Neutral Citation [2016] IEHC 627

THE HIGH COURT

[2012 No. 11329 P]

BETWEEN

GRAHAM GIBBONS

PLAINTIFF

AND

KITARA LIMITED, COLLEN GROUP LIMITED, CMP ARCHIECTURE T/A COLLEN PROJECT MANAGEMENT, CPM ENGINEERING T/A COLLEN PROJECT MANAGEMENT, LIGHTGATE PROFESSIONAL SERVICES LIMITED, KINGSPAN CENTURY LIMITED, DUBLIN CITY COUNCIL, L.M. DEVELOPMENTS LIMITED, DIARMUID KELLY T/A DIARMUID KELLY & ASSOCIATES

DEFENDANTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 21st day of October, 2016

Nature of the case and issues arising

1. This is the applicant's motion to set aside an order renewing time for the service of a plenary summons. The applicant herein is the sixth named defendant in proceedings involving a claim for damages for negligence and breach of duty including statutory duty. The proceedings relate to alleged defects in the building of an apartment purchased by the plaintiff, including alleged defects primarily related to fire safety and sound transmission. It is alleged, in particular, that by reason of the fact that the property is a fire hazard, it cannot be inhabited, sold or rented, and is therefore essentially now without value. The role of the applicant/sixth defendant in the construction of the apartment was that he supplied the engineered timber structure of the property and certified by letter dated 27th September 2006 that the structural elements of the timber structure were fit for purpose. The present motion is that of applicant pursuant to Order 8, rule 2 RSC to set aside an ex parte order made by Barr J. dated the 22nd September 2014 renewing the summons, this having been the second renewal order, in circumstances where the first such order was made by Peart J. on 10th March 2014.

Relevant Chronology

2. The originating summons was issued on 9th November 2012, in respect of nine defendants, of whom the applicant in this motion was the sixth named defendant.

3. The plenary summons was not served within 12 months as required under the Rules. An ex parte application was brought, after the 12 month period had expired, pursuant to Order 8, rule 1 RSC, for an order that the summons be renewed for a further six months. This application was granted by Peart J. by order dated 10th March 2014. That such an application can be made after the expiry of the 12-month period is clearly envisaged and permitted by Order 8, rule 1, provided such application is made to the Court and not the Master. This March 2014 order will be referred to as the 'first renewal order'.

4. The first renewal order permitted service within six months, which was a period due to expire on 10th September 2014. One week prior to this expiry date, on 3rd September 2014, the applicant received a letter from the respondent's solicitor, which provided the first intimation to the applicant that proceedings were contemplated. On 8th September, the applicant's solicitor wrote to the plaintiff's solicitor indicating that service of proceedings would be accepted. It may be noted that nothing was said in this letter about delay on the part of the respondent or of any prejudice caused to the applicant by reason of the lateness of the proceedings.

5. On 10th September, being the last day of the six-month period permitted by the first renewal order, service was attempted on behalf of the respondent by posting the plenary summons to the applicant. The summons did not arrive until the next day and fell therefore one day outside the six-month period permitted by the first renewal order. Service should have been effected by hand.

6. On 11th September 2014, the applicant's solicitor wrote to the respondent's solicitor indicating that they were unable to accept service because the time had expired, but the letter invited the respondent's solicitor to seek a further (i.e. second) renewal order. Again, it may be noted, in this letter there was no mention of delay, nor were any concerns raised about the lateness of the proceedings.

7. On 22nd September 2014, a second ex parte application was made on behalf of the Plaintiff to the High Court (Barr J.) and an order extending the time by a further six months was granted. The order was perfected on the 23 September 2014. This September order will be referred to as the 'second renewal order'.

