Neutral Citation Number: [2009] IEHC 366

THE HIGH COURT

2001 11119 P

BETWEEN:

HUMPHREY O'KEEFFE

PLAINTIFF

AND

G & T CRAMPTON LIMITED AND

PATRICK O'CONNOR BUILDERS (WATERFORD) LIMITED

DEFENDANTS

JUDGMENT of Mr Justice Michael Peart delivered on the 17th day of July 2009:

This is an application by the first named defendant to set aside an order made by the High Court (Ms. Justice Clark) on the 5th November, 2007 to renew the Plenary Summons issued herein on the 5th July, 2001 for a period of six months from the date of that order. It would appear that the second named defendant company is now dissolved and therefore is not a party to this application.

In the normal way an application to renew those proceedings would be made *ex parte* pursuant to the provisions of Order 8, rule 1 of the Rules of the Superior Courts ("RSC"). However it appears that the application was made by way of Notice of Motion which issued on the 15th October, 2007, and which was directed to each of the defendants at what was believed to be their respective registered offices. On the return date for the Notice of Motion there was no representation by or on behalf of either defendant and the application proceeded on an unopposed basis. The explanation for the fact that there was no appearance on behalf of the first named defendant when the application to renew the Plenary Summons was moved is that the address at which the said Notice of Motion and Grounding affidavit was served by post was not the correct address, and accordingly the documents were not received. This much appears to be accepted by the plaintiff as being the situation.

In her affidavit sworn to ground the present application, which is sworn on the 4th March, 2008, Caroline Murphy, solicitor for the first named defendant states that the accident which gave rise to the issue of these proceedings is alleged to have occurred on the 10th October 2000, and that the last correspondence received by her clients in relation to the matter is dated 17th April, 2002. She refers to the fact the only step taken by the plaintiff since that date was the filing of the application to renew the Plenary Summons which resulted in the said order made on the 5th November 2007.

The correspondence which passed between the plaintiff's solicitor and Royal & Sun Alliance Plc, the insurance company for the first named defendant includes a letter dated 9th October 2001 whereby a medical examination of the plaintiff to take place on the 22nd October 2001 was notified to the plaintiff's solicitor. The plaintiff did not attend for that examination, and when asked about this by letter dated 6th November 2001, the plaintiff's solicitor delayed in responding to that letter until he wrote by letter dated 4th March 2002 when he informed the insurance company that the reason for the plaintiff's failure to attend was that he had failed to inform the plaintiff of the appointment. He sought another appointment for examination and confirmed that he would pay the non-attendance fee which had been incurred. He also sought the identity of a solicitor who would accept service of the proceedings. The insurance company replied to that letter by the letter dated the 11th April 2002, already referred to, stating that they were awaiting some further information and were not yet in a position to nominate solicitors to accept service. The letter concluded by stating that they hoped to be in a position to do so "in the near future".

Nothing further happened until the application to renew the proceedings was brought in November 2007, although I note that the affidavit to ground that application had been sworn by the plaintiff's solicitor on the 23rd July 2007. The arrival of the long vacation at the end of July 2007 will presumably have been the reason for the delay in moving the application prior to November 2007.

Importantly that grounding affidavit stated the reason for failing to have the Plenary Summons renewed at any earlier date in the following way:

> *"I say the reasons for failing to have the said summons renewed are and were that same was lost in the office and due to pressure of work the service thereof within the period of validity was overlooked but nevertheless say that as each of the defendants were put on notice of an intention on behalf of the plaintiff to proceed herein, the said defendants are not prejudiced by any intervening lapse of time."*

No further averment was made to address the delay of some six years from the date of issue of the said summons.

