Neutral Citation Number: [2009] IEHC 612

THE HIGH COURT

2004 9197 P

BETWEEN

PATRICK JACKMAN

PLAINTIFF

AND

GETINGE AB, SOUTHERN HEALTH BOARD AND MANEPA LIMITED

DEFENDANTS

JUDGMENT delivered by Mr. Justice McMahon on the 27th day of February, 2009

The Background
The plaintiff, an employee of the second named defendant, injured his fingers in 2004 when operating a machine manufactured by the first named defendant and controlled, maintained or serviced by the third defendant.

Proceedings were commenced by way of plenary summons issued on the 31st May, 2004. The plaintiff claims damages for personal injuries. The plaintiff sent a summons on the 19th May, 2005 to the defendant whose registered office was in Sweden. The summons was insufficiently and wrongly addressed and the first named defendant was also wrongly named. The first named defendant received a copy of the plenary summons and a copy of the concurrent summons on the 24th September 2007, three and a half years after the accident, the subject matter of the proceedings. This was the first indication that the first named defendant had that proceedings were in being in respect of the injury to the plaintiff.

It is important to set out the relevant time line for the determination of the application. The relevant timeline is as follows:-

- Date of the accident, the subject matter of the proceedings - 26th February, 2004;
- Plenary summons issued - 31st May, 2004;
- Statute limitation runs out - 26th February, 2007;
- The latest date for service of a summons within the time permitted by the statute - 25th February, 2008; (*i.e.* if the plaintiff waited until the 25th February, 2007 before issuing the plenary summons);
- Attempted service on the first named defendant - 19th May, 2005;
- Re-service on first named defendant at correct address – 24th September, 2007;
- *Ex parte* application to renew summons – 9th June, 2008;
- Order of Mr. Justice Peart granting the renewal of the plenary summons – 9th June, 2008;
- Renewed plenary summons served – 1st July, 2008;
- Unconditional appearance entered – 10th July, 2008.

In a notice of motion dated the 3rd November, 2008 the first defendant seeks the following orders from this Court:-

> (1) An order pursuant to the inherent jurisdiction of this honourable Court discharging the appearance entered by mistake on behalf of the first named defendant in circumstances where it was intended at all times that a conditional appearance only would be entered on its behalf;
>
> (2) An order pursuant to O. 8, r. 2 of the Rules of the Superior Courts, setting aside the order of Peart J. made on the 9th June, 2008 renewing the plenary summons and the concurrent summons for a period of six months from that date;
>
> (3) Such further and/or other orders as may be necessary or appropriate; and
>
> (4) An order providing the cost of this application.

The first named defendant under heading 3 subsequently applied at the hearing of this motion for a further order that the costs order made by Peart J. on 9th June, 2008 should also be set aside.

First Relief
In making its application under this heading the first named defendant referred the court to O. 8, r. 2 of the Rules of the Superior Courts which states:-

> "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."

It is clear from this that the first named defendant can only apply to set aside the order of Peart J. dated the 9th July, 2008 where it has not already entered an appearance. Since the first named defendant has entered an appearance on the 10th July, 2008 it requests the court to exercise its inherent jurisdiction and allow it to enter a conditional appearance instead of the unconditional

appearance already entered. I will postpone the consideration of this request until later in this judgment for reasons that will be become apparent at a later stage.

Second Relief
Order 8, rule 1 of the Rules of the Superior Court reads as follows:-

> "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…"

It is clear from this that the original or concurrent summons may be renewed if

> (i) the court is satisfied that reasonable efforts have been made to serve the defendant or
>
> (ii) "for other good reason".

It will appear from the alternative ground given to the court ("for other good reason") that it is intended to give the court a wide discretion in the matter and it is a recognition of the fact that procedural requirements may have to yield in appropriate cases to the superior interests of fairness and justice. This is not, of course, to assert that the rules can be disregarded on a whim. The rules must be respected and allowed to regulate where possible. If, however, the technicalities are seen to inhibit a just result, the courts may depart from them where there is "good reason".

(i) Did the plaintiff make "reasonable efforts" to serve the first defendant?
For the sake of argument, and because of my views on the alternative "good reason" ground outlined in the following paragraphs, I am prepared to accept at this stage that the solicitor for the plaintiff may not have made the required reasonable efforts to serve the first defendant in this case.

In attempting to serve the first defendant, the plaintiff sent the summons to "Hamstat, Sweden", when the correct address which was on the first defendant's website for many years, was PO Box 69, SE 31044 Getinge, Sweden. Hamstat is a small town, 20 kilometres from Getinge. The subsequent attempt to serve was also flawed since it was also outside the year allowed and since it was the summons that was served and not the *notice* of the summons as required by O. 11A, r. 6 of the Rules of the Superior Courts.

(ii) "Other good reason"
In *Baulk v. Irish National Insurance Co. Ltd.* [1969] I.R. 66, the Supreme Court held at pp.71-72 that "other good reason" was "not exclusively referable to the question of service but refers also to any other reason which might move the Court, in the interests of doing justice between the parties, to grant the renewal". The other good reason recognised in that case was that the defendant knew from the outset that the plaintiff intended to sue.

