THE COURT OF APPEAL

No. 2015/247

Kelly P.
Irvine J.
Hogan J.

BETWEEN/

DESMOND MONAHAN

PLAINTIFF/APPELLANT

- AND -

KEVIN BYRNE AND SHANE COYLE (PRACTISING UNDER THE STYLE AND TITLE OF BRANNIGAN AND MATTHEWS SOLICITORS)

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 20th day of January 2016

1. This is an appeal from the decision of the High Court (Hedigan J.) delivered on 27th April 2015 ([2015] IEHC 263) whereby he allowed an appeal from the Master of the High Court and set aside an order renewing the plenary summons which grounded these proceedings and which itself was dated 7th June 2012.

2. At the close of the hearing on 17th November 2015 this Court indicated that it would dismiss the appeal and give its reasons for that decision at a later date. The reasons for this decision are now set out in this judgment.

3. The issue arises in the following way: The defendants are a firm of solicitors practising in Drogheda, Co. Louth. The plaintiff is a former client of the defendants and in these proceedings he claims damages for breach of contract, breach of fiduciary duty and misrepresentation. The claim itself relates to a contract for the purchase of land on 14th June 2006. The plaintiff contends that he and another individual, Mr. Ray White, jointly borrowed some €2.2m. from Allied Irish Banks which was secured by certain mortgaged property. €1m. of this sum was then paid to the plaintiff. It is said that a further €1.08m. was then paid to the defendants on trust for the plaintiff.

4. The essence of the complaint made against the defendants is that €790,500 of these monies were paid by them to Mr. White on 30th June 2006 and a further sum of €146,250 was paid on 16th August 2006. It is said that these payments were unauthorised and amounted to a breach of duty. The plaintiff further contends that through the wrongdoing of the defendants the plaintiff was made liable jointly and severally with Mr White to AIB in the amount of €2,338,097. On the 11th of April 2012 AIB called in the debt.

5. If the plaintiff is correct, then his cause of action crystallised immediately with these wrongful payments so that the six year limitation period in both contract and tort had almost expired by the time the proceedings were actually issued on 7th June 2012. Critically, however, the summons was not actually served on the defendants during the twelve month period permitted by Ord 8, r.1 RSC. The summons would accordingly have expired unless it had been renewed on or before 6th June 2013. On the 4th June 2013 the Master of the High Court made an order ex parte on the application of the plaintiff's solicitors extending the time for the service of the summons for six months.

6. The first defendant was served on 2nd December 2013, the day before the renewed summons was due to expire. The second defendant was served on the 6th December 2013. On 9th June 2014 the plaintiff's solicitors provided the defendants' solicitors with a copy of the affidavit grounding the application, this having been requested a few weeks earlier. Some six weeks later the defendants issued a motion seeking an order pursuant to Ord. 8, r.2 seeking to have the service of the summons set aside.

The reasons for the delay and the judgment of Hedigan J.

7. The reasons given for the various delays relate to both the incompleteness of the conveyancing file and a reluctance on the part of the plaintiff's then solicitor to sue fellow professionals who were also based in Drogheda. So far as the former reason is concerned, it appears that at their request, a complete file had been furnished by the defendants to the solicitors for the plaintiff on the 10th of June 2011. It was understood at that point that the plaintiff intended to sue Mr White.

8. It appears, however, that the file (or, at least, important parts of it) went astray in the course of the transfer of that file from the plaintiff's solicitors to a new firm of solicitors in December 2012. It is not clear, however, that the difficulties regarding the file posed a real impediment to the issue and service of the summons. It may be noted that in the course of his judgment in the High Court Hedigan J. observed that:

> "….the file remained incomplete even when the renewed summons was eventually served on the first defendant on the 3rd of December 2013. This reason of incompleteness of the file is not an acceptable one. The renewed summons was served while the file remained incomplete. Service of the summons issued on the 7th of June 2012 might just as readily have been made at any time up to the 6th of June 2013."

