THE HIGH COURT

[RECORD NO. 2015 10424 P]

BETWEEN

DANA KAVANAGH

PLAINTIFF

AND

ROBYN FENTY, A.K.A. RIHANNA

DEFENDANT

JUDGMENT of Ms. Justice O'Regan delivered on Thursday the 5th day of July, 2018

Issues

1. The issue before the court is an application on behalf of the defendant, brought by way of notice of motion dated the 2nd May 2017, pursuant to O. 12, r. 26 of the Rules of the Superior Court, to set aside the purported service on the defendant of the notice of the summons on the grounds that the purported service was invalid and ineffective.

2. At the hearing of this motion the plaintiff, without formal application, indicated that she was looking for an order deeming service good. The defendant was prepared to deal with such application on behalf of the plaintiff given that both applications would be grounded upon the same circumstances.

Proceedings

3. O. 12, r. 26 of the Rules of the Superior Courts provides: -

> "A defendant before appearing shall be at liberty to serve a notice of motion to set aside the service upon him of the summons or of notice of the summons, or to discharge the order authorising such service."

4. On the 29th June 2015 the intended plaintiff secured liberty to issue and serve a notice of a personal injury summons on the intended defendant outside the jurisdiction at the intended defendant's New York City address.

5. In the events the personal injury summons issued on the 14th December 2015.

6. Prior to the defendant maintaining the within application two affidavits of service were filed on behalf of the plaintiff by one Mohammed Bouri, summons server. The first such affidavit states that, on the 18th November 2015, the summons server served the within personal injury summons on a suitable aged person, being John Doe, concierge, at the defendant's dwelling house. He mailed a copy of same in a post-paid envelope properly addressed to the defendant, on the 18th November 2015, by certified and first class mail. A description of the concierge was given, as it appears that the concierge refused to give a name. The second affidavit of service of Mr. Bouri states that, on the 27th October 2016, he served the personal injury summons on a suitable aged person, being John Doe, at the defendant's dwelling house and, on the 18th November 2015, mailed same by certified and first class mail. Again, it appears that the concierge refused to give a name. However, the description in the affidavits is such that it is clear that the second concierge was not one and the same person as the first concierge.

7. Jonathan Hoffman, US lawyer, swore an affidavit of law on the 24th May 2017 and subsequently swore an updated affidavit on the 14th March 2018. These affidavits are relevant to the within proceedings for the purposes of setting out the manner of service of summonses within the US and in particular within New York, by reason of The Hague Convention. Under Article 10 of The Hague Convention it is provided that provided the destination State does not object, the Convention shall not interfere with the freedom to send judicial documents by postal channels directly to the person abroad. The parties agreed that because of and in accordance with The Hague Convention, in order to establish proper service of the notice of summons on the within defendant, the plaintiff must show compliance with either :-

> (1) Federal rules which require delivery to the individual personally, or by leaving a copy at the individual's dwelling or usual place of abode, with someone of suitable age and discretion who resides there, or by delivering a copy of same to an agent authorised by appointment or by law to receive service of process, or,
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> (2) Under New York rules which require delivery of the summons to a person of suitable age and discretion at the actual place of abode of the person to be served and by mailing within 20 days of each other, the summons to the person to be served at his or her last known residence.

8. The plaintiff contends that service was effected in fact under federal law and New York law.

9. Part of the affidavit evidence put before the court on behalf of the defendant, to support the application in the notice of motion, was an affidavit of Sarah Francus bearing date of the 14th March 2018 wherein at para. 2 she states that in her role as manager she is responsible for opening and reviewing any mail, packages or deliveries for the defendant sent to her at her home address and she has held this role since 2014. She avers at para. 3 of her affidavit that only one set of such papers were received and those were delivered by hand, and not by mail, and received by the concierge on or about the 27th October 2016.

10. In resisting the application, on the part of the defendant, the plaintiff has filed an affidavit of Jeffrey Cohen, president of Precision One, Inc. being the relevant document server company for which Mr. Bouri was acting, bearing date the 5th January 2018. At paras. 8 and 9 of his affidavit he says that service was effected on or about the 11th August 2015. At para. 12 he refers to the order secured in Ireland for Noonan J. affording liberty to issue and serve the personal injury summons as being the 29th June 2017 and then refers to an affidavit of Mr. Bouri to the effect that on the 27th October 2017, he effected service of the relevant documents. At para. 13 of Mr. Cohen's affidavit he refers to three attempts at service by Mr. Bouri all in October 2017. At para. 12 he refers to the service by prepaid mail by Mr. Bouri which he alleges occurred on the 28th October 2017. This assertion is again repeated at para. 16 of his affidavit.

