for renewal was made by their solicitor, who deposed that because of a letter written by the former solicitor he believed that the file in the action had been transferred to another firm of solicitors and also that there was inadvertence, in a period of adjustment when practices were amalgamated, and uncertainty as to whether the file had been actually transferred. It seems that the solicitor dealing with the matter gave up practice on accepting a public appointment and there subsequently followed an amalgamation of two firms of solicitors. There was confusion and misunderstanding and the result was that the summons was not served. It is clear that the defendants were available for service and are all apparently well-known so there would have been no difficulty about effecting service.
6. It seems to me that the plaintiffs themselves knew who their solicitor was and they knew whether they had stayed with the original firm, even if it was now managed by somebody else, or had transferred to a firm in Dublin. They were informed in the previous solicitor's letter of 2nd November, 2006 of the position and I do not think there was much room for confusion about what he said. The letter makes it clear that the summons has not been served. I am not entirely clear either as to how the solicitor could have been so confused by this letter about whether there had been a change of solicitors. However, it may be that the deponent is on firmer ground in relying on the changes of personnel and the amalgamation of firms, rather than on the terms of the letter just mentioned.
7. It seems to me that all these cases come down to decisions on their own facts as to where the justice lies between the parties.

8. Overall, I think that although the reason offered is not a very strong one there is sufficient substance in the explanation offered to constitute other good reason within the meaning of O. 8, r. 1. As to the balance of justice that must then be considered, I think that the plaintiffs' interest in being permitted to make their claim outweighs the disadvantage to the defendants and the unascertainable – at this stage – prejudice that may affect them. My reasons are briefly as follows.

- First, I think that the delay that is critical to the application between the 18th September, 2007 (the last day for normal service of the summons) and the 18th February, 2008 is not grossly unacceptable.
- Second, every point the defendants can rely on will be available to them, except for the statute of limitations, which had not expired when the summons was originally issued.
- Third, the defendants were notified of the basis of the claim on 28th February, 2002 and 5th January, 2004, although the amount has substantially increased since then. Nevertheless, all appropriate defences are open to the defendants.

9. I refuse this application accordingly.

Cases

1. *McCooey v. Minister for Finance and Another*, [1971] I.R. 159.
2. *Kerrigan and Others v. Massey Brothers (Funerals) Limited and Another* – (Unreported) Geoghegan J., 15th March, 1994.
3. *Moynihan v. Dairy Gold Cooperative Society Limited*, [2006] IEHC 318
4. *Chambers v. Kenefick*, [2007] 3 I.R. 526
5. *O'Grady v. Southern Health Board and Another*, [2007] IEHC 38.
6. *Bingham and Another v. Crowley and Others*, [2008] IEHC 453.