In her affidavit grounding this application to set aside the renewal order, Ms. Murphy states that such a long delay cannot simply be explained away by stating, as Mr O'Connor has, that the summons was lost and pressure of work. She states also that the first named defendant is severely prejudiced at this stage in defending the plaintiff's claim, and that in accordance with her client's normal practice, the files relating to this case was closed in January 2004 on the basis that the claim was in all probability statute barred since nothing had been heard from the plaintiff's solicitor since April 2002. She goes on to say that efforts to locate the case file have been unsuccessful. What she describes as a "very limited amount of documentation" has been located from their archives, and in particular there is no trace of their investigator's report which is one of the earliest steps taken by them upon notification of a claim being made, and that such a report

would normally have involved an attendance at the locus of the accident, photographing same, obtaining relevant documentation and speaking to any witnesses involved. She refers to the failure by the plaintiff to attend the medical examination which had been notified to the plaintiff's solicitor to which I have already referred. I should add at this stage that in a later affidavit sworn on the 11th June 2008, Ms. Murphy states that the insurance claims inspector has since "uncovered further documentation in relation to this claim, comprising photographs, accident report form, safety statement and witness statement", but that the original claims file has not been recovered.

Mr O'Connor has sworn an affidavit on the 25th April 2008 in reply to that affidavit of Ms. Murphy.In that affidavit he outlines the nature of the accident which is alleged to have caused the personal injury to the plaintiff. It appear to be alleged that the plaintiff was engaged in working on a construction site and that he fell from an unsecured scaffolding. It is alleged that site manager of the first defendant company was on site at the time and became aware of the accident, and further that he required the workmen on the site to complete their tasks within a short time and that they were required to work long hours to ensure that a penalty clause would not be invoked. He goes on to state that this is the type of claim where the doctrine of *res ipsa loquitur* applies and that in all probability the only issue to be decided when the case is heard will be the quantum of damages. He suggests therefore that the first named defendant is not in reality prejudiced in the manner alleged.

Mr O'Connor states also that the first named defendant failed to bring any application to have the proceedings of which they were aware dismissed for want of prosecution. However that ignores the fact that the proceedings had never been served. He suggests also that the defendants can be seen as having acquiesced in the renewal of the proceedings by failing to appear on that application in order to oppose it. It would appear that at the time he swore that affidavit he had not been made aware that the first named defendant had not in fact received the Notice of Motion in question as it had been served at an out of date address. He refers also to the failure of the insurers to revert to him following their letter dated 17th April 2002 when they had stated that they hoped to be in a position to nominate solicitors to accept service "in the near future", and suggests that this is indicative of a wish on their part to let time run in the hope that they would not have to face a decree for damages.

Mr O'Connor suggests also that it would be normal practice for bodies such as insurers to retain their files for periods in excess of the delay which occurred in this case and that it is inappropriate for them to rely on that matter. Some submissions of a legal nature are also contained in his affidavit.

I should refer in passing to a draft of the Statement of Claim proposed to be delivered in this case in the event that the matter can proceed. In addition to setting out the alleged facts giving rise to the alleged injuries and setting out those injuries in some detail, presumably by reference to a medical report obtained by Mr O'Connor, the document sets out a large number of heads of negligence, breach of duty and breach of statutory duty. While it is true that the doctrine of *res ipsa loquitur* is pleaded, it is the last of the thirty one pleas. There is no need to set out all these pleas seriatim.

By way of contrast, the O'Byrne letter sent to each defendant on 9th January 2001 simply informs the defendants that *"on the 11th inst (sic) our client suffered severe personal injuries at work due to the negligence of you, your servants and agents"*. No further details or allegations are contained in that letter.

Finally, Mr O'Connor has sworn a further affidavit on the 12th May 2009, shortly before this application came before me. Apart from repeating in large measure what was stated in his second affidavit sworn on the 25th April 2008 already referred to, he avers that the first named defendant has not been prejudiced by the delay, since it has now appeared that the insurers have been aware of the incident, and he refers to the uncovering of some documents as stated by Ms. O'Connor in her latest affidavit. He states that the delay has not been inordinate or inexcusable in that the "the conduct of the defendant parties contributed to same, and he asks that the period of delay be overlooked by the Court. He suggests that the first named defendant has sufficient information to defend this action, and that an order setting aside the renewal order would constitute *"a denial of the plaintiff's right to be heard herein in accordance with aforementioned fair procedures which accrue to both parties in proceedings"*.