11. Mr. Bouri also swore an affidavit in these proceedings, bearing date the 5th January 2018, to the effect that he served the summons on the 11th August 2015. However, in the course of this affidavit he refers to a first class prepaid mail envelope and does

not at any point suggest he served by certified post. Reference is made at para. 5 of this affidavit to an order of Noonan J. of the 29th June 2017 and to service of the documentation on the 27th October 2017. At para. 6 he refers to attempts at service on three separate occasions in October 2017. At para. 7 he suggests that service was effected, on the 28th October 2017, by first-class prepaid mailing to the defendants' address. There is incorporated in para. 7 of Mr. Bouri's affidavit, but hand crossed out, the following statement contained in brackets: -

> "If Mr. Bouri can say from where and when he posted the envelope or has a receipt of such postage he should aver to this exhibit proof of postage."

At para. 8 he refers to a clerical error in his affidavit, of the 6th November 2016, to the effect that he should have incorporated the date of the 28th October 2016 as being the date upon which he posted certain documents (rather than the 18th November 2015 as recorded in the second affidavit).

12. In Mr. Hoffman's second affidavit aforesaid, Mr. Hoffman points out the various errors contained within the affidavits of Mr. Bouri and Mr. Cohen and the effect of discrepancies as between these affidavits and the earlier affidavits of service of Mr. Bouri. Mr. Hoffman also confirmed that service by certified post has the advantage of there being documentary evidence from an independent third party as to the actual postage of documents and ultimately as to the actual receipt of such documents.

13. The plaintiff did not seek to address by further affidavit evidence the various discrepancies in the affidavits of Mr. Cohen and Mr. Bouri in these proceedings over the affidavits of service of Mr. Bouri, by any further affidavit.

14. As matters stand therefore, Ms. Francus apparently received a copy of the relevant documentation via the concierge on or about the 27th October 2016 and she avers that no other papers in these proceedings have been received by mail as she would have opened the envelope containing them and reviewed them.

15. The defendant's motion was originally grounded upon the affidavit of Gearoid Carey, solicitor, of 26th May 2017 in which he says at para. 2 that a conditional appearance was filed on the 6th January 2017 expressly without prejudice and solely to contest the validity of the purported service and to contest jurisdiction of the Irish courts. In correspondence of the 15th March 2017, the defendant's solicitors indicated that the appearance was filed in order to challenge the purported service on her and accordingly therefore the issue as to jurisdiction of the Irish courts appears to have fallen away.

16. The plaintiff objects in the most strenuous terms to the content of the affidavit of Mr. Carey on the basis that his evidence is hearsay and his means of knowledge is not identified. The plaintiff also complains as to the nature of the affidavits of Mr. Hoffman in that the plaintiff suggests he has gone beyond what an expert should record in an affidavit in dealing with conclusions to be reached on facts which is a matter for the court and in failing to address the affidavit of Ms. Francus. I believe these objections are well founded however similar comments could be made in respect of the affidavit of Mr. Cohen who is not a legal expert, for example paras. 7 and 15 of his affidavit.

Should service be set aside?

17. The defendant's argument is to the effect that no valid service was effected as a matter of New York law or federal United States law and accordingly service should be set aside as it was not conducted in a manner envisaged by Article 10 of The Hague Convention. The defendant is not suggesting that Ireland does not have jurisdiction to hear the case and therefore the defendant's challenge is limited to the service effected.

18. The plaintiff in resisting the application of the defendant makes the following points: -

> (i) The defendant is obliged to make the application as soon as possible and there has been a delay of seven months since the date of receipt of the documents and the institution of the motion and therefore this delay should be sufficient to refuse the order;
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> (ii) The defendant has not discharged the burden by way of affidavits on behalf of the plaintiff to counter the affidavits of Mr. Bouri and Mr. Cohen including Mr. Bouri's affidavits of service;
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> (iii) Although the service asserted in 2015 was prior to the issue of the proceedings, nevertheless same should be taken into account as relevant generally;
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> (iv) The plaintiff asserts that service was in fact effected in accordance with New York law because, the plaintiff asserts, the documents were served on the concierge and posted within 20 days of service on the concierge. In addition, in this regard the plaintiff asserts that service was effected under US federal law on the basis that following leaving the documents with the concierge, such documents were delivered to Ms. Francus who the plaintiff asserts was the agent authorised by appointment and by law to receive such service;
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> (v) The plaintiff argues that the defendant's application is a strictly technical argument and should be reviewed accordingly;
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> (vi) The plaintiff argues that the point of law of exorbitant jurisdiction was relevant at a leave stage and is not relevant at this stage although the defendant argues that a like approach to the lead stage should be applied to the defendant's application to set service aside.