8. It is worth pausing here to note the contents of the affidavit grounding the ex parte application which led to the second renewal order, sworn by the respondent's Solicitor on 19th September 2014, (hereinafter the 'first affidavit of the respondent's solicitor) because the applicant now complains that it was incomplete and made without the degree of candour that would be expected for an ex parte application. This first affidavit on behalf of the respondent's solicitor included the following key averments: (1) that while the building works had been carried out in 2006 and the contract for purchase was in January 2007, the fire safety problem did not come to the respondent's attention until 2011; (2) that there was a change of solicitor on 31st October 2013, 7 working days before the expiration of the initial 12 month period; and (3) that given the number of defendants and the technical and complex factual nature of the plaintiff's claim, the plenary summons was not served within the currency of the original summons due to ongoing investigations and outstanding advices and reports from various experts; (4) that following the obtaining of the first renewal order, *'further investigations were undertaken and preparation of the case, including further consultation with experts, continued'* and that, on foot of those, it was no longer intended to serve proceedings on a number of defendants; (5) that the original plenary summons was sent by registered post to solicitors on behalf of the applicant on 10th September 2014 and that the plaintiff's solicitors received the letter the next day declining to accept service; and (6) averring that the applicant would suffer *'no significant hardship arising from the renewal of the summons'* whereas the respondent *'will suffer significant hardship if the summons is not renewed as he may be prevented from prosecuting his claim as against the Defendants, having already deployed significant resources to that end.'* It may be noted, regarding the last point, that there was no specific averment that the statute of limitations would or had expired. It may also be noted that the only explanation of the delay in attempting to serve until the very last day of the six-month renewal period was as set out at (4) above.

9. On the 8 December 2014, a conditional appearance was entered on behalf of the applicant.

10. However, no application was brought to set aside the renewal order of 23rd September until the present application was brought by notice of motion dated 10th September 2015, some 10 months after the entry of a conditional appearance on behalf of the applicant. It has been asserted by the respondent's solicitor on affidavit (the second affidavit of the respondent's solicitor, discussed below), and not challenged on behalf of the applicant, that it was only when the respondent threatened a motion for directions that the present motion issued. On the other hand, it has been pointed out on behalf of the applicant that the conditional nature of the appearance entered in December 2014 gave notice of the fact that there might or would be an issue regarding the ex parte order that had been granted. Nonetheless, no actual steps were taken on behalf of the applicant in that regard until September 2015.

11. The affidavit grounding the present motion, dated 9th September 2015, sworn by the applicant's solicitor, inter alia alleges that the delay in serving the plenary summons '*has greatly prejudiced*' the position of the applicant. Two specific matters are averred to: (1) '*significant changes in personnel and that several of the individuals who had carriage of the particular project are no longer with the firm*'; and (2) that '*the firm ordinarily retains documents for a period of six years in compliance with its taxation and other obligations and unless proceedings were indicated within such period, complete records would not be retained'.*

12. In response to this affidavit, which also asserted the failure of the first affidavit of the respondent's solicitor to explain the delay and also alleged a lack of candour in the laying of the facts before the judge on the ex parte motion, a second affidavit was sworn by the respondent's solicitor, dated 29th October 2015. This again referred to the change of solicitor shortly before the expiry of the first 12-month period; also referred to the fact that the plaintiff now resides in Holland; and went on to say the following concerning the six month period between March and September 2014:

> *"Further investigations were undertaken and preparation of the Plaintiff's claim, including further consultation with experts, continued. It transpired that relations between two experts who had been involved in preparation of the Plaintiff's claim, Messrs Manning and Tennyson, had broken down. Your deponent therefore commissioned an independent expert report by Robert Knox and Associates, Fire and Building Regulations Consultants. Mr. Knox attended the property on 2nd April 2014 and furnished his report dated 12th June 2014…."*.

However, there is no further explanation of what happened in June, July, or August, following receipt of this report, up until the 10th September 2014, when service was attempted. The fact that service was attempted on 10th September by post, instead of hand delivery, is averred to as having happened '*owing to administrative oversight'*. As regards the alleged prejudice arising from absence of documents, the affidavit suggested that even if the applicant could not locate relevant documentation, '*any missing documents would likely remain in the power, possession or procurement of other defendants'*. As regards the claim of prejudice arising from personnel no longer working for the applicant, the affidavit suggested that this did not operate to prevent any important witnesses as to fact from being identified and contacted with a view to giving evidence. It was also averred that the effective hearing of the case would '*rely heavily on careful consideration of a wide range of documentary evidence'*, thus reducing the potential for prejudice due to the erosion of memory of witnesses. To this it should be added that during the hearing of the motion, it was urged upon the Court on behalf of the respondent that it was also significant that the apartment and the timber structure for which the applicant was responsible are still in existence and therefore available for inspection and expert comment. The second affidavit of the respondent's solicitor also, for the first time, averred that if the order of Barr J. were set aside, the claim would become statute barred.

