Neutral Citation [2018] IEHC 8

THE HIGH COURT

[2014 No. 10029 P]

BETWEEN

PATRICK MCDONAGH

PLAINTIFF

AND

GEAROID MCGANN, JANE M. O'CONNOR, THERESA O'DONOGHUE, SHANE M. O'NEILL, JAMES DAVID SWEENEY ALL TRADING UNDER THE STYLE OR TITLE OF SWEENEY MCGANN SOLICITORS

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 16th day of January 2018.

1. This judgment is given in the application by the defendants pursuant to O. 8, r. 2 of the Rules of the Superior Courts to set aside an order renewing the plenary summons made by the Master of the High Court.

2. This professional negligence action was commenced by plenary summons issued on 27th November, 2014, and renewed by order of the Master on 26th November, 2015, the day before it expired. The ground given for the renewal of the summons was that an expert opinion was awaited.

3. Eight affidavits have been sworn for the purposes of the present hearing.

The chronology

4. The proceedings seek damages against the defendant firm which acted as solicitors for Mr. McDonagh in proceedings in 2003 entitled *McMullan Brothers Limited v. Patrick McDonagh* (2003 No. 2431 P) relating to a leak of petrol at the Singland Service Station on the Dublin Road in Limerick. Judgment was delivered by Smyth J. in October, 2007, *McMullan Bros. Limited v. Patrick McDonagh* (Unreported, High Court, 18th October, 2007), by which liability in respect of the claim was apportioned as to 60% against Mr. McDonagh and 40% against that plaintiff.

5. That decision was appealed to the Supreme Court by Mr. McDonagh and the plaintiff lodged a cross appeal in respect of the finding of contributory negligence.

6. The Supreme Court heard the appeal in November, 2014 and on, 5th March, 2015, delivered judgment upholding the judgment of Smyth J: [2015] IESC 19.

7. During the currency of the appeal process and between the delivery of judgment by Smyth J. in October, 2007 and the judgment of the Supreme Court in March, 2015 (a period of 7 and a half years), correspondence was had between the Mr. McDonagh personally and the defendants, in which Mr. McDonagh expressed dissatisfaction with the manner in which the 2003 proceedings had been conducted. He dispensed with the services of the defendants on 23rd November, 2011, and thereafter instructed new solicitors, who commenced correspondence and received the file of papers relating to the 2003 proceedings in October, 2012.

8. In July, 2014, the solicitors for the plaintiff sought a report from an independent solicitor, Mr. Bryan Strahan, regarding a possible negligence claim against the defendants arising from the conduct of the 2003 proceedings. The expert solicitor sought additional papers immediately upon receiving his instructions and the relevant papers were requested from the defendants, who did not furnish those papers until 24th June, 2015. I consider the relevant correspondence below.

9. By November, 2015, the plaintiff had the benefit of an oral indication from the expert solicitor that in his professional view there existed a cause of action against the defendants. The expert did not then furnish a written opinion as he required sight of another report he believed existed from the engineer on whose evidence the judgment of Smyth J. had relied heavily.

10. The expert solicitor furnished a "draft opinion" on 1st April, 2016, and this formed the basis of a letter of claim of 6th April, 2016, from the solicitors for the plaintiff.

11. The renewed summons was served on 21st April, 2016, two weeks later.

12. As the chronology shows, there was some correspondence between the plaintiff and the defendants ending in the letter from the defendants of 18th June, 2012. A gap of four years ensued between that letter and the pre-action letter of 6th April, 2016. In the meantime, the plenary summons had issued and the Master had renewed the summons for six months. The renewed summons was served a few days after the pre-action letter, and days before it expired

Good reason to renew the summons: the test

13. It is convenient to now identify the test and a number of authoritative and recent judgments.

14. The application under O.8, r.2 is a *de novo* hearing and may engage a consideration of all of the facts, and not just those before Master of the High Court on the renewal application. This is established in the judgment of Feeney J. in *Bingham v. Crowley & Ors.* [2008] IEHC 453 and the Court of Appeal decision in *Monahan v. Byrne* [2016] IECA 10.

15. The exercise to be engaged by the court was described recently by Finlay Geoghegan J. in *Chambers v. Kenefick* [2005] IEHC 402, [2007] 3 I.R. 526:-

> "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 interests of justice as 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." (At para. 8)

16. That formulation of the test was approved by Hogan J. giving the judgment of the Court of Appeal in *Monahan v. Byrne* [2016] IECA 10, where he stated at para. 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."