Legal submissions:
Counsel for the first named defendant refers to the provisions of Order 8, rule 1 of the Rules of the Superior Courts, 1986 ("RSC") which provide, as relevant:

> *"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 ……" (my emphasis).*

Counsel has submitted that the mere request to the first named defendant to nominate a solicitor in early 2002 should not be found to constitute "reasonable efforts to serve" the first named defendant, and that if the summons is to be renewed it must be because the application falls to be considered on the basis of "other good reason". In that regard, it is submitted that the only reason offered on behalf of the plaintiff is oversight by, and pressure of work on the part of, the plaintiff's solicitor, and that while that is clearly the reason for non-service it cannot be regarded as a "good" reason.

Counsel for the first named defendant has relied on the judgment (ex tempore) of O'Flaherty J. in *Roche v. Clayton* [1998] 1 IR. 596, being an appeal against the refusal to set aside an order renewing a plenary summons under O.8 RSC. In that case no attempt at service had been made during the relevant twelve month period post-issue of the summons, and the only reason put forward by the plaintiff (who was by the time the appeal was heard) acting in person, was that he had been let down by a solicitor whom he had previously engaged for the purpose of his case. As it happened, he had discharged that solicitor prior to the issue of the proceedings because he was dissatisfied with him, and he instituted the

proceedings himself. It was accordingly his own failure to serve the summons rather than any default by his previous solicitor which led to the need to renew the summons. O'Flaherty J. concluded that any problems which the plaintiff had with his solicitor were nothing to do with the defendants, and that he was unable to detect any good reason for the purpose of O.8, r.2 RSC. He reiterated also the by now well-accepted principle that the mere fact that the claim is by now statute-barred, if the summons is not renewed, is not of itself a reason for renewing it, since "the Statute of Limitations must be available on a reciprocal basis". It is sufficient to refer only to the Supreme Court's decision in *Baulk v. Irish National Insurance Co Ltd* [1969] IR. 66, to, inter alia, this effect.

Counsel referred also to the judgment of Feeney J. in *Bingham v. Crowley*, unreported, High Court, 17th December 2008 which sets out a comprehensive examination of case-law relevant to a number of aspects of an application to renew a summons/application to set aside such an order. Counsel seeks to distinguish that decision on the basis that it was a medical negligence case where, he submits, different considerations apply.

Conclusions:
As already stated, there is no doubt that prior to the expiry of the summons in this case there were no "reasonable efforts" made to serve the proceedings. It is true that a letter was written by the plaintiff's solicitor to the insurers of the first named defendant in which, inter alia, they were requested to nominate a solicitor to accept service of the proceedings. But equally that never occurred, and the solicitor did not take the very simple step in these circumstances of simply serving the proceedings upon the first named defendant by post to it at its registered office, as provided by s. 379 of the Companies Act 1963. No difficulty would stand in the way of doing this. It is a simple procedure which could have been done at any time within twelve months of the date of issue of the proceedings. In fairness to the plaintiff's case, it is not really being grounded on any assertion that reasonable efforts to serve the proceedings were made during that period. Rather, and to his credit, it is frankly stated in Mr O'Connor's grounding affidavit, it is sought to establish "other good reason" for the granting of the order on the sole basis that he simply overlooked the question of service due to pressure of work, and that no actual prejudice has accrued to the first named defendant. He does say that in fact the summons was "lost" and that the matter was overlooked, but I feel it is reasonable to conclude that realistically the reason is that service was simply overlooked, especially since there is no evidence given as to when the loss of the summons came to light and when the search for same commenced.

I cannot regard the oversight by the plaintiff's solicitor of the question of service during a six year period from the 5th July 2001 until the first affidavit to ground an application to renew the summons was sworn on the 23rd July 2007 as constituting "other good reason" for the purpose of the rule, particularly in the light of the case-law to which Counsel for the first named defendant has referred. The expression "good reason" as opposed to "reason" implies that the reason given must be one which justifies, or otherwise renders reasonable and understandable, or excuses, the fact that the delay occurred. Mere oversight by the solicitor could not, without more, in my view do that.

In so far as it may be thought that this question of there being "other good reason" has already been decided by Clark J. when she granted the renewal order following the application (by way of Notice of Motion) on the 5th November 2007, and cannot be revisited, a couple of things should be said.

