

## THE HIGH COURT

[2015 No. 7288 P.]

BETWEEN

JOSHUA BROPHY

PLAINTIFF

AND

GOVERNOR OF MOUNTJOY PRISON, GOVERNOR OF LIMERICK PRISON, MINISTER FOR JUSTICE AND EQUALITY, IRISH PRISON SERVICE,

IRELAND AND ATTORNEY GENERAL

DEFENDANTS

**JUDGMENT of Ms. Justice O'Regan delivered on the 6th day of December, 2018****Issues**

1. The within matter comes before the court by way of motion on behalf of the defendants pursuant to O. 8, r. 2 of the Rules of the Superior Courts, bearing date 13th March 2018, to set aside the renewal of the plenary summons obtained by the plaintiff on 10th July 2017. The relevant summons was issued on 9th September 2015, and ultimately served on the respondent on 8th January 2018.

2. Under O. 8, r.1, an original summons is in force for twelve months, however, if the defendant is not served within that time, the plaintiff may apply before the expiration of the time to the master for leave to renew and after the expiration of the twelve month period such an application to extend time is to be made to the court. The court or the master, if satisfied that reasonable efforts have been made to serve such defendant or for other good reason may order the renewal for a period of six months. Under O. 8, r. 2, if the application for renewal under O. 8, r. 1 is on an *ex parte* basis, a defendant is at liberty before entering an appearance to serve notice of motion to set aside such order.

**Brief Background**

3. A conditional appearance was entered by the defendants on 6th March 2018.

4. It is the case that the within named plaintiff was in Mountjoy Prison for various periods between 3rd December 2009 and 23rd December 2011, and was in Limerick Prison for various periods from 3rd February 2012, and 22nd August 2012 (see the letter of 25th January 2018 confirming same by the plaintiff's solicitors to the defendants, exhibited in the grounding affidavit of Marian Lonergan, in support of the defendants' motion).

5. It is common case that no notification was afforded to the defendants in respect of the plaintiff's claim herein prior to the service of the summons as aforesaid 8th January 2018 (two days before expiry of the renewal period).

**Arguments**

6. The defendants acknowledges that it is possible for an applicant to afford the relevant good reasons identified in O. 8, r. 1 of the Rules of the Superior Courts both in the affidavit to ground the *ex parte* application and in the affidavit to resist the set aside application on behalf of the defendants. In this regard, two affidavits were sworn by Gareth Noble, Solicitor, on behalf of the plaintiff, the first being to support the *ex parte* application bearing date 29th June 2017, and the second bearing date 21st November 2018, for the purposes of resisting the defendants' application to set aside the renewal.

7. In addition, there is an affidavit of Nicola Dunphy of 22nd November 2018, on behalf of the plaintiff wherein she has reviewed the cases in which the office of Messrs. K. O'D. Lyons Solicitors secured renewal orders on the 10th July 2017, and it appears that 43 such orders were obtained on that date. On an assessment, she states that in respect of fourteen of the cases, a conditional appearance was entered with the intention of making an application to set aside the renewals. However, save for potentially four cases, the balance of the renewal applications, were the subject matter of unconditional appearances. On the basis of this affidavit, it is argued on behalf of the plaintiff that the plaintiff has been treated differently to other claimants without reason or explanation.

8. The defendants argues that although it is possible to expand or give additional reasons over those afforded when securing the renewal of the summons, in resisting the application to set aside the summons, nevertheless such reasons should not be contradictory. The defendants acknowledge that there is no line of jurisprudence in this regard, however, argues that it is self-evident that contradictory reasons should not be entertained by the Court. I did not understand the plaintiff to argue otherwise but rather the plaintiff's argument was to the effect that there was, in fact, no contradiction between the two affidavits given the fact that the first affidavit of Mr. Noble on 29th June 2017, at Para. 4 referred to the reasons for not renewing the summons following the expiry of the initial twelve month period. Paragraph 4 of the first affidavit was not therefore dealing with why the summons was not served within the initial twelve month period. Counsel for the plaintiff acknowledges that there may well be a lapse in failing to identify why the summons was not served within the twelve month period.

