Neutral Citation: [2016] IEHC 535

THE HIGH COURT

[Record No. 2013/907P]

BETWEEN

DARJOHN DEVELOPMENTS LIMITED (In Liquidation)

PLAINTIFF

AND

IRISH BANK RESOLUTION CORPORATION LIMITED (formerly Anglo Irish Bank Corporation Limited)

And

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANTS

JUDGMENT of Mr. Justice Noonan delivered on the 3rd day of October, 2016

1. This is an application by the plaintiff for an order pursuant to Order 8 of the Rules of the Superior Courts renewing the plenary summons herein and for an order lifting the stay on proceedings against the first defendant ("IBRC") automatically imposed by s. 6 of the Irish Bank Resolution Corporation Act 2013.

Background

2. The plaintiff is a company which was involved in property development and construction. On 20th December, 2007, a cheque was drawn by the plaintiff's solicitors on their clients' account with the second defendant ("BOI") in favour of the plaintiff in the sum of €136,206.09. The cheque was crossed and endorsed "and co not negotiable". The cheque was presented for payment on 24th December, 2007, when it appears to have been altered by the insertion of the payee as Anglo Irish Bank Corporation, IBRC's former name, in lieu of the plaintiff. It is alleged that one of the plaintiff's directors was indebted to Anglo Irish Bank Corporation and the cheque was purportedly altered for his benefit. The cheque was paid by the BOI to Anglo Irish Bank Corporation. The plaintiff alleges that the defendants thus wrongly converted the cheque without the plaintiff's authority resulting in the loss of its value to the plaintiff.

3. On 14th December, 2009, the court appointed a liquidator to the plaintiff pursuant to a petition brought by the Revenue. On 19th November, 2012, the liquidator obtained the leave of the court to bring the within proceedings. A plenary summons was issued on 30th January, 2013, claiming damages for negligence, breach of duty (including statutory duty), breach of contract and conversion. The summons was not served on either defendant.

4. This application was initially brought ex parte when I directed that it should be made on notice to the defendants. The application is grounded upon an affidavit of Victor Clarke, the plaintiff's solicitor. He avers that shortly after the summons was issued, a special liquidator was appointed on 7th February, 2013, to IBRC and s. 6 of the Irish Bank Resolution Corporation Act 2013 had the effect of causing an immediate stay to be placed on the proceedings. He avers that this gave rise to uncertainty as to whether the proceedings were automatically stayed although subsequent case law established that where proceedings were already in being prior to the passing of the act, an application could be made to the court to lift the stay. This was the effect of the judgment of this court (Ryan J. as he then was) in *Quinn v. IBRC* which was delivered on 15th March, 2013, just over a month later.

5. In his affidavit at para. 8, Mr. Clarke avers:

> "[8.] I say and believe that although case law subsequently established that proceedings in being against the second named defendant could proceed following application to this Honourable Court the liquidation then became focused on numerous other avenues including potential liquidation seeking funds in excess of €1 million. In addition I say and believe that the liquidator became unwell for a significant period of time causing further delay and an inability to obtain instructions".

6. This affidavit was responded to on behalf of IBRC by one of the special liquidators, Mr. Kieran Wallace. In his affidavit, Mr. Wallace says that Mr. Clarke appears to suggest that a decision was made by the plaintiff not to pursue this case while other matters were in train. He also notes that the averment in relation to the alleged ill health of the liquidator is vague and unparticularised.

7. Mr. Clarke responded to this in a second affidavit. This affidavit, rather surprisingly, makes no reference to the issue of the liquidator's illness despite the challenge raised in Mr. Wallace's affidavit. Moreover, Mr. Clarke says that advice was received in March 2013 that it would be necessary to bring a motion to lift the stay and instructions were sought from the liquidator. The liquidator's instructions apparently were that there was little to be gained from pursuing the proceedings when the best possible outcome for the plaintiff against IBRC was that it would become an unsecured creditor.

8. In effect therefore, Mr. Clarke is saying that the liquidator decided not to pursue the proceedings because there was no point. However, Mr. Clarke then goes on to say that on a subsequent unspecified date, it became apparent that a fund might be available to meet claims against IBRC and thus it became appropriate for the liquidator to pursue the action again. In the result, instructions were given in December 2013 to bring a motion to lift the stay. The *ex parte* application was however, not made until 22nd June, 2015.

9. What emerges from the affidavits is that these proceedings were not pursued because the liquidator took the view that there was no point in doing so but he subsequently changed his mind on the basis of new information that came to light. In substance and in fact, this is the only reason advanced for the failure to serve the proceedings.

Order 8 of the Rules of the Superior Courts

10. Order 8 of the Rules of the Superior Courts provides:

> "[1.] 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. The summons shall in such case be renewed by being stamped with the date of the day, month and year of such renewal; such stamp to be provided and kept for that purpose in the Central Office and to be impressed upon the summons by the proper officer, upon delivery to him by the plaintiff or his solicitor of a memorandum in the Form No. 4 in Appendix A, Part I; and a summons so renewed shall remain in force and be available to prevent the operation of any statute whereby a time for the commencement of the action may be limited and for all other purposes from the date of the issuing of the original summons.

[2.] 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."