Firstly, it is clear that when that application was first moved on an *ex parte* basis, the judge hearing that application was obviously concerned about the delay in service and the reasons for it, and directed that the defendants be put on notice of the application, rather than have it moved *ex parte*. While a Notice of Motion was issued, and proof of service was available on the 5th November 2007, everybody accepts that it had been served at an incorrect address for the first named defendant, and that in effect the application was *ex parte* on the 5th November 2007, since there was no attendance in Court on that date by or on behalf of the first named defendant, or for that matter the second named defendant. I am satisfied that it cannot be concluded from that non-attendance that the first named defendant in any manner acquiesced in the making of the renewal order, since they were unaware of the application being made at all. However, there is equally no doubt but that Clark J. when granting the order for renewal did so, having reason to believe that they had been served with notice of the application and had chosen for whatever reason not to oppose the application.

For these reasons, I am satisfied that there can be no question but that the first named defendant is not estopped from making, or otherwise not entitled to make, submissions as to the non-existence of "other good reason" on the present application. If the application on the 5th November 2007 had in fact been an *ex parte* application, I am satisfied that a correct approach to the procedure under O.8, r.2 RSC is that set forth in the judgment of Finlay Geoghegan J. in *Chambers v. Kenefick* [2007] 3 IR. 526, with which reasoning Feeney J. was in agreement in his judgment in Bingham [supra], namely that as a matter of fair procedures, not having had an opportunity at the *ex parte* application, to make submissions as to why the court's discretion ought not to be exercised, a defendant seeking to set aside a renewal order should be permitted to make such submissions, even where there are no new facts adduced on the latter application which were not before the court at the *ex parte* stage.

The question then arises as to whether in the absence of "other good reason", the Court is nevertheless required, under O.8, r.2 RSC to go on and consider the question of doing justice between the parties, which in turn brings the issue of prejudice and the balancing of each party's rights, before deciding to set aside the renewal of the summons; or whether in the absence of other good reason and/or reasonable efforts to serve the summons the order should simply be set aside, bringing the case to an end.

Order 8, r. 1 does not refer to prejudice at all. That would suggest that the issue of establishing prejudice does not arise for consideration until such time as the Court is satisfied that there were reasonable efforts to serve the summons or that there is some "other good reason".

However, Feeney J. concluded that the overall interests of justice as between the parties was something which should be considered in the context of deciding whether or not there was "other good reason". I agree.

I have taken account of that consideration in reaching my conclusion that there is not any "other good reason" in this case. If the delay in bringing the application to renew the summons was slight, even if it was due to mere oversight, the Court may be entitled to conclude, especially where actual prejudice to the defendant is not adequately made out, it would be an injustice to punish the plaintiff by barring his claim, even though no effort had been made to serve the summons within time or where no other good reason was established. But in the present case, there has been a passage of six years since issue of the proceedings, and a delay of five years in commencing the application to renew the

summons. That is a very long time indeed. The first named defendant's insurer has located some documentation in relation to the accident in question, but that is not the end of the matter. The plaintiff's solicitor obtained a medical report from a Consultant at Waterford Regional Hospital which is dated 23rd January 2001 which is some three months post-accident. The first named defendant's insurer by letter dated 9th October 2001 notified the plaintiff's solicitor that they had arranged to have the plaintiff medically examined on the 22nd October 2001. That examination never took place because the plaintiff's solicitor failed to notify his client of same. No later examination has taken place, albeit that the plaintiff's solicitor requested a new appointment. It is now almost nine years post-accident and any examination which could now take place would be meaningless. But the blame for this must rest on the plaintiff's side and not the defendant in the circumstances of this case.

