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Judgment: approved by the Court for handing down | *Delivered:* **2/6/16**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Capital Home Loans Limited

Plaintiff;

and

Liam Joseph Vallely practising as Liam Vallely & Co, solicitors

Defendant.

Master Bell

Introduction

[1] This judgement deals with two applications. The first application is an application by the defendant to set aside service of the writ. The second application is an application by the plaintiff to extend validity of the writ. Mr Gibson appeared on behalf of the plaintiff and Mr Gowdy appeared on behalf of the defendant. Both counsel made oral submissions and furnished the court with skeleton arguments.

The Context

[2] The pre-action Letter of Claim explains the context of these applications. Capital Home Loans Limited (hereafter referred to as "CHL") was a client of Mr Vallely who was retained by them to act on its behalf. Part of CHL's instructions to Mr Vallely was that his firm must act in accordance with the conditions contained in the Mortgage Offers, the Council of Mortgage Lenders' Handbook for Northern Ireland, and CHL's Part 2 Instructions. CHL made

mortgage offers to a company entitled MIE Rentals Ltd in respect of the purchase of four properties. It is alleged that Mr Vallely's firm was non-compliant in a number of respects including:

(i) His office did not have full control of the purchase monies;
(ii) His office confirmed that the source of £81,000 held on account was from the sale of 64 The Brambles Randalstown when in fact that property was not owned by, or sold by, the borrower;
(iii) His office acted for both the purchaser and the vendor in the transactions but no notification was provided to CHL of this.
(iv) Deeds of Guarantee executed in each case were undated and therefore defective.

[3] A writ was issued on 4 July 2015. The damages sought amount to £452,250 plus interest, less any payments received. The writ was valid for service up until, and including, 3 July 2015.

The Application to set aside service of the Writ

[4] In an application to set aside service of the writ the task of the court is to assess what attempts have been made to serve the writ and decide whether any of them amount to good service. The provisions governing service are contained in Order 10 Rule 1 of the Rules of the Court of Judicature.

[5] Order 10 Rule 1 provides :

> (1) Subject to the provisions of these Rules or any statutory provision a writ must be served personally on each defendant by the plaintiff or his agent.
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> (2) A writ for service on a defendant within the jurisdiction may, instead of being served personally on him, be served-
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> (a) by sending a copy of the writ by ordinary first-class post to the defendant at his usual or last known address, or
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> (b) if there is a letter box for that address, by inserting through the letter box a copy of the writ enclosed in a sealed envelope addressed to the defendant.
>
> (3) Where a writ is served in accordance with paragraph (2) –
>
> (a) the date of service shall, unless the contrary is shown, be deemed to be the seventh day (ignoring Order 3 rule 2(5))

after the date on which the copy was sent to or, as the case may be, inserted through the letter box for the address in question;

(b) any affidavit proving due service of the writ must contain a statement to the effect that-

(i) in the opinion of the deponent the copy of the writ, if sent to, or, as the case may be, inserted through the letter box for, the address in question, will have come to the knowledge of the defendant within 7 days thereafter; and

(ii) in the case of service by post, the copy of the writ has not been returned to the plaintiff through the post undelivered to the addressee.

[6] Three attempts were made to serve the Writ in this case. Firstly a copy of the Writ was faxed to Mr Vallely at his office under cover of a letter. Order 10 of the Rules of the Court of Judicature do not allow for writs to be served by fax. Hence this cannot amount to good service and Mr Gibson concedes that this is the correct position. In most cases no further comment would be necessary in respect of this attempt at service. However in the particular circumstances of this case, further comment is necessary for reasons which will later be understood. The fax send sheet shows that the fax was sent at 9.38 am on 1 July 2015. The covering letter identified the subject matter as "Re : Capital Home Loans v You" and the body of the letter stated simply "We refer to the above and enclose herewith Writ of Summons by way of service upon you." Mr Vallely in his affidavit avers that the fax did not reach his office before he left at lunch time. This assertion would appear to be contradicted by the documentary evidence of the time stamp on the fax itself.