13. It would appear that the hearing of the present motion was adjourned from time to time because of the fact that judgment was awaited from the Court of Appeal in a case involving the same plaintiff and a different defendant in the same proceedings. That judgment was delivered on 2nd March 2016, dismissing Mr. Gibbons' appeal and upholding the order of the High Court setting aside the renewal of the plenary summons, albeit on different grounds to those relied upon by the High Court. Naturally the applicant seeks to rely on the decision of the Court of Appeal in that case to argue that the same outcome should be achieved in this case. The judgment in that case is discussed below.

How this Motion should be approached and the submissions of the parties

14. Order 8, rule 1 provides that upon an application for renewal of a summons:-

> *'The Court…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….'.*

15. Accordingly, the Court has a discretion in the matter, and the two matters to which the Court should have regard in Order 8, rule 1 are (1) whether there have been reasonable efforts to serve the defendant or (2) whether there is 'other good reason' to grant the order.

16. Order 8, rule 2 says that 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. Nothing is explicitly said in this sub-paragraph of the Order as to the test to be applied on such an application and it is to be presumed that the two-fold test of 'reasonable efforts to serve' and 'good reason' continue to apply, which appears to be borne out by the authorities in this area.

17. The decision of the Court of Appeal in *Crowe, O'Neill and Gibbons v. Kelly*, [2016] IECA 62, however, makes clear that in the case of an application for a second renewal order, provided for by Order 122, rule 7 RSC (which was held in that judgment to apply to Order 8, rule 2), the power to extend the period is a power '*which should only be utilised in very limited circumstances and where there are compelling reasons for so doing',* and for example, in the case of something like a '*technical defect'*.

18. It was argued on behalf of the applicant/sixth defendant in seeking to set aside the second renewal order that the Court should consider the overall lapse of time since the apartment had been built in 2006 and the fact that the first intimation of proceedings given to the applicant was by letter dated 3 September 2014. It was argued that while the challenge was in form only to the second renewal order, the applicant did not know about the first renewal order while it was still in existence and that it would not have been appropriate to seek to challenge an order by the time it had already expired, and that the Court was not precluded from looking at the overall period of time. The applicant also contended that the ex parte order should be set aside because the High Court (Barr J.) who granted the order was not informed of the full facts, and further, that insufficient facts had been laid before him to justify the order being made. The applicant also relied upon the two specific grounds of prejudice alleged on affidavit: (1) that arising out of the the documentary policy of the company, which was a policy of not retaining records beyond the expiry of 6 years; and (2) that employees concerned with the project in question have moved on and are no longer employed by the applicant.

19. It was urged upon the Court on behalf of the respondent/plaintiff that as the present motion was confined to the second renewal order only, the most relevant circumstance was that service had been merely one day outside the six-month period authorised by the second renewal order, an error which was due to an oversight in the solicitor's office as to the correct manner of service. It was argued that this rendered the situation akin to the 'technical defect' type situation alluded to in the Court of Appeal decision in

Crowe, O'Neill and Gibbons v. Kelly [2016] IECA 62. As regards prejudice, it was argued on behalf of the respondent/plaintiff that the Court, in considering the issue of prejudice, should confine itself to looking at the difference in the position of the plaintiff as between the 10th and 11th September 2014 only, and that, in any event, the grounds of prejudice alleged were vague and premature. It was also pointed out that the building structure in question is still in existence and can be inspected by experts and that this would be a significant counter-balance to any alleged prejudice.