19. I am satisfied that the weight of evidence is in favour of the defendant in respect of the defendant's application to set service aside for the following reasons: -

> (i) The plaintiff relies on the case of *Reynolds v. Coleman* [1887] 36 ChD 453, to suggest that the delay in service is sufficient to refuse the defendant's application. In that matter, there was a delay of twelve months. In the instant matter, Ms. Francus acknowledges receipt of the documents on or about the 27th October 2016 and the motion issued on the 26th May 2017 amounting to a delay of seven months. The plaintiff has not filed an affidavit to identify any prejudice by reason of this delay and it does appear to be noteworthy that the personal injuries summons herein issued on the 14th December 2015 and hence service was not effected until October 2016, some ten months later;
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> (ii) I am not satisfied that the affidavit evidence on behalf of the plaintiff, that is the three affidavits from Mr. Bouri, and one affidavit from Mr. Cohen, are insufficient to challenge Ms. Francus' affidavit as to when she received the documents.

In this regard as aforesaid there are several problems with the affidavits of Mr. Bouri in respect of various dates and indeed whether or not postal service included certified post. Although it is clear from the affidavits on behalf of the defendant that these discrepancies were an issue in the case nevertheless the plaintiff did not avail of the opportunity to deal with same and was satisfied too in his submission to the court that to state that we all know the dates intended. Such a submission is most unsatisfactory. Even with such a submission same does not deal with the fact that the initial affidavits of Mr. Bouri suggest that certified post was availed of whereas not only does Mr. Bouri not make such an assertion in his affidavit of the 5th January, 2018 but by reason of the note and the deletion of same from his affidavit, coupled with the decision not to explain the discrepancy, one is left with the clear and unambiguous impression that certified post was not availed of by Mr. Bouri. This fact in turn casts doubt as to the veracity of his affidavit of service of the 7th November 2016 and further casts doubt on whether or not first class mail service was employed;

(iii) I do not accept that the attempts at service in 2015 at a time when the personal injury summons had not yet issued is sufficient to complement or assist any deficiencies in service on behalf of the plaintiff in or about October 2016;

(iv) I am not satisfied that service was effected pursuant to the US federal rules as there is no evidence that either the concierge or Ms. Francus was an agent authorised by appointment or by law to receive service of process.

(v) I am not satisfied that service was effected under the New York rules for service by reason of the various discrepancies in the affidavits of Mr. Bouri and the clear and unequivocal statement of Ms. Francus that the only copy of the document she received was via the concierge and not via post.

20. In the circumstances therefore, although it is accepted that the burden of proof rests with the defendant to establish that the summons should be set aside in accordance with the jurisprudence identified in *Heffernan v. Ryan* [2005] 1 IR 32. Nevertheless, I am satisfied that the defendant has discharged this burden so that there has been no valid service effected as a matter of New York law or federal United States law.

Deeming service good

21. The plaintiff points to the fact that The Hague Convention has as its purpose:

> "Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time.
>
> Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure."

The plaintiff argues that given the purpose of The Hague Convention and the fact that there is sworn evidence before the court from Ms. Francus to the effect that the documents have indeed been brought to the attention of the defendant and/or her legal representatives, the court should deem service good. The plaintiff argues that this was the approach adopted by Herbert J. in *Heffernan v. Ryan*, aforesaid, when the court found that the second defendant had established a prima facie case on the affidavit evidence for the purpose of setting aside service, however in accordance with O. 9, r.15 of the Rules of the Superior Courts, the court deems service actually effected sufficient.

22. The relevant provisions of O. 9 are as follows: -

> "15. In any case the Court may, upon just grounds, declare the service actually effected sufficient.
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> 16. This Order, so far as practicable, shall apply to the originating document in proceedings not commenced by summons and to notice in lieu of service."

