Neutral Citation Number: [2006] IEHC 406

THE HIGH COURT

2003 No. 10788 P

BETWEEN

GERALD KELLEGHER AND ANNE KELLEHER

PLAINTIFFS

AND

RAYMOND BRADLEY AND FRANK LANIGAN TRADING UNDER THE STYLE AND TITLE OF MALCOLMSON AND LAW SOLICITORS

DEFENDANTS

Judgment of Ms. Justice Dunne delivered on 18th December, 2006

1. This is an application by the defendants herein for an order pursuant to O. 8, r. 2 of the Rules of the Superior Courts setting aside the order of this Honourable Court dated the 14th day of February, 2005, renewing the plenary summons herein for a period of three months from the making of that order.

2. The background to this matter is somewhat complicated. Originally the plaintiffs in these proceedings brought proceedings in respect of the construction of their home at Paulstown, County Kilkenny. They moved into that home in October, 1997. Subsequently it was alleged that there were defects in the house in relation to its construction and as a result of that proceedings were issued on behalf of the plaintiffs against John Hayes, Tallis Engineering Company Limited and others. Those proceedings did not include any claim for damages in respect of personal injuries by reason of the stress caused to the plaintiffs in relation to the difficulties they found themselves in. Those proceedings have been issued in March of 2000.

3. Subsequently, having become dissatisfied with their original solicitors, the plaintiffs retained Malcolmson Law Solicitors in August, 2000. It is clear from correspondence that by October of 2000, Malcolmson Law were aware of an issue in relation to the Statute of Limitations. They wrote a letter to the solicitors who previously acted for the plaintiffs and who were still on record, Messrs. Hughes, Murphy & Company, Solicitors, pointing out that there was a deadline due to expire in October relating to the Statute of Limitations and calling on them to deal with the matter. I should say that it is clear from that letter that, whilst the defendants had at that stage agreed to act for the plaintiffs, they were undoubtedly not on record because the letter went on to request the plaintiffs' file "subject to the usual undertakings to protect your own interests and in addition that notice of change of solicitor should be filed". Subsequently, the following year, Malcolmson Law formally came on record on behalf of the plaintiffs in relation to the matter.

4. It appears that following this no steps were taken by Hughes, Murphy & Company, Solicitors to amend the pleadings or to deliver a statement of claim including a claim for damages for personal injuries prior to the end of October, 2000.

5. Ultimately Malcolmson Law Solicitors came on record in relation to this matter in August, 2001.

6. Dillon Mullins came on record on behalf of the plaintiffs in March of 2003. At that time it appeared that no statement of claim had been served against the defendants in the proceedings. In September of 2003 a plenary summons was issued by Dillon Mullins Solicitors on behalf of the plaintiffs against the defendants herein. In that plenary summons the plaintiffs claimed damages for severe personal injuries, loss and damage suffered and sustained by the plaintiffs by reason of the negligence and breach of contract and breach of duty by the defendants, their servants and agents. That summons is the one which is the subject of these proceedings.

7. An *ex parte* application was made to renew the summons on foot of an affidavit of Andrew Dillon sworn herein on 4th February, 2005. In that affidavit Andrew Dillon swore as follows:

> "6. I say and believe that at the time after issue of the said plenary summons in September, 2003, I honestly believed that the associated High Court proceedings would progress sufficiently and therefore effectively render the current proceedings against the defendants herein irrelevant.
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> 7. I say that in the circumstances I did not serve or attempt to serve the defendants herein with the plenary summons herein, on that basis.
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> 8. I now say that due to unforeseen circumstances, it appears that the current proceedings issued against the defendants herein shall have to proceed and we therefore require an extension of time for service of the said plenary summons as the time limit for service of same has expired."

8. On foot of the *ex parte* application an order was made by the High Court renewing the summons for a period of three months from the date of the making of that order on 14th February, 2005. The defendants were ultimately served with that summons on 6th May, 2005. Thereafter the solicitors for the defendants herein sought a copy of the affidavit grounding the application for the renewal of the summons and also subsequently, on receipt of same, sought information as to the "unforeseen circumstances" referred to in the affidavit. Dillon Mullins & Company, Solicitors, responded by indicating that they no longer act for the plaintiffs and accordingly the information was not made known to the solicitors for the defendants herein. Accordingly, this application was brought on behalf of the defendants herein on the basis that no good reason was disclosed by or on behalf of the plaintiff for the renewal of the plenary summons. A replying affidavit has been sworn by the plaintiffs herein. In that affidavit they set out a number of matters in relation to the background to the original proceedings in respect of the alleged defects in the construction of their home. They outlined a number of matters in relation to the subsequent history of proceedings and the circumstances in which they changed solicitors on a number of occasions. They outlined their involvement with the Law Society and the circumstances in which they became involved with Dillon, Mullins & Company. Perhaps most surprisingly of all, they say that the application to renew the plenary summons was made without their knowledge and they did not see the grounding affidavit. A number of allegations are made in the course of that affidavit to the effect that Mr. Dillon had been involved in an effort to "protect his legal colleagues". At this point the plaintiffs have now discharged the firm of Dillon Mullins & Company.