20. One of the arguments made by counsel on behalf of the applicant was that the Court's focus should be on whether or not there was sufficient evidence before Barr J. to grant the order sought at the time of the making of that order. One consequence of the Court adopting this narrow approach would be to render irrelevant the applicant's own conduct in delaying by 10 months before issuing the present motion; another would be that the Court would be precluded from taking into account the additional facts presented by the affidavits sworn for the present motion. It seems to me that, having regard to *Chambers v. Kenefick* [2007] 3 I.R. 526, which was briefly alluded to in the course of the hearing on behalf of the respondent in response to the above argument, and the authorities referred to therein, the Court should look at the matter in light of all of the evidence now available to the Court and the circumstances existing at the time of the hearing of the motion. It seems to me that the point made in *Chambers v. Kenefick* was that it is not necessary to lay additional facts before the court on an Order 8(2) motion and that the applicant seeking to set aside an ex parte renewal order *may* approach the matter by making submissions on the facts which were before the judge on the ex parte application, without necessarily having to adduce additional facts himself. This, however, is not authority for the proposition that, where there are additional facts, the Court should disregard them. Accordingly, I propose to approach the motion on the basis of all of the evidence before the Court and the circumstances as they exist at the time of the hearing of the motion.

Authorities referred to
21. There are a number of authorities concerning the exercise of discretion under Order 8, rule 2 of the RSC. I was referred in argument in particular to *Baulk v. Irish National Insurance* [1969] I.R. 66, as well as to the judgments of the High Court and Court of Appeal in proceedings involving the plaintiff in the present case against a different (the ninth) defendant, in the same proceedings as those in issue in the present application; namely, the case of *Crowe, O'Neill and Gibbons v. Kelly,* [2016] IECA 62. There have been numerous authorities in the years between those two decisions and it is clear that the role of the statute of limitations issue, upon which there was considerable emphasis in *Baulk*¸ is somewhat different in the more modern jurisprudence, as discussed in the *Crowe* case itself. The latter case was the authority most focussed upon at the hearing of this motion, for obvious reasons.

22. The High Court decision in *Crowe, O'Neill and Gibbons v. Kelly* was delivered by Moriarty J. on 15th May 2015 and dealt with two issues: (1) the merits of application in respect of the three plaintiffs and (2) a jurisdictional issue, namely whether the Court has power to grant an enlargement of time for the consideration of an application for a renewal order, in circumstances where the renewal order is a second or subsequent order and is made after the expiry of the first renewal period. On the jurisdictional issue, which involved a question of interpretation of Order 8 RSC and a consideration of whether Order 122 rule 7 applied, the Court held that it had no jurisdiction to grant an enlargement of time and held against the plaintiff Mr. Gibbons, in whose case there had been a second renewal order.

23. On appeal, the Court of Appeal reversed on the jurisdictional issue and held that an Order 122, rule 7 enlargement of time could be granted in such a case. However, as noted above, the Court of Appeal emphasised that the exercise of this power should be used 'in *very limited circumstances and where there are compelling reasons for so doing'* and that it would require something akin to a *'technical defect'* to warrant the exercise of the power.

24. As regards the merits of the application, the Court of Appeal held in favour of the first two plaintiffs, but reached an unfavourable decision concerning the case of the plaintiff Mr. Gibbons, who is also the plaintiff in the present case. This was on the basis Mr. Gibbons, unlike the other two plaintiffs, had offered no justification for serving the summons three days outside the renewal period. The Court held that while he had an arguable excuse for his failure to serve within the life of the first renewal period, there was no justification or excuse for the revival of the summons after the renewal period had expired. For obvious reasons, the applicant in the present case sought to rely on the Court of Appeal decision in that regard. The respondent sought to distinguish that decision the basis of a number of matters, referred to below.

The enlargement of time issue in the present case
25. It would appear that there was no formal application to the High Court (Barr J.) seeking an enlargement of time within which to apply ex parte for the second renewal period in the present case, but I would consider the grant of such enlargement as being implicit in his granting of the order of renewal itself. From a technical point of view, a formal application should probably have been made in September 2014, but I am not satisfied that a failure to have done so renders the order itself invalid or prevents the matter from being dealt with by the Court at this juncture. It has now been clarified by the Court of Appeal that the Court has jurisdiction to grant an enlargement of time and, in the future, it would seem advisable for applications for ex parte applications outside the currency of any existing summons to be accompanied by a formal request for enlargement of time pursuant to Order 122, Rule 7.