[7] The second attempt at service was by means of first class post. According to the affidavit of Gillian Crotty sworn on 19 November 2015 this letter was posted on 1 July 2015. As indicated above, Order 10 provides that, where posted, the date of service shall, unless the contrary is shown, be deemed to be the seventh day after the date on which the copy was posted. Mr Vallely indicates in his affidavit that he left his office on 1 July 2015 and did not return there until 8 January 2015 (both counsel accept that this is simply a typing error in the affidavit and was intended to be 8 July 2015). This means that, by the time it was received by Mr Vallely, its period of validity had expired. Hence this attempt at service was also not good service.

[8] The third attempt at service was by means of a process server. According to the affidavit of Gillian Crotty the process server attended Mr Vallely's office and spoke with a woman at reception. The woman indicated she was not accepting any legal documents and after he left the writ with her, she followed the process server to his car trying to return the writ and saying she was not accepting it. Karen McCrudden is Mr Vallely's secretary. She describes her role as performing typing for Mr Vallely, assisting with filing and preparation of papers, and, where necessary, covering the reception of Mr Vallely's practice. In her affidavit she states that on the afternoon of 1 July 2015 she was working in the practice. Mr Vallely had left to go home that morning. Mr Vallely's receptionist had left as usual at 1.00 pm. Mr Morgan, an apprentice with the firm, was working in his office, having returned from lunch at around 2.00 pm. Ms McCrudden avers that, sometime after Mr Morgan had returned from his lunch, a man came into the office and asked for Mr Vallely. She told him that Mr Vallely was not in the office. The man then left the office only to return a few minutes later and threw an envelope on the floor. Ms McCrudden lifted up the envelope and asked the man what it was in relation to. He mentioned that it was legal documentation. She told him that she could not accept service of this and so followed him out to hand it back to him but he simply drove off. Ms McCrudden states that she did not open the envelope but put it in Mr Vallely's in-tray for him to open when he returned to the office which he did on 8 July 2015.

[9] For the sake of completeness I record that a note from the process server explaining how service was performed indicates that the writ was served at 11.14 am on 1 July 2014. A letter from the process server's employer similarly reported to the plaintiff's solicitor that the writ was served at 11.14 am on 1 July 2015. However an email from the process server to the plaintiff's solicitor and to his own employer indicates that service was carried out at 13.51 hours. Neither of these times fit with the chronology given by Ms McCrudden. This was a point which had not been addressed by either counsel and was one which I only noticed after the hearing was over. I therefore invited counsel to attend again and make submissions regarding this discrepancy. After counsel had investigated the position, I was informed that counsel jointly agreed that service by the process server had been attempted in the afternoon as suggested by Ms McCrudden.

[10] Mr Gibson argues that I should rule that proper service has been made by the process server and offers *Barclays Bank of Swaziland Ltd v Hahn* [1998] 1 WRR 506 as authority for that proposition. In that case a writ was inserted through the letter box of Mr Hahn's home on

14 April 1987. Mr Hahn was however out of the jurisdiction. The caretaker took the envelope and left it for Mr Hahn's attention. Later that day the caretaker went to Heathrow airport to pick up Mr Hahn and his wife. He told Mr Hahn that a man had called at his flat and posted an envelope through the letter box. As a result of this information Mr Hahn did not return to the flat but instead sent his wife there where she inspected the envelope but did not open it. Mr Hahn and his wife then left the jurisdiction. Lord Brightman, ruling on the meaning of the words "unless the contrary is shown", said the following, which Mr Gibson prays in aid of his client:

> "My Lords, in the case of letter box service I can think of nothing which is capable of giving content to the expression 'unless the contrary is shown' save that it refers to the defendant's knowledge of the existence of the writ, nor was the appellant's counsel able to suggest any other solution. Indeed, it is the obvious solution because the purpose of serving a writ is to give the defendant knowledge of the existence of proceedings against him; that is exactly what a defendant acquires when a writ is served on him personally; and it is exactly what I would expect that procedural rules would require when service is impersonal and not personal."

