

BETWEEN**CONGIL CONSTRUCTION LTD (IN LIQUIDATION)****PLAINTIFF****AND****PROINSIAS KITT, ROBERT CLINTON, TERENCE NOONE, STEPHEN CROWLEY AND MARK GIBBS, PRACTICING UNDER THE STYLE AND TITLE OF DHKN ACCOUNTANTS AND DHKN LIMITED****DEFENDANTS****JUDGMENT of Mr. Justice Coffey delivered on the 8th day of May, 2018**

1. This is the defendant's application for an order pursuant to O 8, r. 2 of the Rules of the Superior Courts setting aside an order of this Court (Humphreys J.) extending the time to apply for a renewal of the plenary summons, issued by the plaintiff on the 19th January, 2014 and renewing the said summons for a period of six months.

Factual summary

2. On the 26th April, 2010, Declan Mannion, chartered accountant, was appointed as the official Liquidator ("the Liquidator") of the plaintiff company by the High Court, prior to which the company had been involved in the construction industry. It is common case that the defendants acted as auditors and that they had provided financial and taxation advices to the company between March 2004 and the 26th April, 2010. The defendants deny the assertions of the Liquidator that they also provided a monthly bookkeeping service to the company or that it completed VAT returns or PAYE/PRSI returns for the company.

3. In his affidavit before Humphreys J., the Liquidator made two complaints against the defendants, however, he has since clarified, through his counsel, that these proceedings relate solely to the second complaint. The complaints are as follows:-

(i) he alleges that the defendants failed in their duty to the company in verifying the audited accounts of the company for the years ending 30th April, 2008 and 2009 by reason of the fact that the said accounts purported to assign a very significant value to its work in progress when in fact the relevant unfinished projects had no value;

(ii) he alleges that the defendants were further negligent in permitting VAT and other tax irregularities to occur during the same period which has resulted in a loss to Revenue of approximately €2 million, being the damages that are now being claimed in these proceedings.

4. The Liquidator issued two sets of proceedings on foot of these complaints:-

(i) on the 27th April, 2014 the Liquidator obtained leave from the High Court (Finlay Geoghegan J.), pursuant to s. 231 of the Companies Act 1963, to issue but not serve a plenary summons against the defendants relating to the allegation made in respect of the overvaluation of the company's work in progress;

(ii) on the 19th January, 2015 the Liquidator obtained leave from the High Court (Baker J.), pursuant to s. 231 of the Companies Act 1963, to issue but not serve a plenary summons against the defendants in respect of the allegation of VAT irregularity.

5. The application before this Court relates only to the second set of proceedings. Prior to seeking leave to issue the second set of proceedings, the Liquidator informed the High Court (Finlay Geoghegan J.) on the 7th April, 2014 that he was in effect abandoning the first set of proceedings. Counsel for the Liquidator made the court aware of this when leave was sought to issue the second set of proceedings on the 19th January, 2015.

6. Prior to making the application on the 19th January, 2015, the Liquidator was advised that he had until the 27th February, 2014 to institute these proceedings by reason of the fact that the application would soon be outside of the time allowed for the making of such an application in circumstances where the allegations concerned accounts that had been signed off on by the defendants on the 28th February, 2008.

7. As time was of the essence, the Liquidator applied to the High Court on the 19th January, 2015 for leave to issue but not serve a plenary summons against the defendants notwithstanding that a supporting expert report from an accountant was not available. The High Court adjourned the issue of service of the proceedings until such time as the requisite expert accountancy report and a favourable opinion from counsel could be properly put before the court.

8. On the 14th December, 2015 the expert accountancy report and counsel's opinion were put before the court in a short affidavit, as a result of which the High Court (Keane J.) made an order granting leave to the Liquidator to serve the plenary summons on the defendants.

9. As of the date of the making of the order, the 14th December, 2015, the Liquidator had until the 18th January, 2016 to serve the summons before it lapsed by virtue of O. 8 r. 1 of the Rules of the Superior Courts.