The plaintiff argues that if the summons is not renewed it will effectively mean that he will be defeated by the Statute of Limitations 1957, if he issues a new summons. This, he advances as a "good reason" for renewing the summons since otherwise he will be denied the opportunity to pursue his otherwise legitimate claim against the first named defendant. Without using this language, counsel for the plaintiff implicitly suggests that to set aside the order of Peart J. would have a disproportionately adverse affect on the plaintiff.

It is true that this is a factor which the courts have taken into account in deciding to renew summonses in the past. In *Baulk v. Irish National Insurance Co. Ltd.* [1969] I.R. 66, the Court expressed the view at p. 72 that "the fact that the Statute of Limitations would defeat any new proceedings, which might be necessitated by the failure to grant the renewal sought, could itself be a good cause to move the Court to grant the renewal." (See also *Martin v. Moy Contractors Ltd.,* Unreported, Supreme Court, 11th February, 1999).

But it is not the only factor. Further, the court's duty is that both parties in the litigation and as O'Flaherty J. stated in *Roche v. Clayton* [1998] 1 I.R. 596 at p. 600:-

> "The Statute of Limitations must be available on a reciprocal basis to both sides of any litigation."

In *O'Brien v. Fahy* (Unreported, Supreme Court, 21st March, 1997), Barrington J. in the Supreme Court, engaged in this balancing exercise, in setting aside the renewal of the summons. After acknowledging the serious consequences for the plaintiff of refusing a renewal order, he went on to say at pp. 4-5 of the unreported judgment:-

> "On the otherhand the Defendant did not know nor was she given any warning that a claim would be made against her and her Solicitor has sworn an Affidavit saying that, as a result, were a claim to be now made the Plaintiff would be greatly prejudiced in the defence of the case as it is now nearly four and a half years since the alleged accident and he says at this stage it is extremely difficult, if not impossible, to investigate all the circumstances surrounding the accident. It appears to me that the lapse of such a time without knowing that claim was going to be made is something which itself implies prejudice and when the Defendant and her Solicitor are prepared to swear Affidavits that in fact it is not a theoretical prejudice but an actual prejudice which the Defendant would suffer; one must set that against the loss to the Plaintiff, if as a result of a refusal to renew the Summons which is out of time, her claim became statute-barred.
>
> Unfortunately, for the Plaintiff, it appears to me that the balance of justice is in the circumstances of the present case is in favour of refusing to extend the time for service of the Summons and therefore of reversing the Order Mr. Justice Barr."

In undertaking such a balancing exercise, it is critical to establish, first, when the first named defendant first knew that it was likely to be sued (see *McCooey v. Minister for Finance* [1971] I.R. 159) and second, what level of prejudice would the first defendant be likely to suffer if this Court renewed the summons now. The answers to these questions are to be found primarily in the affidavits. In the affidavit of Mr. Hurley, solicitor for the first named defendant, of the 26th September, 2008 he states that the first indication that the first named defendant received that proceedings were in being in respect of the plaintiff's accident was on the 24th September, 2007. In his second affidavit, of the 10th February, 2001, however, Mr. Hurley confirms that the first named defendant was notified by the second named defendants, the insurers of the hospital, of the incident in February 2004 and had confirmed to the solicitor for the first named defendant that an accident report had been completed on the 17th March, 2004. Because of the seriousness of the

injuries (*i.e.* loss of the tips of two fingers) it would be unusual if proceedings were not instituted in such circumstances and in my view, it would be unreasonable to assume that they would not be taken or, as is averred by Mr. Hurley in that same affidavit, that the first named defendant "[has] long since concluded that the person concerned had no intention of advancing any claim against it." In any event it is clear from the evidence that the first named defendant knew of the incident and of the report as far back as March 2004.

It must also be noted that no employees of the first named defendant witnessed the accident and that the proceedings are properly in being against the hospital (the second named defendant) and the distributor/service company (the third named defendant). It is not unreasonable to assume that these defendants have collected, and will produce in court, any evidence which is available to weaken the plaintiff's case, and that the first named defendant will collaterally enjoy the benefit of this exercise. Moreover, apparently an accident report is in existence. It is difficult to see how the first named defendant would be severely prejudiced in these circumstances. The fact that some employees who "had some awareness of the accident" (as submitted on behalf of the first named defendant) had left the company and that the first named defendant had relocated its offices, are hardly serious prejudices given the circumstances of this case.

Finally, the period of time between the date of the accident and the date on which the first named defendant first became aware of an intention to involve it is only three and a half years and is not so great as to disturb the courts unduly. Had the plaintiff's solicitors waited for two years and eleven months (as it was entitled to do) before issuing the summons, service on the 24th September, 2007 would have been within the period allowed in the rules. In this context, it is difficult to accept that there would have been any serious prejudice to the first named defendant on the basis of the passage of time, and certainly the length of time involved was not such as to raise a presumption of prejudice that a longer period might suggest. For this reason too, the argument that the witnesses' memories would have faded does not greatly impress the court. The present case can be distinguished from *O'Brien v. Fahy* (Unreported, Supreme Court, 21st March, 1997). In this case there are other defendants against whom the proceedings are alive and there is, in existence a report on the accident made in March 2004; and unlike the facts of that case I am not of the view that it would be extremely difficult to investigate all the circumstances around the accident at this remove.