9. Hedigan J. thus concluded that the absence of a complete file did not, in fact, cause or contribute to the delay in serving the proceedings. While he observed that there might well have been a reluctance on the part of the plaintiff's then solicitor to sue fellow professionals working in the locality, this could not objectively justify the delay in effecting the service. Hedigan J. concluded that the plaintiff had not provided any "good reason" within the meaning of Ord. 8, r. 1 such as would have justified the renewal of the summons and he accordingly set it aside.

The provisions of Order 8, rr. 1 and 2

10. Before considering the reasons given by Hedigan J. in his judgment to justify the setting aside of the renewal of the summons, it may be convenient to set out the provisions of Order 8, rr. 1 and 2. Rule 1 states:

> "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 so from time to time during the currency of the renewed summons…."

11. Rule 2 provides:

> "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."

Whether the ex parte order should be set aside

12. It is clear that any ex parte order renewing a summons can at most have a provisional status, since by definition the court will not yet have had an opportunity of hearing the other side who almost by definition will be affected by the making of such an ex parte order. The provisional status of *ex parte* orders is true as a matter of general law (*Adam v. Minister for Justice* [2001] 3 I.R. 53), but, in any event, constitutionally mandated principles of fair procedures require that such orders cannot be accorded any higher legal status: see*, e.g., DK v. Crowley* [2002] 2 I.R. 744. This point was confirmed in the specific context of Ord. 8, r.2 by Finlay Geoghegan J. in *Chambers v. Kenefick* [2007] 3 I.R. 526, 529 and by my own decision as a judge of the High Court in *Doyle v. Gibney* [2010] IEHC 10.

13. It is clear from the decision in Chambers that the court should first assess whether there was "good reason" within the meaning of Ord. 8, r.1 to order renewal of the summons. As Finlay Geoghegan J. made clear in her judgment in Chambers, the "good reason" in question is not necessarily referable to the service of the summons. If it finds the existence of such good reason, the court should then consider whether it is in the interests of justice that it should so order. In doing this the court should consider the balance of hardship for each of the parties.

14. The question as to how the court should assess whether the plaintiff had established "some other good reason" was examined by Peart J. in *Moynahan v. Dairygold Cooperative Society Ltd.* [2006] IEHC 318 where he stated:

> "It is important to note the reference in Ord.8, r.1 is to 'other good reason' (my emphasis). It does not state simply 'any reason'. The court must therefore consider whether there is a reason offered as to why the summons ought to be renewed, and whether that is a good reason. That task requires the court in the present case to form a view as to whether the reason offered is one which justifies the inaction which occurred, especially in circumstances where it is now alleged that the delay has caused prejudice to the defendant's ability to defend, and, in effect extend the limitation period under the Statute of Limitations from three years to over six years….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."

15. Applying that test I must ask myself whether the reasons offered here for the renewal of the summons constitute a good reason. There are essentially three reasons advanced by the plaintiff for this purpose.

16. First, the file was mislaid and/or was incomplete as a result of which the new solicitor was not happy to take on the file. Second, the solicitor for the plaintiff was reluctant to sue his colleague in his own town for professional negligence. Third, there was a real risk that the plaintiff's claim would become statute barred if the summons was not renewed beyond the 6th of June 2013. These reasons may be considered in turn.

The incomplete nature of the file

17. As Hedigan J. noted in his judgment, no reason has been advanced to explain the delay between June and December 2012. As to the delay beyond that period, all the court is told is that the file was transferred to the new set of solicitors in December 2012. In the course of transfer of the file between solicitors it has been stated that it became apparent that documentation was missing and thus the file was incomplete. The new firm of solicitors then refused to file a notice of change of solicitors until this happened.

