

## THE HIGH COURT

[2012 No. 5606 P]

BETWEEN

DESMOND MONAHAN

PLAINTIFF

AND

KEVIN BYRNE AND SHANE COYLE (PRACTISING UNDER THE STYLE AND TITLE OF BRANNIGAN AND MATTHEWS SOLICITORS)

DEFENDENTS

**JUDGMENT of Mr Justice John Hedigan delivered the 27th day of April 2015**

1. The defendants seek an order pursuant to O.8 r.2 of the Rules of the Superior Courts setting aside the order of the Master of the High Court dated the 4th of June 2013 renewing the plenary summons herein dated the 7th of June 2012. That order was granted on the basis of a grounding affidavit of Sean Sheehan sworn on the 4th of June 2013.

2. The plaintiff claims damages for alleged breach of contract, misrepresentation, breach of fiduciary duty, negligence and breach of duty on the part of the defendant and each of them their respective servants or agents.

3. These proceedings relate to a contract for the purchase of land between the plaintiff of the one part and Ray White of the other dated the 14th of June 2006. The case relates to the alleged wrongful release of funds to Mr White on the 30th of June 2006 and further on the 16th of August 2006.

It is alleged that through the wrongdoing of the defendants the plaintiff was made liable jointly and severally with Mr White to AIB in the amount of €2,338,097.80. On the 11th of April 2012 the bank called in the debt. The wrongful acts alleged against the defendants by the plaintiff occurred on dates between the 14th of June 2006 and the 16th of August 2006.

The chronology of events have been helpfully set out in the submissions as follows;

1.	<b>14 June 2006</b>  <b>to</b>  <b>16 August 2006</b>	The events the subject matter of proceedings  2nd date of release of monies to White
2.	<b>1<sup>st</sup> April 2010</b>	Request from Aaron Kelly & Co for conveyancing documents
3.	<b>9 April 2010</b>	The First Named Defendant's response
4.	<b>10 May 2011</b>	Request from Aaron Kelly & Co for the original file to pursue Ray White
5.	<b>10 June 2011</b>	The original file furnished by The First Named Defendant to Aaron Kelly & Co
6.	<b>11 April 2012</b>	Letter from AIB calling in the loan advanced to the Plaintiff on a joint and several basis
7.	<b>7 June 2012</b>	The plenary summons was issued on the 7th June 2012, and was scheduled to expire 12 months later on the 6th June 2013.
8.	<b>13<sup>th</sup> June 2012</b>  <b>To</b>  <b>15 August 2012</b>	Various points at which the Plaintiffs alleged cause of action would have become statute barred but for the issuance of the summons.
9.	<b>December 2012</b>	The Plaintiff instructed Aaron Kelly & Co to transfer the file to Lawlor Partners and the file was transferred.
10.	<b>December 2012</b>	The point at which the Plaintiff was aware that the file was " <i>incomplete</i> "
11.	<b>8 April 2013</b>	Aaron Kelly & Co seek a copy of the file from The Defendants
12.	<b>30 April 2013</b>	First Named Defendant's telephone conversation with the Plaintiff who confirmed that he sought the file in order to pursue Ray White and during which the Plaintiff referred to the original file having been lost by his barrister;
13.	<b>22 May 2013</b>	Further telephone conversation between the First Named Defendant and the Plaintiff in which the Plaintiff sought the file to pursue Ray White. The First Named Defendant asked the Plaintiff have his solicitor contact him.
14.	<b>23 May 2013</b>	The Plaintiff's son hand delivered the letter dated 8th April 2013

15.	<b>27 May 2013</b>	Lawlor Partners return the file to Aaron & Kelly & Co on the basis that it was " <i>incomplete</i> "
16.	<b>30 May 2013</b>	The First Named Defendant wrote to the Plaintiff's solicitor Aaron Kelly & Co informing him that he had been on annual leave and that the matter would be dealt with
17.	<b>4 June 2013</b>	An Application was made, by Aaron & Kelly & Co on behalf of the Plaintiff, to The Master of The High Court, <i>ex parte</i> , for an order renewing the plenary summons under O 8 r 1 RSC. It was renewed for 6 months from the date of the application
18.	<b>16 September 2013</b>	The file was handed over to Lawlor Partners for a second time
19.	<b>2 December 2013</b>	Service on First Defendant
20.	<b>3 December 2013</b>	renewed summons due to expire;
21.	<b>6 December 2013</b>	Service on Second Defendant
22.	<b>28 March 2014</b>	Plaintiff's application for pre-pleading discovery
23.	<b>15 April 2014</b>	The Defendants' solicitor sought a copy of the affidavit grounding the <i>ex parte</i> application
24.	<b>29 April 2014</b>	Chasing letter from the Defendants' solicitor
25.	<b>20 May 2014</b>	The Plaintiff's solicitor threatened to bring a motion seeking judgment in default of appearance
26.	<b>27 May 2014</b>	The Defendants' solicitor set out his objection to a motion seeking judgment in default of appearance including the fact that the Plaintiff had not furnished a copy of the affidavit on which the application of 4 June 2013 was grounded
27.	<b>29 May 2014</b>	Notice of Change of Solicitor from <i>Aaron Kelly 8 Palace Street Drogheda County Louth to Lawlor Partners 415 Arran Square, Arran Quay, Dublin 7</i>
28.	<b>9 June 2014</b>	Plaintiff's solicitor furnished the Defendants' solicitor with a copy of the grounding affidavit of Sean Sheehan
29.	<b>18 July 2014</b>	Motion seeking to set aside renewal issued by the Defendants

