Neutral Citation Number [2006] IEHC 215

THE HIGH COURT

[2003 No 15970 P]

BETWEEN

ALLERGEN PHARMACEUTICALS (IRELAND) LIMITED

PLAINTIFF

AND

NOEL DEANE ROOFING AND CLADDING LIMITED,
M. J. CONROY AND SONS LIMITED AND
LIAM MULLALY AND AIDEN LEONARD PRACTISING UNDER THE STYLE AND TITLE OF MULLALY LEONARD PARTNERSHIP

DEFENDANTS

Judgment of O'Sullivan J. delivered on the 6th day of July 2006

Introduction

1. This is an application to set aside an order of the High Court (McKechnie J.) dated 7th November, 2005, renewing the plenary summons herein for a period of three months. The application is made pursuant to Order 8, Rule 2 of the Rules of the Superior Courts which simply provide that:

> 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.

Background

2. The proceedings arise out of damage caused to the plaintiff's industrial premises at Castlebar Road, Westport, Co. Mayo, when a high wind storm on 26th December, 1998, caused extensive roof damage to the plaintiff's factory premises which had been delivered to it by the first two defendants on 31st July, 1998. The first defendant is a specialist roof contractor and the second a general contractor. The third defendants (who make this application) were the architects. Because no effort was made to serve the summons (issued within the statutory period) on the third defendant within twelve months of the date of issue the submissions on this application centred on whether there was "other good cause" for renewing the summons and also on whether to do so is in the interests of justice. Because of this it is appropriate that I first set out the procedural history in the case.

Procedural History

31st July, 1998	Works handed over to the defendant.
26th December, 1998	Damage to the roof by high wind storm
30th December, 1998	Third defendants inspect roof damage.
11th February, 1999	Third defendant submits detailed report stating primary cause of damage was the high wind and recommending replacement of the roof with extra bonding and extra mechanical fixing.
27th September, 2002	Plaintiff's solicitor writes "O'Byrne" style letters to the defendants including the third defendant. Replies are received from the first and second defendants but not from the third defendant. In an affidavit the plaintiff's solicitor states that part of the reason why this letter was not written earlier was that he had been out of the office due to illness for much of the year preceding September, 2002.
February, 2003	Plaintiff's solicitor briefs counsel who advises necessity of getting clarification from two engineers (Ove Arup and N. J. O'Gorman) already involved before a statement of claim can be drafted. Plenary Summons can be drafted.
November, 2003	Plaintiff's solicitors write to one of the engineers (Ove Arup) who respond that they are unable to help.
23rd December, 2003	Plenary summons issued following advice from counsel concerning possible issues relating to the statute of limitations. Prior contact is made with the insurance advisers for the first and second defendant but not with the third defendant the reason given being that they had not responded to the "O'Byrne" letters. This summons is not served on any (apparently) of the defendants.
January, 2004	Plaintiff's solicitors attempt to renew contact with the first engineer but receives no reply after several efforts.
June, 2004	Plaintiff's solicitors contact the second engineer who responds promptly with advice which is sent to counsel. It is necessary, however, to seek further clarification from the engineer.
September, 2004	Second engineer's clarification comes to hand by way of an extensive report. Plaintiff's solicitor identifies this report as giving the information initially required by counsel who was briefed in February, 2003, and who, by inference, responded some time between then and November, 2003, when the plaintiff wrote to the first engineer.
22nd December, 2004	Last day of the twelve month period for serving plenary summons issued on 23rd December, 2003.
26th December, 2004	Third defendant "closed their file".
September, 2005	Plaintiff's solicitor sends second engineer's extensive report to counsel. In his affidavit he deposes that through inadvertence he was under the impression that he had done this on receipt of the report a year earlier but only discovered that he had not in September, 2005.
7th November, 2005	Plaintiff applies to the High Court to renew the summons and gives as "a good reason" for renewal the fact that if it is not renewed the claim would be statute barred.
22nd November 2005	The summons is served on the third defendant and is followed by a statement of claim delivered on 13th January, 2006.