In addition it can be presumed that there is little prospect of witnesses having a clear and reliable memory of the events leading to this accident by the time this case may eventually be heard. It is already almost nine years since the accident occurred, and it is not unfair to suggest that at the least a further twelve months may pass before the case could be heard. Mr O'Connor has suggested in his affidavit that the only real issue which will need to be determined in this case is the quantum of damages, and he says this on the basis that the doctrine of *res ipsa loquitur* will apply. But the draft Statement of Claim, to which I have already referred, sets out almost thirty allegations of negligence, breach of duty, including statutory duty. It could not be concluded that the plaintiff's case and the defendant's defence of it will be confined to the question of *res ipsa loquitur*. As presently drafted, the plaintiff's case will require the calling of a number of relevant witnesses, and undoubtedly the defendant will need to call relevant personnel who were involved on this building site at the time. While the defendant has not stated in any affidavit that as a fact any or some relevant witnesses are now unavailable, the Court is entitled to presume that at this remove in time, their recollection of events and matters of relevance will be easily impugned as unreliable. That gives the plaintiff an unfair advantage at this stage in my view and speaks to the question of the fairness of any hearing, from the defendant's point of view, in the future.

In that regard I refer to the comments of Lynch J. in *Martin v. Moy Contractors Ltd* [1999] IESC 26 (11th February 1999), a similar case where the delay was some ten and a half years, and where he stated that *"the mere lapse of time in this case, now ten and a half years since the accident, gives rise to a general presumption of some prejudice by the dimming of memories of witnesses of the events…".* He went on, on the facts of that case, to conclude that the defendant in question in fact had no witnesses to call as to the accident, and in these circumstances was satisfied that this general presumption did not apply. But the present case is different. Quite a number of witnesses will have to be called by the first named defendant regarding the manner in which the scaffolding from which the plaintiff fell was erected, the system of work, training and supervision, the question of the pressure said to have been applied to the plaintiff and others working on the site to work quickly to avoid the application of a penalty clause and so forth.

In addition the second named defendant company has been dissolved, according to the affidavit filed by Ms. Murphy. That company was the plaintiff's employer at the time that he was working on the site where the first named defendant was the main contractor. Issues would no doubt arise as to whether the responsibility for the safety of the scaffolding, the training given to the plaintiff and so on can be laid by the first named defendant at the door of the second named defendant. It will be nigh impossible for the first named defendant to seek an indemnity/contribution against the second named defendant in the event that the first named defendant establishes that the second named defendant has a liability. That is a serious prejudice since it leaves the first named defendant in a position where he will have to "carry the can" in the event of it being found liable. That is unfair.

Against these clear matters giving rise to prejudice, presumptive or otherwise, is the question of the prejudice to the plaintiff if the order for renewal is set aside. Clearly every plaintiff whose claim is barred in this way will always be prejudiced where any new summons issued thereafter will be fatally vulnerable to a plea by a defendant under the Statute of Limitations. Yet, that fact has been found not, of itself, to justify renewal. The Court, however, in the present case, has no evidence of any kind from Mr O'Connor as to whether or not the plaintiff personally contributed to the delay in this case. I suspect not, since otherwise this would surely have been stated. Indeed, since there is no affidavit sworn by the plaintiff I cannot even be sure that he is aware of the difficulty presently facing his proceedings. On the evidence before me the plaintiff personally is blameless. It was not even his fault that he failed to attend the medical examination arranged in October 2001. That personal blamelessness is the best foot that he can put forward on this application. Everything else is against him. While there can be no doubt that a litigant is vicariously liable for the actions of or inaction by his/her solicitor, the question of his/her own personal blameworthiness is a relevant factor when considering the balance of justice between the parties, but it cannot on all occasions trump clear prejudice facing the other party in defending the claim.

In my view the balance of justice lies in favour of setting aside the order which renewed the summons in this case. While the plaintiff will suffer prejudice, and almost certainly through no fault on his part, by the bringing to an end of these proceedings, the prejudice to the defendants has been made out, and is apparent from the nature of the claim and the way in which the case will inevitably run at hearing, and is such in my view as to far outweigh the prejudice to the plaintiff. The defendants are entitled to a hearing within a reasonable time. They cannot get that, and to force them to defend this claim after such a long time is tantamount to expecting them to do the impossible and leave them unfairly disadvantaged to the extent that the plaintiff might well have a clear and unimpeded run to the finishing line.

I will therefore order that the order made on the 5th November 2007 be set aside.