17. A plaintiff must justify the failure to serve a summons within its currency, although the test is not so narrow as to require a plaintiff to establish to the satisfaction of the court that reasonable efforts were made to serve the defendant within the currency of the summons: *Monahan v. Byrne, per* Hogan J. at para. 14, approving the judgment of Peart J. in *Moynihan v. Derry Gold Co-operative Society Limited* [2006] IEHC 318.

18. It is also established that the reasons for the failure to serve must explain the delay, be credibly supported by the surrounding circumstances and be sufficient to justify the renewal, *i.e*. that it be a good or justifying reason. The relief is discretionary in nature, and the discretion of the court will be exercised in the light of the interests of justice.

19. It is clear from the decision in *Roche v. Clayton* [1998] 1 I.R. 596 that the fact that a plaintiff would otherwise be statute barred is not a sufficiently good reason to renew a summons, primarily because the Statute of Limitations operates on a reciprocal basis, as was explained by O'Flaherty J., giving the judgment of the Supreme Court.

20. In *Moloney v. Lacey Building & Civil Engineering Ltd. & Ors*. [2010] IEHC 8, [2010] 4 I.R. 417, Clarke J. firmly fixed the jurisdiction to set aside the renewal of a summons within the policy reasons of the Statute of Limitations and considered that a failure to serve a summons is not a mere "procedural mishap" but can in practical effect fail to recognise the policy inherent within the Statute of Limitations that proceedings be tried "within a reasonable proximity to the events giving rise to the relevant claim" (para. 26), so as to "minimise the risk of injustice".

21. I do not propose considering the present application in the light of the argument not fully canvassed that the plaintiff might have been statute barred at the date of renewal or before.

The reasons offered

22. The primary reason given for delay in service and the basis of this application to renew is the absence of a clear supportive expert report.

23. The application for the renewal of the summons was grounded on an affidavit of Thomas Kelly, solicitor, sworn on 25th November, 2015, who says that he instituted the proceedings to protect his client's interests and to prevent the running of the Statute of Limitations. He says in broad terms that he did not serve the summons within its currency "as I was awaiting expert opinion which has only become available on today's date".

24. If the expert opinion was then available, as is averred in the first affidavit of Mr. Kelly, no good reason exists to explain the fact that the summons was not served immediately thereafter, but, as later affidavit evidence now before me on this application shows, the circumstances were more complex than those just described.

The report of the expert

25. Because it is regarded as appropriate, and not merely good practice, for a party suing in professional negligence to have obtained a sufficient expert report prior to litigation (Connolly v. Casey [2000] 1 I.R. 345), the absence of an expert report in a professional negligence case will often be a starting point for the analysis of a justifying reason. Feeney J. in *Bingham v. Crowley & Ors.* accepted that the absence of an appropriate expert report may in certain circumstances be a good reason for not serving a plenary summons pending receipt of such a report.

26. Clarke J. elaborated on this proposition in *Moloney v. Lacey Building & Civil Engineering Ltd. & Ors*. where he said that the absence of a favourable report might be a justifying reason only if "the existence of the report concerned would be reasonably necessary in order to justify the commencement of proceedings in the first place" (para. 19)

27. As he said in para. 20:

> "In summary, therefore, insofar as the absence of an appropriate expert report may be put forward as a good reason for not serving a plenary summons, it seems to me to follow that the expert report concerned must be reasonably necessary in order to justify the decision to responsibly maintain proceedings in the first place, rather than be necessary in order to take further steps in the proceedings (such as the drafting of a statement of claim or bringing the case to trial) and it must also be established that any delay occasioned by the absence of the expert report concerned was reasonable in all the circumstances, such that appropriate expedition was used by the party placing reliance on the absence of the expert report concerned in attempting to procure same."

28. The present action is a professional negligence action against a firm of solicitors and the decision to await a report from an expert solicitor was reasonable, as a supportive report was reasonably necessary to maintain the proceedings. The first part of the test explained by Clarke J. in *Moloney v. Lacey Building & Civil Engineering Ltd. & Ors*. is met.

29. But a court considering whether the absence of an expert report was a sufficient basis for renewing a summons not served within its currency must also examine whether the party had sought the expert report in a reasonably timely manner: *per* Dunne J. in *Creevy v. Barry-Kinsella & Ors.* [2008] IEHC 100.

30. The plaintiff argues that the material for consideration by the expert was very extensive and the expert sought further documentation in order to come to a definitive view. The affidavit evidence of Mr. Strahan is that, in or about the month of August, 2014, he agreed to undertake a review of the papers in regard to a number of proceedings in which the defendant firm acted for the plaintiff in connection with the leak of petrol at the service station.