18. It should be noted that at their request, a complete file had been furnished by the defendants to the then solicitors for the plaintiff on the 10th of June 2011. This was documentation which was provided on the basis that the plaintiff intended to sue Mr White. At some point thereafter – probably in the course of the transfer as between solicitors – key documentation contained in the file went missing. What is critical, however, is that the file remained incomplete, even when the renewed summons was eventually served on the first defendant on the 3rd of December 2013.

19. All of this suggests that, viewed objectively, the absence of a complete file was not a real impediment to the service of the proceedings. In these circumstances, this does not amount to a "good reason" within the meaning of Ord. 8, r.1.

The reluctance on the part of the former solicitor to act again local colleagues

20. There is no doubt at all but that at a human level the unwillingness of the former solicitor to issue proceedings against other solicitors practising in his home town is a most understandable one. It must nevertheless have been obvious for some time that the plaintiff's claim was pointing increasingly in that direction. In those circumstances, viewed objectively, it was incumbent on the plaintiff's solicitor to arrange for another solicitor to act against his local colleagues if he was himself unwilling to do so. It ought to have been obvious that considerable urgency attached to this matter, since the proceedings were actually issued within - at best - weeks of the six year limitation period expiring.

21. In view of the provisions of Ord. 8, r. 1 the plaintiff had the (not ungenerous) period of 12 months within which to serve these proceedings on the defendants as of right. Whatever difficulties may have attended to the incomplete file, it is very hard to justify the failure to serve the proceedings within that period given the urgency which attached to the matter.

22. In these circumstances, the reluctance to sue local solicitors cannot constitute a "good reason" within the meaning of Ord. 8, r. 1.

The risk that the plaintiff's claim would now be statute-barred if the order is set aside

23. It is true that there are two Supreme Court decisions which might suggest that the fact that a plaintiff's action might otherwise

be statute-barred is itself a good reason for the purposes of Ord. 8, r.1: see *Baulk v. Irish National Insurance Company Ltd* [1969] I.R. 66 and *McCooey v. Minister for Finance* [1971] I.R. 159. But it is equally clear that these two decisions have been effectively qualified by a series of subsequent cases, even if they have not been formally overruled by the Supreme Court. As Clarke J. stated in *Moloney v. Lacey Building and Civil Engineering Ltd.* [2010] IEHC 8, [2010] 4 I.R. 417, 428:

> "To the extent, therefore, that *Baulk v. Irish National Insurance Co. Ltd.* [1969] I.R. 66 might give rise to a possible argument to the effect that the plaintiff might otherwise be statute-barred can provide good reason on its own, it seems to me that subsequent Supreme Court authority makes it clear that that argument is not tenable."

24. All of this has come about in a context where the courts have become increasingly conscious of their obligations derived from Article 34.1 of the Constitution to ensure that the judicial mandate to administer justice is discharged in an efficient and timely fashion.

25. The first of the two Supreme Court decisions to which Clarke J. alluded in *Maloney* is *O'Brien v. Fahy*, Supreme Court, 21 March 1997. In that case Barrington J. stressed that the fact that a claim might otherwise be statute-barred could not in itself be dispositive in a case of this sort. In that case the accident happened on 24th July, 1988, the summons was not issued until 23rd July, 1991 and the first intimation that proceedings were contemplated against the defendant was given on 5th June, 1992 approximately four years after the date of the accident. (The relevant limitation period for personal injuries at the time was three years). Barrington J. stated as follows:

> "It appears to me that the lapse of such a time without knowing that claim was going to be made is something which itself implies prejudice and when the defendant and her solicitor are prepared to swear affidavits that in fact it is not a theoretical prejudice but an actual prejudice which the defendant would suffer, one must set that against the loss to the plaintiff, if as a result of a refusal to renew the summons which is out of time, her claim becomes statute barred. Unfortunately, for the plaintiff, it appears to me that the balance of justice is in the circumstances of the present case in favour of refusing to extend the time for service of the summons....."