Whether the second renewal order should be set aside in the present case
26. Having regard to all the evidence currently before the Court, the factors weighing in favour of the applicant/sixth defendant and the setting aside of the second renewal order appear in this case to be the following matters;

> (a) The overall timescale: The sixth defendant was first notified of the proceedings on 3rd September 2014, some 7 and a half years after its involvement in the building of the apartment in question; this being almost two years after the originating summons was served; and in circumstances where the plaintiff did not serve the plenary summons within the 12 months required and obtained a renewal order outside the 12 month period; and then sought to serve on the last day of the 6 month period, which service was ineffectual by reason of the method of service employed;
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> (b) The fact that the plaintiff did not effect valid service within the period combined with a somewhat incomplete explanation as to why no service was attempted until the very last day of the renewal period. By this I mean that there was an explanation up to the date of the procurement of the expert report but not regarding the period of time thereafter until the 10th September 2014;
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> (c) The alleged potential prejudice caused by the lapse of time, in particular the fact that documents were destroyed in the ordinary course of business after 6 years, and the fact that employees who worked on the project have since moved on from the sixth defendant's employment.

27. The matters to be put in the balance in terms of the exercise in favour of the respondent and the upholding the second renewal order include the following:

(a) The gravity of the case; The case involves the construction of an apartment in which the Plaintiffs took up residence, and which they are said to have had to leave by reason of the defects alleged, and which may have become valueless because of the problems arising from the manner in which it was built;

(b) The fact that the proceedings appear to involve at least some degree of complexity; it is of course difficult to judge the level of complexity of the proceedings, and the particular role of the sixth defendant, on the basis of the limited materials before the Court on this motion, but the case is certainly one which involves experts and issues relating to fire safety in the construction of buildings as well as a number of defendants who appear to have had varying degrees of involvement in the construction of the apartment;

(c) The fact that there was a change of solicitor on behalf of the plaintiff shortly before the expiration of the original 12 month period allowed for the service of the plenary summons pursuant to Order 8, rule 1.

(d) The reaction of the applicant when first informed of the potential proceedings by the plaintiff; the applicant's solicitors, when first notified of the proceedings being brought, by letter dated 3rd September 2014, did not raise any concerns about the lateness of the proceedings; on the contrary, there was an indication of willingness to accept any proceedings, and when the summons was served one day out of time, they suggested that the plaintiff apply to the Court for an order regularising the position. It may be noted that this is relied upon by the respondent as a point of distinction between this case and the circumstances in *Gibbons v. Kelly*;

(e) The fact that service was attempted within the renewal period, albeit on the last day of same, and that the failure of service was due to an oversight within the Solicitor's office as to the appropriate method of service;

(f) The delay of the applicant in bringing this motion - there was a delay of some 10 months on the part of the applicant from the time of awareness of the second renewal order and the present motion being issued. Again this is a point relied upon by the respondent as a point of distinction between this case and the circumstances in *Gibbons v. Kelly*.

28. An issue which was addressed only in one of the affidavits, and did not loom large in oral argument, is the issue of the proceedings becoming statute-barred. The only mention of this within the affidavits sworn for this motion is in the second affidavit of the respondent's solicitor, who simply asserted that to grant the order would be to effectively strike out the plaintiff's claim as against the sixth named defendant because the plaintiff's claim would become statute barred. This issue was not mentioned in her first affidavit. In terms of pin-pointing the precise date, or even year, when the limitation period was reached, there seem to be a number of potentially relevant dates in the chronology of the case; (a) 2006, being the date of the building of the apartment; (b) January 2007, when the plaintiff signed a contract for the purchase of the apartment; (c) 2007 onwards, when the plaintiff was living in the apartment and became aware of the noise problems; and (d) 2011, when, the plaintiff alleges in the statement of claim, he became aware of the alleged fire hazard presented by the manner in which the apartment had been built. Accordingly, it is not clear to me precisely when, according to each of the parties, the claim (or individual parts of the claim) is or are alleged to have become statute-barred; and in particular, whether time is alleged to have expired by reason of the applicant's delay in bringing this motion or at some earlier time. For present purposes, all that can be said in this regard is that there was an uncontested claim on behalf of the plaintiff that the statutory limit had expired by the date of the swearing of the respondent's solicitor's second affidavit, being the 29th October 2015, and that therefore the effect of setting aside the second renewal order would be to render the matter non-justiciable. The *Baulk* case, referred to above, is authority for the proposition that the expiry of the statute of limitations is a significant matter which should be put into the balance, although, as already noted, this issue no longer appears to play as dominant role as it had done in the earlier authorities. I place some but not heavy weight upon this particular factor, having regard to the more modern jurisprudence.