31. At consultation on 2nd December, 2014, Mr. Strahan said he required sight of files relating to other proceedings. The solicitors for the plaintiff sought these further papers by letter of 22nd January, 2015. The boxes had been sent to their costs accountants by Messrs. Sweeney McGann, though early 2015 correspondence between the two firms of solicitors shows some lack of clarity regarding

their whereabouts. By letter of 27th March, 2015, the defendant firm confirmed that they had received the files and that they would go through them in the following few days and would forward them. Reminders were sent on 28th April, 2015, and 4th June, 2015, and the boxes were ultimately sent on 24th June, 2015, together with an index. One further letter of 18th August, 2015, sought a missing document.

32. But Mr. Strahan avers that, when he reviewed the files, he was not satisfied that the litigation files were complete, as the expert engineering report of Mr. Henry given in November, 2003 was "silent on the issue" of the cause of or responsibility for the leaks. The report had dealt with the condition of the petrol retail premises and the suitability of the premises for the sale of fuel, and Mr. Strahan avers that he believed this report was "prepared for a different purpose" and did not deal with much of the matters in respect to which Mr. Henry gave oral evidence at trial.

33. As Smyth J. had placed emphasis on the evidence of Mr. Henry in the course of his judgment, Mr. Strahan concluded that a further or second report dealing with the issues of causation and responsibility was likely to have been prepared by Mr. Henry for the purposes of the trial, and he was keen to see it. Mr. Strahan avers that he did not wish to provide a written report until he had sight of all relevant reports by Mr. Henry, that he "assumed that a second report was likely to exist" and that he considered it proper to await sight of such before giving a final view on liability.

34. Mr Henry has sworn two affidavits and says that, in a phone conversation in early December, 2015 with a representative of the plaintiff, he confirmed he was "unable to locate" a copy of his report but that, as no further enquiries were made of him, he believes the enquiries made were not "exhaustive". In his second affidavit, he accepts that his report was not commissioned or prepared "for the purpose of ascertaining responsibility for the leak" but says it did relate to "the cause of the leak". He says he cannot accept that the transcript of his evidence suggests a second report was prepared by him and confirms that no such report exists.

35. Clarification that no second written report was ever given by Mr. Henry was not received by Mr. Strahan until 8th December, 2015.

36. A criticism is contained in the supplemental affidavit of Gearoid McGann (wrongly called "McCann" in the title to the proceedings) where, at para. 4.n, he suggests that neither the plaintiff's solicitors nor Mr. Strahan had read in full the report dated November, 2003 which was furnished. Mr. Strahan is clear in his evidence that he was aware of the 2003 report and concluded at para. 13 of his affidavit that "it had been prepared for a different purpose and was not relevant to the matters on which I had been asked to express an opinion".

37. Therefore the evidence is that Mr. Strahan was asked to give an expert opinion as early as July, 2014 and a consultation was had with him in August, 2014 before he was formally instructed. It was, in my view, reasonable for Mr. Strahan to refuse to furnish a final report, or even to form a tentative view, until he had reviewed the extensive documentation. The evidence is that the documentation was contained in four boxes and it is clear to me from the correspondence that the issue of whether the boxes were complete had not been resolved until December, 2015.

38. The judgment of Smyth J. referred extensively to the evidence of Mr. Henry and I consider that it was reasonable in those circumstances for Mr. Strahan to believe that there was, in fact, a report which dealt with the leaks and to request sight of it before concluding his report. He had given an oral indication, but having regard to the desirability, clear from the authorities, that a plaintiff would have a positive expert's report before commencing proceedings, it was correct and reasonable for the plaintiff to delay the service of the proceedings until he had a clear view from Mr. Strahan. The proceedings were served with expedition once an expert view on liability was available. The delay in the completion of his report by Mr. Strahan was not of his making, nor can it be levied against the plaintiff having regard to the sequence of events explained above.

Was there delay in seeking the expert report?
39. Counsel for the defendants points me to a *dictum* of Feeney J. in *Bingham v. Crowley & Ors.*, where, at para. 35, he quoted with approval the observation of O'Sullivan J. in *Allergan Pharmaceuticals (Ireland) Ltd. v. Noel Deane Roofing and Cladding Ltd. & Ors*. [2006] IEHC 215, [2009] 4 I.R. 438 with regard to the need to obtain an expert opinion before the commencement of professional negligence proceedings:-

> "It would be ironic if such a concern could, as it is said to do in this case, lead to service after the expiration of the statutory six year period designed to protect all defendants including professional ones from the very mischief underlying such concern."