23. In passing, in my view the provisions of Rules 8 and 9 of O. 11 are also noteworthy, in that they provide: -

> "8. Where the defendant is not, or is not known or believed to be, a citizen of Ireland, notice of the summons, and not the summons itself, shall be served upon him.
>
> 9. Subject to the provisions of this Order, notice in lieu of service shall be given in the manner in which summonses are served."

24. In resisting this application on behalf of the plaintiff the defendant did not in fact argue as to whether or not it might be 'just' to deem service good but rather limited her argument to such a deeming provision did not apply to non –Irish citizens and it would not apply as it would circumvent The Hague Convention.

25. I am satisfied that the defendant is incorrect in her submission to the effect that the deeming provision of O. 9, r. 15 of the Rules of the Superior Courts does not apply to service on non – Irish citizens. Having regard to the plain and ordinary meaning of the Rules of the Superior Courts, herein before outlined. Indeed, the defendant in her arguments in this regard suggests that the case law in the United Kingdom is such that in the matter of *Deutsche Bank AG v. Sebastian Holdings Inc.* [2014] 1 A11 ER (COMM) 733, is effective authority for the proposition that where there is an international arrangement between states such arrangement must be strictly complied with, however, where there is no such treaty or legally binding agreement between states a deeming provision can apply. In *Deutsche Bank*, Mr. Justice Cooke thus explained the apparent anomaly as between the previous cases namely *Cecil v. Bayat* 2011 1 WLR (Court of Appeal) and *Abela v. Baadarani* [2013] 1 WLR (Supreme Court).

26. In suggesting that a deeming order cannot apply as same would circumvent The Hague Convention, the defendant relies on the aforesaid judgment of Mr. Justice Cooke in the UK in the *Deutsche Bank* matter and also relies on two decisions of the Canadian courts, namely *Khan Resources Inc*. [2013] ONCA 189 and *Metcalfe Estate v. Yamaha Motor Power Products Company Ltd*. [2012] ABCA 240.

27. In *Khan*, the Supreme Court set aside the Master's order dispensing with or validating service and concluded that the convention, incorporated into Ontario law through Rule 17.05(3), is a complete code for service on parties in contracting states. At para. 41 of that decision, the court noted that: -

> "The notion of the Convention's exclusive character was recently affirmed by the Alberta Court of Appeal in Metcalfe."

It is clear from paras. 43 to 48 of the judgment that *Metcalfe* aforesaid was highly influential on the outcome of *Khan*.

28. In *Metcalfe*, the deeming provisions in the Alberta rules (Rule 11.27) were apparently applied to states which were non-signatories to The Hague Convention, however the Court of Appeal in *Metcalfe* insisted that Rule 11.27 must be narrowly construed with regard to Hague Convention signatories. In Alberta, following the decision in *Metcalfe*, the Alberta rules were altered (July 2013) so that the rules specifically allowed for the deeming provision to apply to Hague Convention signatories.

29. The foregoing demonstrates that in *Metcalfe* the Court of Appeal was considering the application of the internal court rules in Alberta applying such rules strictly resulted in the finding that the deeming provisions within the Rules did not apply to The Hague Convention.

30. The Alberta court rules were subsequently changed to specifically include The Hague Convention in the deeming provisions.

31. The *Khan* judgment was considerably influenced by the *Metcalfe* judgment and also involved an interpretation of the internal rules in Ontario.

32. In the UK, in the *Deutsche Bank* matter, as aforesaid Mr. Justice Cooke in the High Court reconciled the two judgments in *Abela* and *Bayat*, concluding that one dealt with The Hague Convention whereas the other dealt with a state which was not a signatory to The Hague Convention. The application before Mr. Justice Cooke involved an application for an alternate method of service other than was provided by The Hague Convention in circumstances where there had been no previous attempt at service in accordance with The Hague Convention. It is noted that one of the relevant rules under review by Mr. Justice Cooke, namely CPR 6.16 provided that the court can only dispense with service of the claim form in exceptional circumstances. Ultimately, Mr. Justice Cooke concluded (see para. 31) that there must be some good reason beyond speed and convenience. Mr. Justice Cooke felt that he could find nothing in the evidence which would justify finding "good reason" for allowing service at this stage, other than by The Hague Convention route. He added: -

> "Of course, should service prove difficult by such means or any other conventional means, or evidence show that Mr Vik was seeking to evade service, then an order for alternative service would be available on different facts and in different circumstances and an application could be renewed under Rule 6.15.1"