4. Order 8 rule 1 of the Rules of the Superior Courts provide 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...."*

Order 8 rule 2 of the Rules of the Supreme Courts further provide:

*"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."*

5. The principles applicable are to be found in a number of the cases opened to the court. The most relevant seem to be as follows;

(a) The application herein may be made on the basis either of new evidence or submissions on the evidence that was produced at the *ex parte* application. Although there have been some diversions, the better view of the law now clearly is that new evidence does not need to be produced on an O.8 r.2 application. See Finlay Geoghegan J. page 529 in *Chambers v. Kenefick* [2007] 3 I.R. 526 adopted by Feeney J. in *Bingham v. Crowley* [2008] IEHC 453 page 10 and Peart J. in *Moynahan v. Dairygold Cooperative Society Ltd* [2006] IEHC 318.

(b) The court should first assess whether there was good reason, not necessarily referable to the service of the summons, to order renewal. If it finds such good reason, it should then consider whether it is in the interests of justice that it should so order. In doing this the court should consider the balance of hardship for each of the parties. See *Chambers v. Kenefick* cited above.

(c) "Other good reason" means any reason "which might move the court, in the interest of doing justice between the parties, to grant the renewal". See *Baulk v. Irish National Insurance Company Ltd* [1969] I.R. 66, Walsh J. at page 71. This must be assessed as at the date of the application for renewal. See *Bingham v. Crowley* cited above, Feeney J. at page 18 in *Moynahan v. Dairygold Cooperative Society Ltd* cited above Peart J. considered how to assess whether the plaintiff had established "some other good reason" as follows:

*"It is important to note the reference in O.8 r.1 RSC 2 'other good reason' (my emphasis). It does not state simply 'any reason'. The court must therefore consider whether there is a reason offered as to why the summons ought to be renewed, and whether that is a good reason. That task requires the court in the present case to form a view as to*

*whether the reason offered is one which justifies the inaction which occurred, especially in circumstances where it is now alleged that the delay has caused prejudice to the defendant's ability to defend, and in effect extend the limitation period under the statute of limitations from three years to over six years....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."*

Thus the plaintiff must justify the failure to serve the summons within twelve months of its issue.

6. The reasons advanced – these are set out at paragraphs 9 to 11 of the affidavit of Sean Sheehan. They are two;

- (a) The file was mislaid and/or was incomplete as a result of which the new solicitor was not happy to take on the file.
- (b) The solicitor for the plaintiff was reluctant to sue his colleague in his own town for professional negligence.

It was later argued in the affidavit of Fintan Lawlor that the plaintiff's claim would become statute barred if the summons was not renewed beyond the 6th of June 2013.

Taking these reasons in turn;

- (a) No reason has been advanced to explain the delay between June and December 2012. As to the second six month period, all the court is told is that the file was transferred to Lawlor Partners in December. In the course of transfer it is stated that it became apparent that documentation was missing and thus the file was incomplete. Lawlors refused to file a notice of change of solicitors until the full file was furnished. As the file was never completely furnished to them, Lawlors returned it to the plaintiff on the 27th of May 2013 and he returned it to his former solicitors.

It should be noted that at their request, a complete file had been furnished by the defendant s to the solicitors for the plaintiff on the 10th of June 2011. This on the basis that the plaintiff intended to sue Mr White.

The facts surrounding the loss of the file are confused. The plaintiff contradicts Mr Sheehan as to what occurred. It is however clear that the legal advisors including counsel (now deceased) lost the file or important parts thereof. Moreover the file remained incomplete even when the renewed summons was eventually served on the first defendant on the 3rd of December 2013. This reason of incompleteness of the file is not an acceptable one. The renewed summons was served while the file remained incomplete. Service of the summons issued on the 7th of June 2012 might just as readily have been made at any time up to the 6th of June 2013. Moreover the case made amounts at best to carelessness or inadvertence on the part of the plaintiff's legal advisors. Without more, this cannot amount to "other good reason" for the purpose of the rule.

- (b) The suggestion that a reluctance to sue a fellow professional in the same town is not a statable one anymore than that such proceedings are not instigated lightly. To raise such arguments to justify extending the statutory limitation period seems to turn logic on its head.

7. The plaintiff also raised the issue of delay. It is argued that the defendants should not have waited four and a half months from service of the renewed summons before requesting on the 15th of April 2014 a copy of the affidavit grounding the application to renew the summons.

I agree they should ideally have moved within days of the service on the first defendants. However the delay of four and a half months is not a sufficient delay to disentitle the defendants to bring this application.

8. The balance of justice does not arise because no good reason to renew the summons has been demonstrated to the court.

9. There will thus be an order made in accordance with paragraph 1a (as amended) of the notice of motion.