[11] I do not consider that this authority is of any assistance to the plaintiff. In *Barclays Bank of Swaziland Ltd v Hahn* the knowledge which Mr Hahn possessed was that a writ had been served at his address in a manner compliant with the rules. In Mr Vallely's case, the knowledge that I am satisfied Mr Vallely possessed (from having received, or having been told about, the faxed copy of the writ) was knowledge that an attempt would likely be made to serve a writ upon him. Knowledge that a writ is likely to be served upon a person at some time in the future is not the same as knowledge that a writ has been served in the past.

[12] None of the three attempted methods of service were therefore successful and I must grant the defendant's application and declare that in these circumstances the writ was not duly served upon Mr Vallely. As is said by the Masters frequently in these type of applications, the learning point is that solicitors and the clients they represent must not leave service to the last moment. Where they do so, things often go wrong.

The Application to Extend Validity of the Writ

[13] As Master McCorry summarised in *Sweeny v National Association of Round Tables, Enniskillen Branch and Waterways Ireland* [2015] NIMaster 6, Order 6, rule 7 provides (1) that for the purpose of service a writ is valid in the first instance for 12 months beginning with the date of its issue; and (2) where a writ has not been served on a defendant the court may extend the validity of the writ from time to time for such period not exceeding 12 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order or if the application is made before expiry to such later day if any as the court may allow. The most helpful summary of the relevant principles remains that set out at paragraphs 6/8/6, 6/8/7 and 6/8/12 of The Supreme Court Practice ("The White Book") 1999 edition. The essential principles set out there are:

(1) It is the duty of a plaintiff to serve the writ promptly accordingly there must always be a good reason for the grant of an extension of validity. The later the application is made the better the good reason must be. *Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No.3)*[1987] A.C. 597 HL and *Waddon v Whitecroft-Scoville Ltd* [1988] 1 All ER 996 HL.

(2) Whether a reason is good or bad depends on the circumstances of the case and normally the showing of good reason for failing to serve the writ during its original period of validity will be a necessary step to establishing good reason for the grant of an extension (*Waddon v Whitecroft-Scoville Ltd*).

(3) Good reasons include difficulty or impossibility in finding or serving a defendant particularly where he is evading service, or agreement with the defendant to defer service. Bad reasons include: negotiations in the absence of agreement to defer service; difficulties tracing witnesses or obtaining evidence; or carelessness. However, it is important to note that there is a dearth of recent authority in this jurisdiction and of course in England and Wales a somewhat different regime has been introduced with the establishment of their Civil Procedure Rules since 2000 and of course the Human Rights Act 1998.

(4) Where application for renewal is made after the writ has expired and after expiry of the relevant period of

limitation the applicant must not only show good reason for the renewal but must also give a satisfactory explanation for failure to apply for renewal before the validity expired.

(5) Whether or not to extend validity is a matter for the discretion of the court and in exercising that discretion the court is entitled to have regard to the balance of hardship *Jones v Jones* [1970] 2 QB 576.

(6) The application to extend involves a 2 stage inquiry. At the first stage the court must be satisfied that the plaintiff has demonstrated good reason for the extension and a satisfactory explanation for failure to serve before validity expired. Only if it is so satisfied will the court proceed to the second stage by considering all the circumstances of the case including the balance of hardship.

(7) The application to renew the writ should be made within the appropriate period of validity but the court has power to allow extension after expiry as long as the application is received during the "first period of expiry" (i.e. the year following.) *Chappell v Cooper* 1980 1 WLR 958. This is arguably subject to a wider power to allow later extension according to a number of propositions in *Singh (Jogrinder) v Duport Harper Foundries Ltd* [1994] 1 WLR 769.