Discussion

11. It is common case that no attempt to serve the summons was made here and thus the only issue arising is whether or not the plaintiff has advanced a "good reason" for the renewal of the summons. In the absence of proceedings being issued, the plaintiff's claim would have become statute-barred on 23rd December, 2013, and so if renewal is refused, the claim is out of time. What constitutes "good reason" has been considered in many cases but of course cannot be exhaustively stated. The jurisprudence demonstrates that if a good reason is established, the court must go on to consider whether it is in the interests of justice that renewal be permitted. At that stage the issue of prejudice becomes relevant, but only at that stage.

12. There can be little doubt that the courts have adopted an increasingly strict approach to delay of all types in recent years. A corollary of this approach has been an increased level of scrutiny as to what might be regarded as "good reason" for renewing a summons. This was discussed by Clarke J. in *Moloney v. Lacey Building and Civil Engineering Limited* [2010] 4 I.R. 417. Commencing at p. 425, Clarke J. referred to a number of authorities on the question of delay and said:

> "It would be fair to summarise the jurisprudence which emerges from those cases as imposing a stricter view in relation to delay ….
>
> [22.] I am, therefore, satisfied that the general 'tightening up' of the approach of the courts to delay which can be identified in the dismissal for want of prosecution jurisprudence applies also to cases involving an application to renew a summons, such that the question of whether a reason put forward may be deemed a 'good reason' may be looked at with greater scrutiny, and the factors which can properly be taken into account in assessing the balance of justice may need to be looked at from a perspective that places a greater emphasis on the need to move with expedition."

13. Statues of limitation exist to protect parties from stale claims and to bring certainty and finality to litigation. The legislature has decided that there comes a point in time when a party is entitled to conclusively assume that he will not be exposed to a particular claim. The renewal of a summons outside the limitation period is to an extent at odds with this policy and cases such as *Moloney* demonstrate a keener awareness by the courts of that fact.

14. Litigation cannot be conducted on the speculative basis of issuing proceedings but not pursuing them until some event favourable to the plaintiff occurs. In this regard, the views of Lord Denning M.R. in *Thorpe v. Alexander Forklift Trucks Limited* [1975] 1 WLR 1459 are apposite (at p. 463):

> "In this case the third defendants do, I think, make out a prima facie case for dismissal. The plaintiff waited until almost the last day of the three years before issuing his writ against them. It was his duty then to get on with the case promptly. He was not entitled to take an extra year for service. As I said in *Sweeney v. Sir Robert McAlpine & Sons Limited* [1974] 1 WLR 200, 205, the plaintiff is not entitled to delay as of right for four years from the accident, three years before issuing the writ and another year for service. He has no such right. He is not entitled to delay at all. It is his duty, once the writ is issued, to serve it promptly and get on with it promptly. Lord Goddard said so in *Battersby v. Anglo – American Oil Company Limited* [1945] 1 KB 23, 32;
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> > 'It is the duty of a plaintiff who issues a writ to serve it promptly … ordinarily it is not a good reason that the plaintiff desires to hold up the proceedings while some other case is tried or to await some future development.'
>
> So in this case it was the duty of the plaintiff, having issued the writ, to serve it promptly and to proceed with the case with expedition."

15. Once proceedings have commenced, the plaintiff is under a duty to prosecute them with reasonable promptness. The courts are increasingly conscious of their obligations under the Constitution and the European Convention on Human Rights to ensure that litigation is disposed of in a timely manner. Where proceedings are issued but not served, the defendant and the court are deprived of the normal control mechanisms that exist to ensure that undue delay does not occur. In general, it is not permissible to issue proceedings and then "park" them without service in the hope or anticipation, for example, that a change in the law may render them viable or an impecunious defendant may become a mark.

16. There are of course exceptions. One such may arise in professional negligence proceedings where a writ is issued to stop the statute pending receipt of an expert report which is in such cases a prerequisite to the initiation of proceedings. Even then however, a plaintiff seeking renewal will have to explain why such report was not obtained sooner.

17. In *Moloney*, Clarke J. commented on the tension between renewal applications and statutes of limitation (at p. 427):

> "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."

18. He also considered that it was no longer tenable to argue that the fact the cause of action would now be statute-barred could in itself be a "good reason" for renewal (at 427):

> "It also seems clear from *Roche v. Clayton* [1998] 1 I.R. 596 that it is not a good reason to renew a summons simply to prevent the defendant availing of the Statute of Limitations. In that case, O'Flaherty J., speaking for the Supreme Court, and having made reference to *McCooey v. Minister for Finance* [1971] I.R. 159 and, in particular, *O'Brien v. Fahy* (Unreported, Supreme Court, Barrington J., 21st March, 1997), noted that the Statute of Limitations must be available on a reciprocal basis to both sides of any litigation. 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 fact 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. It follows that the 'good reason' must be more than a simple need to renew the summons so as to avoid the defendant being able to rely on the statute."

19. The views of Clarke J. above were approved recently by the Court of Appeal in *Monahan v. Byrne* [2016] IECA 10 where Hogan J., delivering the court's judgment, remarked:

> "[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."

Conclusion

20. It is to my mind clear that the failure to serve the summons here was the result of a deliberate decision not to do so informed by the belief that it was not a worthwhile exercise. In my view, that is not a "good reason" within the meaning of O. 8 and accordingly I must refuse this application.