40. The thinking with regard to the effect of a plaintiff having to wait to obtain an expert report has evolved so that the current position is as stated by Clarke J. in *Moloney v. Lacey Building & Civil Engineering Ltd. & Ors.:*

> "…it must also be established that any delay occasioned by the absence of the expert report concerned was reasonable in all the circumstances, such that appropriate expedition was used by the party placing reliance on the absence of the expert report concerned in attempting to procure same." (para. 20)

41. The defendants argue that over eight years passed following the High Court decision in October, 2007 before the present proceedings were instituted. That fails to take account of the fact that the Supreme Court appeal was not concluded until March, 2015. The plaintiff was justified, in my view, in awaiting the decision of the Supreme Court before deciding whether to commence litigation against his former solicitors, as the result of his Supreme Court appeal might have alleviated the need for such proceedings. The proceedings were instituted before the Supreme Court issued its decision because of the understandable caution of the plaintiff's solicitor regarding the possible running of time.

42. I consider that the plaintiff acted with expedition after the Supreme Court delivered its decision, and after the expert report was to hand.

43. Accordingly I am of the view that there was good reason to renew the summons and turn now to consider the second limb of the test.

Sufficient warning of intention to sue?
44. The authorities suggest that the failure to notify a defendant of the intention to commence litigation may be a factor that would influence a court in the decision to set aside a renewal, a factor that engages the interests of justice.

45. In *Chambers v. Kenefick*, Finlay Geoghegan J. considered the fact that the defendant had been sent a courtesy copy of the

relevant plenary summons was relevant in that the defendant was fully aware of the existence of the proceedings.

46. In his supplemental affidavit sworn on 11th November, 2016, Mr. McGann avers to the fact that he had an "impression" that the allegations of negligence had been investigated and "were not being pursued further". He also avers that, when the files were collected from his office on 10th October, 2012, he believed from a letter from James O'Brien & Co. of 21st August, 2012, that they were being collected for the purposes of the Supreme Court appeal. The defendants argue that the 2012 correspondence could not have amounted to a warning or a means by which they were alerted to the possibility of litigation.

47. Mr. McGann's assertion that he was "most surprised" when he received the pre-action letter of 6th April, 2016, fails to have regard to the fact that there was correspondence between 2012 and 2015 and that correspondence was not casual or even holding correspondence but involved the plaintiff engaging a pursuit of documentation concerning the 2003 proceedings. I do not read that correspondence as suggesting that the solicitor for the plaintiff gave the impression to the defendants that proceedings would not be instituted, or lulled them into a false sense that the risk of proceedings had abated. In that regard, while Mr. McGann says in his affidavit that he was left with the impression that the allegations of negligence had been investigated and were not being pursued, having reviewed the correspondence, I consider that the defendants are incorrect to categorise the correspondence that occurred between 2012 and 2015 as being exclusively referable to the Supreme Court appeal, or as giving an impression that litigation was not being contemplated.

48. In their letter of 18th June, 2012, the defendant firm in response to the suggestion that Mr. McDonagh had an issue with the way in which the file had been handled, made the following but clear statement:-

> "This office totally rejects those allegations."

49. That letter was in my view a considered response to a perceived threat of litigation. Nothing that occurred thereafter can be read as a representation that the plaintiff was not considering litigation.

50. After 2014, it must have been quite clear to the defendants that the request for files and the supposed second report of Mr. Henry was made with litigation in mind.

51. The defendants do not argue that they have suffered any prejudice as a result of the delay. While actual prejudice is not an element to which the court has regard in considering whether to set aside the renewal of a summons, the case law would suggest that the existence of prejudice might influence a court's thinking with regard to the balance of justice. The type of prejudice that might be suffered by a professional firm would include the fact that it had found itself in difficulty with its insurers, as was noted by the Court of Appeal in *Farrell v Arborlane Ltd. & Ors* [2016] IECA 224, but no such difficulty has been identified in the present case.

52. No other form of prejudice has been argued. The delay in the conclusion of the 2003 proceedings in respect to the conduct of which the present proceedings have issued was the primary reason for the delay and one for which neither party may be blamed.

53. Taking all of the circumstances into account, I consider that sufficient grounds did exist for the renewal of the summons and, accordingly, I refuse to make the order setting aside the order for the renewal of the summons.