[14] I now return to the behaviour of Ms McCrudden on the day that the process server attempted to serve the writ. For a secretary in a solicitor's office to follow a process server out of the building to the process server's car, stating that she could not accept service of legal documentation seems, in my opinion, to be bizarre behaviour. One might reasonably think that one of the core functions of a secretary in a solicitor's office was to receive legal documentation. Presumably she does not attempt to return post to the postman each morning when he also attempts to deliver legal documentation to Mr Vallely's office. (Of course whether such delivery amounts to good service is a different matter and depends on a number of factors, including whether the client has given the solicitor instructions to accept service or whether the solicitor has entered an appearance on behalf of a client. Such considerations and conclusions involve mixed matters of law and fact and would fall outside the duties of the average legal secretary.) I do not consider that any reasonable legal secretary would behave in such a fashion unless she had received an instruction to do so. The only inference I can draw from the behaviour of Ms McCrudden is, therefore, that she was given a

specific instruction from Mr Vallely not to accept service of any writ which might be delivered to the office because he wished to evade service thereof. I suspect (though it is not necessary for the purpose of my decision for me to be satisfied on this as a matter of fact) that such an instruction was given to Ms McCrudden simply because he received the faxed copy of the Writ earlier that morning on 1 July 2015.

[15] In her affidavit sworn for the plaintiff on 12 January 2016, Gillian Crotty, a solicitor and partner in Wilson Nesbitt solicitors avers that leave was not sought prior to the expiry of the writ primarily because it was not suspected that a solicitor would attempt to evade service.

[16] It is clear from the authorities that a good reason for extending the validity of a writ is that there has been great difficulty in serving a defendant, particularly if he has been evading service. I am satisfied that Mr Vallely, in giving the instructions which I find he did, was attempting to evade service. Evading service of legal process is not, of course, unlawful in any way. Nonetheless it is distasteful that an officer of the court should do so. There is a strong public interest that, where a solicitor is being sued by a client, attempts to argue that there has been a failure to observe the rules about service of the writ should not be entertained by the court in circumstances where the court is satisfied that the defendant had knowledge of the proceedings against him. To do so would be to allow the justice system to fall into disrepute in the public mind.

[17] There is therefore in my view a good reason to extend time and the plaintiff has given a satisfactory explanation for its failure to apply for an extension before the validity expired.

[18] I now move to consider whether I should exercise my discretion in favour of renewing the writ by considering all the circumstances of the case including the balance of prejudice or hardship. I note in this regard, as the White Book observes at paragraph 6/8/6, that the two stages of the test should not be regarded as watertight compartments and matters which may be relevant at one stage may also be relevant at the other (*Lewis v Harewood*, The Times, 11 March 1996). Mr Gowdy submitted that, although there is an allegation of evasion of service, the plaintiff does not give any evidence as to how it is alleged that he was evading service. I disagree. As previously indicated, I find clear evidence of fact that Ms McCrudden's behaviour gives rise to an inference that she was given a specific instruction from Mr Vallely not to accept service of any writ which might be delivered to the office. However I

must also take into account that, as Mr Gowdy submitted, the plaintiff seems to have waited until the last days of the validity of the writ, which coincided with the start of July, the beginning of the school holidays and a traditional holiday time in and around Belfast. The defendant also submits that I should take into account the loss of an accrued limitation defence and Mr Vallely's averment that he did not receive the Letter Before Action which the plaintiff had posted to him. The plaintiff responds to this argument by asserting that even if the primary limitation period has expired, then the secondary limitation period pursuant to Article 11 of the Limitation (Northern Ireland) Order 1989 is of relevance. Although, of course, I do not require to reach a formal conclusion on this point for the purposes of my decision as to extending the validity of the writ, Mr Gibson's argument for the plaintiff in my mind removes much of the weight which the defendant seeks to be attributed to this factor.

[19] Taking all these factors into consideration therefore, I consider it appropriate to exercise my discretion to extend the validity of the writ. I therefore extend it to 9 July 2015 which has the effect of making the writ valid at the time when Mr Vallely opened it on 8 July 2015 on his return from holiday and hence properly served.

[20] With each party having been successful in one application, I make no order as to costs but certify for counsel.