26. The second case is *Roche v. Clayton* [1998] 1 I.R. 596. In that case O'Flaherty J. stated as follows ([1998] 1 I.R. 596, 600):-

> "It is not a good reason in the light of *O'Brien v. Fahy* to renew a summons simply to prevent the defendant availing of the Statute of Limitations. The Statute of Limitations must be available on a reciprocal basis to both sides of any litigation."

27. It is accordingly clear from this case-law that the fact that an action might otherwise be statute-barred does not in *itself* constitute a "good reason" within the meaning of Ord. 8, r.1 by which a summons should be renewed.

28. Recent decisions have also stressed that the renewal of a summons outside of a limitation period is to some degree at odds with an underlying principle of the Statute of Limitations itself, namely, that a defendant is entitled to assume that he will not face the prospect of litigation after the expiration of a fixed passage of time.

29. A good example of this judicial concern is supplied by the decision of Laffoy J. in *O'Reilly v. Northern Telecom (Ireland) Ltd.* [1998] IEHC 168, [1999] 1 I.R. 214. In that case the plaintiff issued proceedings against his employer claiming damages for personal injuries just before the expiration of the relevant limitation period. The summons was not served within the twelve month period prescribed by Ord. 8, r.1. The plaintiff sought to renewed the summons after a lapse of some two and a half years, but Laffoy J. set aside the renewal of the summons saying ([1999] 1 I.R. 214, 219):

> "The plaintiff has not established any good reason for his failure to serve the summons within the one year period prescribed in Ord. 8, r. 1. His explanation that he feared he would jeopardise his position with the defendant if he instituted proceedings rings hollow. In any event, if an excuse of that nature was countenanced, the time strictures imposed by the Statute of Limitations 1957 could easily be set at naught."

30. A similar point was made by Peart J. in *Moynahan* and by O'Sullivan J. in *Allergan Pharmaceuticals (Ireland) Ltd. v. Noel Deane Roofing* [2006] IEHC 215, [2009] 4 I.R. 438, 450. Similar anxieties were also expressed by Clarke J. in *Moloney v. Lacey Building and Civil Engineering Ltd*. [2010] IEHC 8, [2010] 4 I.R. 417 when he said ([2010] 4 I.R. 417, 428):

> "It seems to me that a renewal of a summons outside the limitation period so as to further extend the time (by reference to the limitation period) within which service can be effected, amounts at least to a stretching of the principles behind the existence of a Statute of Limitations in the first place. Such considerations should, in my view, inform decisions relating to both the question of what might be taken to be a 'good' reason for the renewal of a summons and also in weighing the factors that might be put in the balance in considering where the balance of justice lies."

31. It follows, therefore, that the fact that the action might otherwise be statute-barred is not *in itself* a good reason such as might justify the court renewing the summons for the purposes of Ord. 8, r. 1. If it did, then this might have the effect whereby, in the words of Laffoy J. *in O'Reilly*, the "time strictures imposed by the Statute of Limitations 1957 could easily be set at naught."

The defendants' delay in moving to have the renewal of the summons set aside

32. It remains to address the plaintiff's submission that the defendants have delayed unduly in making the application to have the renewal of the summons set aside. It was contended that the defendants should not have waited four and a half months from service of the renewed summons before requesting on the 15th of April 2014 a copy of the affidavit grounding the application to renew the summons.

33. Just as Hedigan J. observed in his judgment, I agree that ideally the defendants should have moved within days of the service by the plaintiff upon the first defendant in December 2013. But I likewise agree with the conclusion of Hedigan J. that a delay of seven months before bringing the set aside application is not a sufficient delay in these circumstances such as would disentitle the defendants from bringing this application.

Conclusions

34. For all the reasons stated, it must be concluded that the plaintiff has not advanced any "good reason" within the meaning of Ord. 8, r. 1 such as would have justified a renewal of the summons and that Hedigan J. was correct in so finding. It was for these reasons that this Court dismissed the appeal of the plaintiff and affirmed the decision of the High Court setting aside the renewal of the summons.