29. As regards the items of particular prejudice alleged on behalf of the applicant, it does not seem to me that the document-destruction policy particularly advances the arguments on its behalf, because the six-year destruction policy means that documents were destroyed in 2012/2013, on date(s) before any renewal order was made in these proceedings. Further, no discovery order has yet been made, and it is not yet clear either whether any key documents are in fact missing (a) from the applicant and (b) not available from the files of any other party to the proceedings. To this extent, the claim of prejudice based upon the loss of documents appears to be somewhat premature.

30. Nor am I persuaded, on the current state of the evidence, as to the alleged prejudice caused by reason of the fact that persons involved in the project are no longer employees of the company. No information is given as to who they are, whether efforts have been made to locate them, or what their attitude might be to giving evidence in due course. The mere fact of their ceasing to be employees does not necessarily mean, in the absence of further information, that they will not be available to give evidence at any trial if required. The claim of prejudice is again, in that sense, premature.

31. Further, it appears to me to be relevant that the apartment in question is still in existence and can be inspected by experts, in a case in which the key issue in the proceedings is the safety or otherwise of the actual structure.

32. Counsel on behalf of the respondent sought to persuade the Court that, in addition to the 'other good reason' limb of the test being satisfied, there had been 'reasonable attempts at service' i.e. the attempted service by post on the last day of the first six-month renewal period. I am not persuaded that this argument is particularly in their favour where there was only one attempt at service, and this on the last day of the period, which was itself a renewed period, and where the means of service employed was inadequate, as distinct from some problem in locating the defendant in question. It seems to me that this limb of the test is more likely to have in mind a situation where the plaintiff has made repeated attempts to serve the defendant but has been thwarted by various circumstances, or perhaps even the conduct of the defendant himself. I am therefore determining the present application primarily on the 'other good reason' ground of the test in Order 8, rule 1, but in my view, the attempt to make service within the renewal period (on the 10th September 2014) is relevant on that limb of the test in any event.

33. I have considerable sympathy for the defendant by reason of the passage of time between the building of the apartment and the service of the plenary summons. The delay in effecting service of the plenary summons by the plaintiff, and indeed in failing to give any kind of notice of potential proceedings to the sixth defendant prior to the 3 September 2014, is to be criticised. However, in all of the circumstances, and having weighed up the factors referred to above on either side of the balance, and notwithstanding that the power to enlarge time and grant a second renewal order should, in the words of Mahon J., '*be utilised in very limited circumstances and where there are compelling reasons for so doing*', it seems to me that, the Court's discretion on the occasion of this application should be exercised in favour of upholding the second renewal order, namely the order of Barr J. dated the 22nd September 2014. In particular, the 10 month delay on the part of the applicant in bringing the motion to set aside the order, combined with its attitude towards the proposed proceedings as shown in its September 2014 letters, as well as the fact that service was attempted on behalf

of the plaintiff (by the wrong method) within the renewal period, albeit on the last day of the period, all appear to me to be factors which distinguish the case from the decision in the Court of Appeal involving Mr. Gibbons and the defendant Mr. Kelly and to bring it within the exceptional range described in the judgment of Mahon J.

34. The present application is of course confined to the narrow issue raised by the motion, namely whether the ex parte order for renewal of the period within which to serve the plenary summons, dated 23rd September 2014, should be upheld or set aside. If it emerges, following further pre-trial preparation and when the discovery process has been completed, that there are grounds to believe there is a real risk of an unfair trial in respect of the sixth defendant if proceedings are allowed to continue, this judgment, which is based on the limited information available at this point in time, will not in any way preclude appropriate relief being sought at that future time and the matter being considered afresh at that point. While it is undoubtedly the case that there is a considerable overlap between applications to set aside ex parte orders under Rule 8(2) and motions to strike out proceedings on the grounds of inordinate and inexcusable delay, the two types of application are not identical and, in particular, the issue of prejudice to a defendant may not yet have crystallised at the time of a Rule 8(2) application.

35. I refuse the relief sought.