9. Under Para. 4 of the affidavit of Mr. Noble of 29th June 2017, he states that the summons was issued on 9th September 2015, but was not renewed following the expiry in circumstances where it seemed reasonable and expedient as the defendants would suffer no consequence and the plaintiff was awaiting the outcome of the Simpson case before renewing a number of similar summonses.

10. In Para. 12 of Mr. Noble's affidavit of 21st November 2018, he says that it was not a deliberate strategy to allow the summons to go out of time - it was the fact that the defendants requested to stay the progress in all slopping out cases that meant that the plaintiff's solicitors were less concerned about such cases. In this regard, the deponent exhibits a number of documents from the defendants' solicitors in three other cases by way of support of the assertion that the defendants had requested a stay in the progress of all slopping out cases.

11. In this regard, in one letter of 17th October 2016, the defendants' solicitors did not accede to the request for discovery and indicated that they would consider such request after the judgment in *Simpson v. Governor of Mountjoy Prison* [2017] IEHC 561. In another letter of 3rd August 2017, the defendants' solicitors sought confirmation whether or not the plaintiff was agreeable to withholding issuance of the proceedings pending the result of the *Simpson* litigation and in the meantime, a copy of the plaintiff's medical report and a release of his medical records were sought. The deponent also refers to a notice of motion of 23rd October

2015, in the Simpson case brought by the defendants seeking, *inter alia*, to have the Simpson case dealt with without three other cases backing it up and in the grounding affidavit, this was explained because of the substantial amount of work which had to go into the preparation of the Simpson case and preparing for all four cases to run sequentially would involve an oppressive amount of documentation and resources. Accordingly, an order was sought allowing the Simpson case to proceed on a standalone basis.

12. At Para. 5 of Mr. Noble's second affidavit, he indicated that in many cases he has threatened the defendants with a motion for judgment in default of a defence, sometimes on more than one occasion before a defence was produced and in cases which he has sought to progress, the defendants have requested that the plaintiff would wait until the determination of the Simpson matter.

13. Considering that, the deponents suggests that he had served well over one hundred summonses, it seems to me, therefore, that the exhibits in his affidavit would not support the contention that arising from such exhibits, in the context of various motions to threaten the defendants before securing a defence in some cases, the defendants, in fact, requested to stay the progress in all slopping out cases including affording any notification of the existence of the claim itself.

14. In Para. 12 of the affidavit of 21st November 2018, Mr. Noble states that it was An administrative oversight not to renew the summonses in the particular circumstances of the upheaval in his office and on the understanding that all slopping out cases were effectively on hold. Apparently, there is an order to the effect that no other slopping out case would proceed to trial until the determination of the Supreme Court appeal in Simpson.

15. It seems to me, therefore, that as a consequence of Para. 12, the deponent states:-

(a) It was not a deliberate strategy not to serve the summons within time rather he was less concerned about these summonses than other matters.

(b) Insofar as the non-renewal of the summonses is concerned, this was due to an administrative oversight and as soon as it became apparent that the summonses were out of time, renewal was sought in a number of cases.

16. According to Para. 4 of the first affidavit, renewal was not sought following the twelve month period because it seemed reasonable and expedient to await a further period. However, in Para. 12 of the second affidavit, renewal was not sought because of an upheaval within the office and on the understanding that slopping out cases were on hold and when it became apparent that summonses were out of time, renewal was sought.

17. The only reason proffered in respect of non-service within the initial twelve month period was because the firm of solicitors was less concerned about slopping out cases because of an alleged request by the defendants to stay the progress in all slopping out cases.

#### **Decision**

18. I am satisfied in the circumstances of the exhibits in Mr. Noble's affidavit of 21st November 2018, that they do not support a request by the defendants to stay the progress in all slopping out cases.

19. Furthermore, I am satisfied that the reason for not renewing the summons following the expiry thereof after the twelve month period was given as it was reasonable and expedient not to do so in Para. 4 of the first affidavit, however, is given as an administrative oversight in the second affidavit.

20. These reasons are contradictory and I accept the uncontested submission by the defendants that such contradiction is not permissible. The court cannot act in those circumstances and therefore the position of the Plaintiff must be considered as offering no reason as to why the summons was not renewed following the expiry of the 12 month period.