At para. 20 of his judgment, Mr. Justice Cooke noted: -

> "It is plain from paragraph 45 of the judgment of Lord Clarke in Abela and paragraph 53 of the judgment of Lord Sumption with whom Lords Neuberger, Reed and Carnwath agreed, that it is no longer realistic to see the court's exercise of jurisdiction over a foreign defendant as an interference with the sovereignty of the state where process is served. There is no need for "muscular presumptions" against service out which are implied by the use of adjectives such as "exorbitant" when describing this jurisdiction over foreign individuals or corporations in modern commercial life. The need for some sort of connecting factor with England and the fact that a similar jurisdiction is exercised by many other countries on a similar basis, whether under international conventions or otherwise, means that the question of exercising sovereignty over a foreigner in another sovereign state is of limited significance."

33. The above comments appear consistent with the views expressed by Hogan J. in *Albaniabeg Ambient Sh.p.k. v Enel S.p.A. & Anor*, a decision of the Court of Appeal delivered on the 26th February 2018. At para. 21 following a discussion of the judgment in *The Hagen* [1908] p.189, Hogan J. expressed the view that *The Hagen* decision must be viewed in the context of its time. At para. 22 of his judgment, Hogan J. quoted from Lord Neuberger in *Linsen International Ltd. v. Humpuss* [2011] EWCA Civ 1042, where Lord Neuberger stated: -

> "In the increasingly sophisticated world of international movement of goods, assets and money, and the formation of companies and the hiding of assets, the courts have to be astute to ensure that the law keeps pace with modern developments and is not flouted."

34. In *Societe Generale v. Golda's* [2017] EWHC 667, Popplewell J. stated that: - "Where service abroad is the subject matter of The Hague Convention or a bilateral treaty, it will not normally be a good reason for relief under CPR 6.15 or 6.16 that complying with the formalities of service so required will take additional time and cost."

In dealing with The Hague Convention or a bilateral treaty service is to be effected in the manner provided as part of the reciprocal arrangements for mutual assistance and service with this country, comity requires the English court to take into account and give way to those objections. In such cases relief should only be granted under Rule 6.15 in exceptional circumstances. Popplewell J. concludes para. 49 of his judgment: -

> "That is not to say, however, that there can never be a good reason for ordering service by an alternative method in a Hague Convention case."

Conclusion

35. In Ireland, under O. 9, r. 15 of the Rules of the Superior Court, the court has the discretion on just grounds to declare service actually effected sufficient.

36. This applies whether or not the defendant is an Irish citizen.

37. A consideration of the UK cases relied upon by the defendant demonstrates that alternate means of service can be ordered even where a Hague Convention case is involved.

38. In *Deutsche Bank*, the application for an alternate means of service was made in advance of any attempt to comply with The Hague Convention.

39. In all cases relied upon by the defendant, the courts examined the internal rules applicable in determining whether or not an alternate means of service was available.

40. In the instant circumstances there is sworn affidavit evidence before the court that the relevant documentation has been brought to the attention of the defendant in October 2016 (see the affidavit of Ms. Francus).

41. Although discrepancies within the affidavits of Mr. Bouri have not been adequately addressed for the purposes of the court being satisfied that the evidence of Ms. Francus has been successfully challenged, nevertheless the evidence of Mr. Bouri and Mr. Cohen before the court are such that it is clear that the plaintiff in this matter has attempted to comply with The Hague Convention in the service of the documentation.

42. In my view, the following matters are persuasive in considering the granting of relief under Order 9 rule 15 :-

> 1. In *Heffernan* Herbert J stated that the court might regard as sufficient evidence varied with the facts of each individual case.
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> 2. The defendant has not disputed the existence of concierges in accordance with the descriptions in each of the affidavits of service of Mr. Bouri.
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> 3. Ms. Francus does not deny receipt of the documents in November 2015. The argument with regard to this service is that it was in advance of the issue of the summons.
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> 4. Effecting personal service or service at the defendant's residence on someone who resides there, is not, as a matter of practicality, available to the plaintiff (see para. 7 of the affidavit of Mr. Cohen).
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> 5. The defendant has challenged the plaintiff's assertion of posting but not of attending on a number of occasions in October (presumably 2016).

43. In all of the circumstances I am satisfied that there are just grounds to declare that the service actually effected is sufficient pursuant to O. 9, r. 15 of the Rules of the Superior Courts.