3. From the point of view of the third defendant the event giving rise to the cause of action occurred on 26th December, 1998. As architects they were asked within days to inspect the damage and deliver a report, which they did on 11th February 1999. Following this they heard nothing for some three and a half years when on 27th September, 2002, they received the "O'Byrne" style letter to

which they gave no reply. They were not contacted (as were the other defendants) prior to the issuing of a summons on 23rd December, 2003 and therefore the first time they heard of proceedings being taken against them, following receipt of the "O'Byrne" style letters, was when the renewed summons was served on 22nd November, 2005, that is more than three years after the "O'Byrne" letters and some six years and eleven months after the accruing of the cause of action.

Legal principles

4. In the above circumstances the following portion of Order 8, Rule 1 governs the approach of the court:

> "After the expiration of the twelve months, an application to extend time for leave to renew the summons shall be made to the Court. 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."

5. The question on this application is whether there is "other good reason" for renewing the summons. The authorities show a development of the law since the Supreme Court decision in *Baulk v. Irish National Insurance Co. Ltd.* [1969] I.R. 66, where it was held that "other good reason" was not exclusively referable to the question of service but refers to any other question which might move the court in the interests of justice between the parties to grant the renewal. Walsh J. expressed the view that the fact that the statute of limitations would defeat any new proceedings could itself be a good reason to move the court to grant renewal. This view was subject to the criticism that it undermined the policy of the statute of limitations and Barron J. in the Supreme Court in *Prior v. Independent Television News* [1993] I.R. 339 emphasised that prejudice to the defendant is equally important as prejudice to the plaintiff and that their respective hardships had to be balanced by the court among other issues (which in that case included the fact that the plaintiff secured damages from other defendants). Subsequently in *Sullivan v. Church of Ireland* (Unreported, 7th May, 1996,) Laffoy J. said:

> "It seems to me that the essential principle is that where proceedings have not been heard on the merits it may be unjust that they should be barred by procedural difficulties … the question of prejudice to the defendant is equally as important as prejudice to the plaintiff. I must balance the hardship which the plaintiff will suffer … against that which the defendant may suffer…"

6. A similar approach was adopted by the Supreme Court in *O'Brien v. Fahy* (judgment delivered 21st March, 1997) where Barrington J. (Lynch, Barron JJ. concurring) in dealing with the "good reason" advanced to the effect that the statute had run, said:

> "(that) is not the only matter to which the court must pay attention because it is quite clear that in this case the defendant was not told until some four years afterwards that a claim would be brought against her and one of the factors in the McCooey case was that the defendants had known right from the beginning that a claim would be made against them"

7. The court considered what it termed actual as distinct from theoretical prejudice which the defendant would suffer if the proceedings continued. In *Roche v. Clayton* [1998] 1 I.R. 596, the Supreme Court (per O'Flaherty J.) stressed that it is not a good reason for renewing a summons simply to prevent the defendant availing of the statute of limitations. In the absence of any other reason advanced there was no good reason and accordingly on appeal the Supreme Court set aside the High Court order renewing the summons.

8. I have been referred by Mr. Gallagher SC for the plaintiff to the unreported decision of the Supreme Court *Martin v. Moy Contractors Ltd. & Ors.* (per Lynch J.: 11th February, 1999: O'Flaherty, Murphy JJ. concurring) to show that the court in considering whether there was "other good reason" had regard not only to the excuse for the delay in that case (a frank admission of inadvertence by the solicitor) but also to the fact that:

> "in the present case *de Beeres* have not shown any specific prejudice whatever."