10. Against this background, the Liquidator has deposed to the following salient facts:-

(i) that the proceedings to which the plenary summons relate are the only valuable asset in the liquidation;

(ii) that he was aware at all material times between the 14th December, 2015 and the 18th January, 2016 of the need to ensure that the summons was served on the defendants before it expired;

(iii) that on the 14th January, 2016 he made contact with his then solicitor who confirmed that he "would be" serving the summons;

(iv) that on the 19th January, 2016 he again contacted his then solicitor who confirmed to him that he "had served" a copy of the summons on one of the defendants, Mark Gibbs, who indicated that he was accepting service on behalf of the defendants;

(v) that by letter dated the 20th January, 2016, his then solicitor wrote to him confirming he had served the summons on the 19th January, 2016;

(vi) that at no stage between January 2016 and January 2017 was he aware of the fact that the summons had been served one day late;

(vii) that in March and April 2017, he had discussions with his new solicitor and counsel and his original counsel with a view to progressing matters. It was decided that a renewal application should be made to the High Court following which an application was made to Humphreys J. on the 26th June, 2017.

The Law

11. Order 8, rule 1 of the Rules of the Superior Courts provides as follows: -

"1. 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..."

12. Order 8 r. 1 of the Rules of the Superior Courts provides that if a summons is not served within twelve months from the date of its issue then it ceases to remain in force. A plaintiff may apply to the Master of the High Court before the expiration of twelve months for leave to renew the summons. After the expiry of twelve months, an application can be made to the High Court both for an extension of time for leave to renew the summons and for an order that the summons be renewed for six months from the date of such renewal.

13. It is clear from the wording of O. 8, r. 1 that a summons can only be renewed in such circumstances if the court is satisfied that either "reasonable efforts" have been made to serve the defendant or that "other good reason" exists to justify the renewal.

14. Order 8, r. 2 provides that where a summons has been renewed on an *ex parte* application, any defendant shall be at liberty before entering an appearance to serve a notice of motion to set aside such order.

15. The application under O.8, r. 2 is in the nature of a hearing *de novo* and allows a defendant, even without adducing evidence of new facts, to submit that on the facts before the judge hearing the *ex parte* application, that the order for renewal should not have been made having regard to the proper application of the relevant legal principles (see *Chambers v. Kenefick* [2007] IR 526 at p. 529).

16. It is now well settled that the relevant legal principles are those set out by Finlay Geoghegan J. in *Chambers, infra.*, where she stated, at p.530: -

"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."

17. The role of the court in assessing whether the reason offered is a "good reason" was described by Peart J. in *Moynihan v. Dairygold Co-operative Society Ltd* [2006] IEHC 318 as follows: -

"The Court is required in my view to reach the conclusion not only as to what is the true reason why the summons was not served within the proper time, but also to conclude that that reason justifies the failure to serve. It is in that sense that the word "good" must be read."

18. In *Patrick McDonagh v. Gearoid McGann & Ors* [2018] IEHC 8, Baker J. emphasised that the reason or reasons offered "must explain the delay": -

"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 not a good reason to renew a summons simply to prevent a defendant availing of the Statute of Limitations. In *Roche v. Clayton* [1998] 1 I.R. 596, the Supreme Court emphatically rejected the contrary view which had found favour in earlier cases and stated that the Statute of Limitations must be available "on a reciprocal basis" to both sides of any litigation.

20. It is also apparent from recent statements on judicial policy that a reason that is put forward as a "good reason" may be looked at with "greater scrutiny" where the application is for a renewal of a summons outside the relevant limitation period. In *Moloney v. Lacey Building & Civil Engineering Ltd.* [2010] 4 I.R. 417, Clarke J. stated at p. 427: -

"...It seems to me that a renewal of a summons outside the limitation period so as to further extend the time (by reference to the limitation period) within which service can be effected, amounts at least to a stretching of the principles behind the existence of a statute of limitations in the first place. Such considerations should, in my view, inform decisions relating to both the question of what might be taken to be a "good reason" for the renewal of a summons and also in weighing the factors that might be put in the balance in considering where the balance of justice lies."