9. It is, to say the least, unfortunate that it would appear that a statement of claim was only delivered in the original negligence proceedings against the builders this year. For whatever reason, and I am not in a position to comment on this, it is clear that those proceedings have been beset with difficulties. At this stage the plaintiffs are left in a situation where they are representing themselves in the original proceedings and in these proceedings. They make the point that if the renewal of the plenary summons was set aside, any subsequent proceedings brought by them against Malcolmson Law would be statute barred. In those circumstances they asked the court not to grant the relief sought.

10. The essence of the argument put forward on behalf of the defendants in seeking to have the renewal of the plenary summons set aside is that the plaintiffs in an action alleging negligence are not allowed to issue what is in effect a protective writ. It was submitted that there is authority to the effect that in an action for professional negligence a plaintiff should not be allowed to issue a protective writ.

11. In support of the submissions made on behalf of the defendants reference was made to a number of decisions. Reliance was placed in particular on the decision in the case of *Allergan Pharmaceuticals (Ireland) Ltd. and Noel Deane Roofing and Cladding Limited & Ors.* (Unreported, High Court, O'Sullivan J., 6th July, 2006) in which the court noted at p. 4 of the judgment dealing with the issue of whether there is "other good reason". O'Sullivan noted that "Walsh J. expressed the view [in *Baulk v. Irish National Insurance Co. Ltd.* [1969] I.R. 66] 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 have 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 …"

12. Laffoy J. went on to say:

> "The court considered what it termed actual as distinct from theoretical prejudice which the defendant would suffer if the proceedings continued."

13. 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.

14. Counsel for the defendants also relied on the decision in the case of *Moynihan v. Dairygold* (The High Court, Unreported, 13th October, 2006). In that case it was emphasised that it was not sufficient that any reason be shown but that what was required was that any good reason had to be shown for the renewal of the summons. Reference was also made to a number of judgments which deal with the importance in cases alleging professional negligence to ensure that there is credible evidence to support the case before action is commenced. See *Cook v. Cronin & Neary* (14th July, 1999, Supreme Court, Unreported, Lynch J.) and *Connolly v. Casey & Ors*. (Unreported, 12th June, 1998.)

15. On the basis of the authorities opened to the court it was submitted that the averment in the affidavit of Mr. Dillon to the effect that "due to unforeseen circumstances the current proceedings issued against the defendants herein shall have to proceed" is not a sufficiently good reason for the renewal of the summons and that accordingly the application to set aside the renewal should be granted. In their submissions the plaintiffs noted that on previous occasions when this motion was listed various comments were made by the court and further that it was directed that the matter be put back to enable the Law Society to attend and to allow other parties to attend. Whilst the Law Society did appear previously, they indicated that they would be taking no part in the application. The plaintiffs then set out the history of the proceedings and went through the replying affidavit that they had sworn and the correspondence exhibited in the proceedings. One of the main arguments they made was that there was indeed a good reason for the renewal of the summons. It was alleged by the plaintiff that there had been a deliberate attempt by Dillon Mullins & Company Solicitors to protect their legal colleagues from the consequences of any proceedings that might be brought against them by their conduct in relation to delay. They also submitted that it would be a travesty of justice to grant the relief sought in this motion and that justice would only be served by an extension of time.

16. I do not think it would be unfair to say that it appears to me that to date the plaintiffs have had some unfortunate experiences with their solicitors. Whatever may be the merits of the original action in respect of the alleged defects in the construction of their home, it is a fact that proceedings in that case were not issued until 16th March, 200 and it was not until 2006 that a statement of claim was delivered in those proceedings. Incidentally it is worth pointing out that the delivery of the statement of claim was effected by Dillon Mullins & Company. Undoubtedly that is a cause for concern. However, the real issue in this case is whether it was appropriate to issue as a "protective writ" the plenary summons herein against the previous solicitors for the plaintiff. It has been stated by the Supreme Court in a number of decisions that it is not a good reason to renew a summons to prevent a defendant from relying on the Statute of Limitations. See for example the decision in the case of *Roche v. Clayton & Ors.* [1998] I.R. 596 in which O'Flaherty J. noted at p. 600 of the judgment:

> "But there must be some good reason. Here we really have got no good reason at all. The only reason advanced by the plaintiff is that he was let down by Mr. Murphy. That has nothing to do with the defendant. We must make an order that renders justice between the two immediate parties to the litigation. It seems to me that no good reason has been advanced at all. He did know that he had to serve the summons. In a sense (if he is correct), he had been let down by Mr. Murphy before he ever issued the summons because he says he gave money to Mr. Murphy to issue the summons and he did not issue it.
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> I cannot detect that there is any good reason. It is not a good reason in light of *O'Brien v. Fahey* 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."

17. Having considered all of the authorities opened to me and the arguments presented by counsel on behalf of the defendant and by the Kelleghers I can only come to the conclusion that so far as the renewal of the summons is concerned, no good reason was proffered to the court for the renewal of the summons. I know from their submissions that the plaintiffs feel very hard done by in relation to their legal representation. However, the Supreme Court has made it plain that that is not sufficient reason for the renewal of a summons.

18. In the circumstances I feel I have no option but to make the order sought herein.