9. Mr. Barron BL for the third defendant and moving party submits that on this application the court conducts a two step process the first being to consider whether there is "other good reason" for renewing the summons and only if there is then secondly the court will move on to consider whether it is in the interest of justice between the parties to make an order for renewal. Specifically Mr. Barron submits that the question of prejudice to the defendant should not be considered by the court when addressing the first of these two questions. The fact that the plaintiff alleges that the defendant in this case were the very ones who investigated the cause of the fire and reported on it and that they are therefore in a particularly good position to respond to the claim is not something which the court should consider when addressing the issue whether there is "other good reason" for renewing the summons.

10. Mr. Gallagher SC submits to the contrary that "other good reason" can include the interests of justice. He acknowledges that mere safeguarding the plaintiff from the effects of the statute is not of itself or automatically a good reason but says that the general interests of justice between the parties can comprise or contribute to the making up of such good reason.

11. Mr. Barron relies particularly on the judgment of Finlay Geoghegan J. delivered 11th November, 2005 in *Chambers v. Kennefick* where she says :

> "… the submission made on behalf of the defendant leads me to the conclusion 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 the renewal of the summons. Thirdly, in considering the question of whether it is in the interest of justice 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."

12. A further submission made by Mr. Barron relies on the observations of Hardiman J. (Denham and Fennelly JJ. conurring) in *Gilroy v. Flynn* [2005]1 I.L.R.M. 290 at pp. 293/4 where he had averted to the rule change since the *Rainsford and Primor Plc* cases to the effect that on a second application by a defendant to dismiss a plaintiff's claim for failure to deliver a statement of claim the court shall order dismissal unless for special circumstances explaining and justifying the failure, and having done so made the following observations:

> "Secondly, the courts have become evermore conscious of the unfairness and increased possibility of injustice which attaches to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued. Thirdly, following such cases as *McMullen v. Ireland E.C.H.R.* 422 97/98. July, 29th 2004, and the European Convention on Human Rights Act, 2003, the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil, or criminal, are determined within a reasonable time.
>
> These changes, and others, mean that comfortable assumptions on the part of a minority of litigants of almost endless indulgence must end. … in particular, the assumption that even grave delay will not lead to the dismissal of an action if it is not on the part of the plaintiff personally, but of a professional advisor, may prove an unreliable one."

13. Mr. Barron referred specifically to Article 6(1) of the European Convention on the Human Rights Act, 2003, under the heading of "Right to a Fair Trial", which, where relevant, provides:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time …"

14. Accordingly Mr. Barron submits that the weight to be assigned by the court to considerations explaining or excusing delay may have to be recalibrated (to use the phrase of Clarke J. in *Stephens v. Flynn* (judgment delivered 28th April, 2005.))

15. Insofar as Mr. Barron is submitting that a court in considering whether there is good reason to renew a summons may not in doing so consider the overall interests of justice as between the parties, I cannot agree with him. In the first place that touchstone seems to have been one (unsurprisingly) underlying the judgments of the Supreme Court to which I have alluded. In the second place I note that the judgment of Finlay Geoghegan J. upon which he relies refers to the fact that the court when considering whether there is a good reason to renew specifies that the reason "need not be referable to the service of the summons". This may or may not have been intended as an allusion to the observation of Walsh J. in *Baulk* that "other good reason" was not:

> "Exclusively referable to the question of service but refers also to any other reason which might move the court, in the interests of doing justice between the parties, to grant the renewal."
>
> (1969 I.R. 66 at pp. 71/2)

16. Thirdly, the Supreme Court in *O'Brien v. Fahy* (referred to above) in considering that topic did refer to the question as to how an order would affect the defendant as it did also in *Martin v. Moy Contractors Ltd. & Ors.* (per Lynch J. unreported, 11th February 1999,) where at p. 27 Lynch J. said:

> "I think it would be wrong to say that mere oversight or inadvertence or carelessness can never be excused as amounting to "other good reason": for example where the plenary summons may have expired in the recent past. In the present case *de Beers* have not shown any specific prejudice whatever."