21. Clarke J. went on, at p.428, to reject any suggestion that a failure to renew a summons in such circumstances should be considered as amounting to a "penalty for procedural mishap": -

"...To so characterise it would be, it seems to me, to place little or no weight on the policy considerations behind the statute of limitations in the first place. The statute creates a situation where the issuing of proceedings one day after the limitation period leaves the relevant defendant with a complete defence, whereas the issuing of the same proceedings two days earlier would allow the proceedings to be considered on the merits. There are, as I have pointed out, very good policy reasons why a threshold is imposed. To regard a failure, for no explicable reason, to serve the summons within six months or at least within six months of the date when the statute expires as merely a procedural mishap would seem to me to afford far too little weight to the policy behind the statute."

22. The failure of a solicitor to carry out his or her instructions, whether express or implied, to serve a summons within the time permitted by the Rules will not of itself be considered "a good reason" for the purposes of O. 8 r. 1 of the Rules of the Superior Courts. Thus, in *Roche*, *infra.*, O'Flaherty J. stated at p.600: -

"...The only reason advanced by the plaintiff is that he was let down by [his solicitor]. That has nothing to do with the defendants. We must make an order that renders justice between the two immediate parties to the litigation. It seems to me that no good reason has been advanced at all."

23. In *Moynihan infra.* Peart J. noted that in many of the cases that came before him, the basis for seeking renewal was that the question of serving the summons within one year following its issue was "simply overlooked by the solicitor".

24. He went on to state: -

"In many such cases, it is pleaded that the defendant has already been notified of the accident and is therefore on notice at least of the risk that proceedings may issue. In such circumstances, depending on the length of the delay which has occurred, it may be a difficult task for a defendant to plead that it is really prejudiced in the defence of the proceedings. In such circumstances the prejudice to the plaintiff by being deprived of the opportunity of pursuing his/her claim against the named defendant may seem greater than the prejudice, such as it may be, to the defendant who is expected to defend proceedings which have not been served, but of the possibility of which the defendant was made aware. In such circumstances the Court, having a wide discretion in the matter, may well come to the view that the mistake or inadvertence of the solicitor is a "good reason" for renewing the summons, even where to do so is to deprive the defendant of the opportunity of availing of the defence under the Statute of Limitations."

25. Peart J.'s purpose in noting the phenomenon so described was to give a warning to solicitors that: -

"...[P]roper attention must be given to the question of service of proceedings after issue, especially where there is a likelihood that after the expiration of one year from the date of issue, the Statute will have expired."

26. He also stated: -

"...Where a defendant comes before the Court to set aside an order of renewal in such circumstances, and the Court is considering the competing interests, it is hard to see that much weight in the basket of interests to be weighed should be given to the solicitor's mistake."

27. Inadvertence by a solicitor was overlooked by the High Court in the case of *Chambers, infra.*, but in circumstances where the solicitor had given an explanation for his delay which was accepted by the court. In that case the plaintiff's solicitor swore an affidavit in which he stated that he was under a misapprehension that the summons had been properly served which Finlay Geoghegan J. found was supported by the correspondence which passed between the parties in circumstances where a copy of the plenary summons was delivered to the defendants' insurers within a period of approximately less than two and a half months after the issue of the plenary summons and where the plaintiff's solicitor, in the course of seeking medical records, threatened to issue a motion to obtain the relevant documents which he was seeking. Finlay Geoghegan J. renewed the summons and stated at p.530: -

"...It is not the inadvertence which constitutes the good reason, but rather it is that such inadvertence and oversight is the explanation for which the summons, a copy of which had been furnished, was not formally served."

28. In *Moloney, infra.*, Clarke J. appears to suggest that *prima facie* negligence on the part of a solicitor may also be a factor in determining the balance of hardship. He stated as follows: -

"In assessing, in accordance with the test identified by Finlay Geoghegan J. in *Chambers v. Kenefick* [2005] IEHC 402, [2007] 3 I.R. 526, the balance of hardship, it also needs to be noted that the plaintiffs have instituted proceedings (which are currently held up pending this judgment) against their former solicitors for negligence. The jurisprudence concerning dismissal for want of prosecution makes clear that the fact that a plaintiff may have a legitimate complaint against his advisers (and to be able to make claim in that regard) is a relevant factor which leans against absolving a party for failures on the part of those advisers."