The next matter to consider is whether or not these facts were before Peart J. when he made his order on the 9th June, 2008 renewing the plenary summons. I have examined the affidavit sworn by Margaret Tansey on which her *ex parte* application was made, together with the exhibits attached thereto, and have come to the conclusion that since the only issue before Peart J. on that occasion concerned the renewal of the summons on the grounds that it was out of time, the additional matters now identified by the first named defendant as being relevant were either dealt with on the day or were not at issue between the parties then.

With regard to the change of name and address, the first named defendant emphasises, in its legal submissions to this Court, in particular that the first named defendant had adopted a new name since the 28th December, 2001 and that this and the correct address were available on its website "for approximately the last nine years". This would appear to be an exaggeration at the least, even on its own averments since the maximum period could have been no more than seven years on calculations based on averments in its own affidavits. I am not convinced that this would have caused the learned judge to alter his decision to allow an amendment to the summons by including the correct name and address of the first named defendant had this fact, *i.e.* that the relevant information was on the website, been before the court.

A more substantial issue raised by the first named defendant now, however, is that since the summons itself was served and not a *notice* of the summons as required by O. 11A, r. 6 of the Rules of the Superior Courts, the attempt at service was also defective. This of course is a serious issue and can be fatal in some cases. This issue was never raised by the first named defendant in any correspondence before the application was made to Peart J. Correspondence between the parties leading up to the application focused only on the address and the time issue, and accordingly, the plaintiff was entitled to assume that this was the only objection being made by the first named defendant. In view of this correspondence the solicitor for the plaintiff was not obliged, in my view, to raise it as an issue relevant to Peart J.'s deliberations. The correspondence was exhibited to this Court and it clearly showed what the issue was at that time, and it was on the basis of the information properly put before him that Peart J. made his renewal order. Moreover, in any event, it is clearly stated in the affidavit of Margaret Tansey, on which the *ex parte* application was based, that the summons, and not a notice, was served. The fact was not hidden. At para. 5 of her affidavit she says clearly:-

> "I say that the plenary summons herein was issued on 31st May, 2004. All three defendants were served with the plenary summons and/or the concurrent summons."

Again at para. 6 of the same affidavit she avers:-

> "The first named defendant was served by our offices on 19th May, 2005 with the plenary summons and the concurrent summons at what were believed to be their registered offices at Halmstad, Sweden."

Although it is true to say that the matter may not have been highlighted or brought to Peart J.'s attention, it was not hidden from the court.

It has frequently been said that the function of this Court is not an appeal court when exercising its jurisdiction under O. 8, r. 1. In *Behan v. Bank of Ireland*, (Unreported, High Court, 14th December, 1995) Morris J. at p. 3 of his judgment, put the matter this way:-

> "In my view in moving an application of this nature the Defendants takes upon itself the onus of satisfying the Court that there are facts or circumstances in the case which, if the Court which made the Order in the first instance, ex parte, had been aware it would not have made the Order. It is clear, in my view beyond dispute, that this application is not to be dealt with on the basis that it is an appeal from the original Order and accordingly it is incumbent upon the moving party to demonstrate that facts exist which significantly alter the nature of the Plaintiff's application to the extent of satisfying the Court that, had these facts been known at the original hearing, the Order would not have been made."

For the reasons stated above I am of the view that there is "good reason" for renewing the plaintiff's summons in the circumstances of this case.

As support for my position I would also rely on the dictum of O'Neill J. in *O'Grady v. Southern Health Board* (Unreported, High Court, 2nd February, 2007) where at p. 13 of his judgment, he states:-

> "All this tends to persuade me as indicated earlier, that unless a defendant demonstrates on a r. 2 application [i.e. Order 8, r. 2] the clearest case of actual substantial impairment of his defence, a court should at that stage relieve against the ultimate actual prejudice to a plaintiff, namely the time barring of his claim, unless his summons is renewed."

At this juncture it is also appropriate to refer to the first relief which the applicant herein (the first named defendant) is seeking. He requests the court to discharge the appearance entered by mistake on behalf of the first named defendant in circumstances where it was intended at all times that a conditional appearance only would be entered on its behalf. Furthermore, at the hearing of this motion it sought an extra relief which it claimed was caused by the failure to observe the final part of Peart J.'s order, awarding costs to the plaintiff, because of a mistake in the copy of the order furnished to it. The reasons advanced in support of the former is little more than that a mistake was made in the solicitor's office.

In coming to a decision in this matter I must be even-handed. It seems to me that the errors, if any, committed by the plaintiff's solicitors in this matter are in a way no greater than the errors of the defendant's solicitor in making an unconditional appearance.

My principal reason, however, in refusing the first named defendant's application is that I do not believe that there is any serious prejudice to the first named defendant in confirming the renewal order made by Peart J. in this matter. It is my view that Peart J. would not have refused to renew the summons even if the first named defendant had the opportunity of opposing it when the *ex parte* order was made.