17. Accordingly I do not agree with Mr. Barron that there are three separate and watertight sequential steps, the effect of which would be to exclude consideration of questions relating to the interests of justice when the court addresses itself to the question whether there is a good reason to renew the summons.

"Good reason"?

18. Mr. Gallagher SC relied, apart from the statute of limitations point, primarily on the fact that delay in serving the summons was brought about by the plaintiff's solicitor's correct concern that prior to doing so he should be satisfied that there was a proper case to be made against this professional defendant. This approach is undoubtedly correct in principle. In *Connolly v. Casey* [2000] 1 I.R. 345 at p. 350 the Supreme Court per Denham J. said:

> "It is important in professional negligence cases to act reasonably. Proceedings must have an appropriate basis. Counsel have a duty of care."

19. Mr. Barron makes the point that such a consideration could not have applied to the first two defendants upon neither of whom was the issued summons served. Furthermore a countervailing consideration arises from the observation of O'Hanlon J. in *Celtic Ceramics Ltd. v I.D.A.* [1993] I.L.R.M. 248 at pp. 258/9, where the learned judge said

> "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 do the plaintiff and I would respectfully 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."

20. Moreover the proper concern of a solicitor not to serve proceedings upon a professional defendant without having a sound basis for doing so, must surely be tempered not only by the forgoing consideration of O'Hanlon J. but also by a proportionate advertence to the policy underlying the statute of limitations. It would be ironic if such a concern could, as it is said to do in this case, lead to service after expiration of the statutory six year period designed to protect all defendants including professional ones from the very mischief underlying such concern. Furthermore Mr. Barron says that the delay arising from the difficulties with the first engineer consulted is not a satisfactory explanation of the time involved before an engineer's report was procured (a period commencing in November, 2003 and finally ending late September, 2004) because both engineers were involved from prior to this and the second one could have been consulted much earlier than he was (in June, 2004).

21. In the present case the summons was issued on 23rd, December, 2003, and could, therefore, have been served without any intervention from the courts up to and including 22nd December, 2004. Prior to that, in late September 2004, the required extensive engineering report had been received from N.J. O'Gorman but through oversight the plaintiff's solicitors did not forward it to counsel until a year later. By then, of course, it was too late to serve the summons unless renewed. The excuse advanced is simple inadvertence. It is, however, inadvertence against a background that if the summons was not renewed the claim would be statute barred and also against a background of considerable preceding delay in the progressing of the case on the part of the plaintiff.

22. If I were to adopt the attitude of the Supreme Court in *Martin v. Moy Contractors Ltd.* and taking note of the fact that the defendants have not shown any specific (as opposed to presumed) prejudice it may be that I would be entitled to refuse to set aside the renewal of the summons. But, bearing in mind the recent observations of the Supreme Court in *Gilroy v. Flynn* and bearing in mind

specifically the obligation of the court quite independently of the action or inaction of the parties to ensure that civil cases are determined within a reasonable time I must, at the very least, apply the *Martin v. Moy Contractors Ltd.* authority with considerable care. First of all I think I should acknowledge that the passage of time gives rise to a presumption of prejudice in particular in cases where oral evidence is required. Mr. Barron submits that it is clear that the plaintiff will make a case that the third defendants, as architects, failed to supervise the conduct of the work and in this context he submits that they have no notes relating to the job. He also submits that cases where a solicitor's oversight in serving a summons was accepted as a good reason for renewing it involved cases where the documents had been informally communicated to the prospective defendants or their insurers.

23. In the present case the best that can be said on behalf of the plaintiff was that "O'Byrne" letters were sent on the 27th September, 2002 (some three and a half years after the storm damage: there was no reply to these from the third defendant) and that the third defendant were in a very special if not unique situation given that they were professionals who were called in immediately after the damage to report on the cause of the damage and did so in their report of the 11th February, 1999 (some seven weeks later). However following this nothing happened for three and a half years (for much of the last of these it is true the solicitor being out of the office due to illness). At the end of this period the "O'Byrne" letters were sent and then nothing happened for a further five months when the brief was sent to counsel. We do not know when counsel advised but nine months later the plaintiff's solicitor wrote to one of two engineers without success and wrote to the second some seven months later in June, 2004 and a definitive report was received in September, 2004. The period between November, 2003 and September, 2004, is explained but really only partially, by the difficulties in procuring this report. Even when this was received in September, 2004, the issued summons was still "alive" and continued so for a further three months.