21. Accordingly, the only reason remaining within the context of O. 8, r. 1 is that it was not a deliberate strategy to allow the summons to go out of time but rather it arose because the solicitors were less concerned about slopping out. The plaintiff's understanding of the progress of slopping out cases is not borne out by the exhibits.

22. In *Roche v. Clayton & Ors.* [1998] 1 IR 596, a decision of the Supreme Court, 8th May 1998, it was held that renewal of the summons should be set aside where the reason advanced by the plaintiff was that he had been let down by another solicitor. That reason had nothing to do with the defendants. The court also held that it was not a good reason simply to prevent the defendants availing of the statute of limitations.

23. In *Allergan Pharmaceuticals (Ireland) Limited v. Noel Dean Roofing and Cladding Limited & Ors.* [2009] 4 IR 438, a decision of O'Sullivan J. in the High Court of 6th July 2006, the reason put forward appears to be the oversight of the plaintiff's solicitor (see Para. 19 of that judgment) and this was unacceptable.

24. The plaintiff argues that the issue of good reason and the balance of justice wherein the balance of hardship would be considered are issues that should be dealt with at once in accordance with the understanding of the judgment of Finlay Geoghegan J. in *Chambers v. Kenefick* [2007] 3 IR 526. However, in this regard, in the Court of Appeal's judgment of 20th January 2016, in *Monaghan v. Kevin Byrne & Ors.* [2016] IECA 10, Hogan J., at Para. 13 of his judgment indicated that:-

*"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.... 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."*

25. In the Court of Appeal decision, reference is made to a prior decision of Peart J. in *Moynihan v. Dairygold Cooperate Society Limited* [2006] IEHC 318, where the court remarked that O. 8, r. 1 does not state any reason but rather the court must consider whether there is a reason offered as to why the summonses ought to be renewed and whether that is a good reason. The court is required to conclude as to what is the true reason why the summonses were not served within the proper time and also to conclude that that reason justifies the failure to serve. It is in that sense that the word "good" must be read.

26. I am satisfied, therefore, given the limited explanation remaining on behalf of the plaintiff contained in the first full sentence at Para. 12, and noting that :-

*"There can be little doubt that the courts have adopted an increasingly strict approach to delay of all types in recent*

years”

(Para. 12 of *Darjojn v. Developments Ltd (In liquidation) v. Irish Bank Resolution Corporation Ltd.* [2016] IEHC 535 ....), in accordance with the jurisprudence aforesaid this does not comprise a good reason to renew.

27. In my view, the balance of justice and/or the balance of hardship does not, therefore, arise – in *Darjojn Developments*, Noonan, J. indicated that prejudice was relevant at the interest of justice stage - having established good reason (Para.11). However, even if it did arise the plaintiff claims he will have lost the ability by reason of the statute of limitations to continue with his action and this amounts to the hardship for him. On the other hand:-

(a) the defendants did not receive any notification of the within plaintiff’s claim until 8th January, 2018,

(b) as was stated by Noonan J. in *Darjojn Developments*, a judgment of 3rd October 2016, renewal outside the statute of limitation period stretches the rational for the statute of limitation and should be taken into account in respect of the good reason and the balance of justice.

(c) At Para. 12 in quoting Monaghan, Noonan J. indicated that the rational for the statute of limitations was that a defendant was entitled to assume that he will not be faced with litigation after the passage of a stated period.

(d) The affidavit on behalf of the defendants by Lisa Daly of 21st October, 2015, exhibited in the second affidavit of Mr. Noble identifies the significant task facing the defendants in mounting a defence to the within proceedings

(e) In Roche aforesaid the Supreme Court set aside the renewal in circumstances where the Plaintiff put forward similar grounds to those presented in this matter 30 years ago

(f) Clarke, J. stated at Para. 22 of *Moloney & Moloney v. Lacey Building & Civil Engineering Ltd & Ors.* [2010] 4 IR 417 :-

*“...[T]he 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”*

accordingly, I am satisfied that assessing the reason proffered for failure to serve the summons within the initial twelve month period together with the impact of the statute of limitations on the plaintiff’s position does not, in fact, displace the prejudice occasioned to the defendants in attempting to defend the action and accordingly, even if a balance of justice assessment was required same would not be favourable to the plaintiff.

28. In all of the circumstances, the defendant must succeed in its application to have the renewal set aside.