Reasons Offered by the Plaintiff

29. The plaintiff has offered three reasons to explain his failure to serve the summons between the 14th December, 2015 and the 18th January, 2016:-

(i) the fact that he only obtained leave to serve the summons from the High Court on the 14th December, 2015 with the result that he had a foreshortened period of approximately five weeks to serve the summons within time;

(ii) the fact that on the 14th January, 2016 he contacted his solicitor who confirmed that he would be serving the summons;

(iii) the fact that his solicitor failed to carry out his instructions to serve the summons within time.

Discussion

30. The Liquidator has averred that he was advised that he had until the 27th February, 2014 to institute proceedings if he wished to sue in respect of the accounts for the year ending on the 28th February, 2008. Taking the plaintiff's case at its highest, however, the

proceedings would have become statute barred from the 20th January, 2016, that being six years from the 21st January, 2010, the date upon which the defendants are alleged to have signed off on the company's accounts for the year ending the 30th April, 2009. As the allegations primarily relate to the failure to make VAT and other returns prior to that date, it is more likely than not that the six year limitation period would have expired many months before the 21st January, 2010. It follows that the application made on the 26th June, 2017 was made at least five months, and probably much longer, after the last date when a summons issued within the limitation period could have been served without being renewed. As the renewal of the summons in such circumstances of necessity involves "a stretching of the principles behind the existence of a statute of limitations" this Court is required to interrogate the reasons put forward by the plaintiff in support of the renewal of the summons with "greater scrutiny" (see *Moloney v. Lacey Building & Civil Engineering Ltd infra.*)

31. On any view of the case, considerable urgency attached to the service of the summons when leave was given so to do by the High Court on the 14th December, 2015. The proceedings related to the only potentially valuable asset in the liquidation. The proceedings had been issued very close to the expiry of the limitation period. Although it is averred otherwise, counsel for the liquidator accepts that no warning letter had been sent to the defendants in respect of the matters alleged in these proceedings. The defendants had not been informed of the existence of the proceedings after they had been issued on 19th January, 2015.

32. The Liquidator is not a lay litigant. He was at all material times aware of the need to ensure that the summons was served on the defendants before it expired. During the relevant period he contacted his solicitor on the 14th January, 2016, four days before the summons was due to expire. We know nothing of what was discussed other than that the solicitor confirmed that he "would be" serving the summons.

33. There is no evidence before the court to suggest that there was any impediment to serving the summons on the defendants during the relevant period. The defendants are described in the Liquidator's first affidavit as a "prominent accountancy firm in Galway". The sixth named defendant is a limited liability company and could have been served by ordinary prepaid post at any time. One attempt at service was made, albeit out of time on the 19th January, 2016. On that occasion, the fifth named defendant agreed to accept service on behalf of all the defendants.

Decision

34. Absent any evidence of any impediment to serving the defendants during the relevant period, I am satisfied that the fact that the plaintiff had only five weeks to serve the summons within time cannot of itself constitute a "good reason" as to why service was not effected within the time permitted by the Rules of the Superior Courts.

35. The Liquidator contacted his solicitor on the 14th January, 2016 who confirmed that he "would be" serving the summons. This evidence, of course, does not explain the delay because the solicitor was at all material times under a duty to his client to serve the summons within time.

36. I am satisfied on the balance of probabilities that the true reason as to why the summons was not served within the proper time was either a failure on the part of the solicitor to carry out his instructions or a mistake on his part as to his legal entitlement to serve the summons on the 19th January, 2016. Whether it was inadvertence or a mistake as to law, there is no affidavit from the solicitor to explain why he failed to serve the summons within time. Absent such an explanation, there is simply no explanation and, therefore, there is no "good reason" to renew the summons.

Conclusion

37. For the foregoing reasons, I will set aside the order made by Humphreys J. on the 26th June, 2017.