24. At this stage in my view the need for expedition was particularly pressing and I must also, I think, pay particular attention to the insistence by the Supreme Court in *Gilroy v. Flynn* that the court will give in effect reduced weight to delay on the part of professional advisors. The courts now under the European Convention have their own obligation to ensure civil actions are heard within a reasonable time and I have come to the conclusion with regret that the explanation offered by the plaintiff's solicitor that the comprehensive report previously advised by counsel which came to hand in September, 2004, was not sent to counsel because:

> "…unfortunately due to inadvertence I overlooked sending a copy of the report on to counsel,"

25. is not, in all the circumstances, sufficient to constitute a good reason for renewing the summons.

26. Other grounds were advanced as constituting "a good reason" by Mr. Gallagher SC the first being the notification in September, 2002, by way of "O'Byrne" letters. I have to say, however, that in the absence of any response thereto on behalf of the third defendant this party was surely entitled when the sixth anniversary of the damage came about to conclude that they were not being sued. Furthermore when the summons was issued in December, 2003, the plaintiff's solicitors wrote to the two parties who responded to those letters but not to the third defendant apparently on the basis that they had not replied. I do not understand the logic underlying this decision.

27. Mr. Gallagher also submitted that I should consider that the third defendant could be joined by the first or second defendant as a third party and further that if the third defendant is joined as a defendant they can serve a notice of indemnity or contribution on the other defendants and can join the designers by which I assume he means the party who approved the design of the roof on behalf of the plaintiff's insurers. Mr. Gallagher referred to the acknowledgement by the courts of the relevance of a number of defendants.

28. None of these reasons impress me as particularly relevant as constituting a "good reason" for renewing the summons. I do not think that how a defendant conducts his case vis-à-vis co-defendants or potential third parties is really relevant to determining whether there is good reason for renewing the summons. I do accept that the fact that the third defendant conducted an examination of the storm damage and made a report all within a very short time of the damage itself is a relevant consideration and I have had regard to it. However the case will be made, apparently, that these defendants as architects failed adequately to supervise the work and in regard to that allegation Mr. Barron has submitted that there are no documents available to these defendants at this late stage. In these circumstances I think that there is an element of specific prejudice to these defendants if the proceedings were to go ahead (namely the absence of documents whereby they could defend an allegation that they failed to supervise the works).

29. Moreover I consider that the explanation or excuse offered for the delay in serving the summons is at best only partially adequate because:

> (a) It could not affect the service of the summons on the first two defendants anyway;
>
> (b) There is no adequate explanation as to why only one of the two engineers was consulted initially;
>
> (c) As a matter of principle the correct concern for having a proper basis for suing a professional person must be counterbalanced by a proper concern for the policy underlying the statute of limitations designed to protect prospective defendants;
>
> (d) The proceedings were issued towards the end of the six year limitation period and therefore there was all the greater need for expedition and all the greater need for the court carefully to scrutinise and weigh up any excuse or explanation for delay in serving the issued proceedings.

30. Finally the Supreme Court has made it clear in Gilroy that delay attributable to a professional adviser is now something to which the courts will, in effect, assign less weight by way of excusing delay given the courts' own independent obligation to ensure that civil proceedings are dealt with within a reasonable time.

31. I have come to the conclusion, therefore, that there is no good reason within the meaning of Order 8, Rule 1 for the renewal of the summons and therefore I must accede to the application on behalf of the third defendant to set aside the order of the High Court (McKechnie J.).