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Judgment: approved by the Court for handing down | *Delivered:* **17/1/06**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

MARTIN PAUL EDGAR

Plaintiff/Appellant;

-and-

MARGARET DONNELLY AND SAMUEL DONNELLY

Defendants/Respondent.

HIGGINS J

[1] This judgment is concerned with a summons issued by each party. The first in time is the defendants' summons dated 17 February 2004 in which they seek a declaration pursuant to Order 12 Rule 8 of the Rules of the Supreme Court that a Writ of Summons was not duly served on the defendants. The second summons on behalf of the plaintiff, dated 4 March 2005 and pursuant to Order 6 Rule 7, seeks an order that the time limit for the validity of a writ of Summons be extended.

[2] The plaintiff was born on 29 June 1982. On 11 December 1993 he was involved in a road traffic accident when crossing the road. He was then aged eleven years. A letter of claim was written on 7 March 1994 by a different firm of solicitors. It seems the case passed to a second firm of solicitors and the present solicitors took over the case in March 1999.

[3] The plaintiff achieved his majority on 29 June 2000. On 27 June 2003 a writ was issued on his behalf against the defendants claiming "loss damage and personal injuries sustained (sic) on or about 11 December 1993 … by reason of the negligence of the first named defendant as servant or agent of the second named defendant in or about the driving management and control of a motor vehicle which was the property of the second named defendant". Two days later, on 29 June 2003, the plaintiff attained the age of twenty one years. On 21 July 2003 the defendants' solicitors wrote to the plaintiff's

solicitors stating that they had received instructions from the insurers and asked that they note their interest. In July and August the defendants' insurers wrote to the plaintiff's solicitors requesting personal details of the plaintiff and also medical reports relating to his injuries. In the summer of 2003 the plaintiff's solicitors were aware that the writ of summons was not yet served. In October 2003 they asked the insurers to nominate solicitors to accept service. On 16 October 2003 the insurers replied that the defendants should be served personally. On 4 June 2004 the plaintiff's solicitors again requested the insurers to nominate solicitors to accept service but they were informed that the insurers preferred personal service. It appears that the plaintiff's solicitors attempted to serve the defendants at an address in Rathlin Gardens, Londonderry. The correspondence was returned ' not known at this address'. Between 4 June 2004 and 22 June 2004 they made inquiries relating to the defendants' whereabouts. On 18 June 2004 the plaintiff's solicitors wrote to the defendants' solicitors asking them, as a matter of urgency, to confirm that they had authority to accept service of the writ of summons. No reply was received to this letter. It appears that on 22 June 2004 the plaintiff's solicitors were informed that the defendants now lived at an address in Iniscairn Court, Londonderry.

[4] On 22 June 2004 the plaintiff's solicitors posted the writ of summons by first class post to the defendants personally at 8, Iniscairn Court, Londonderry. On the same date they wrote to the defendants' insurers in the following terms –

> "I refer to the above and enclose herewith copy Writ of Summons by way of service upon you together with Notice to Insurers.
>
> Please note we have also served a copy of the Writ directly on Margaret Donnelly and Samuel Donnelly and C & H Jefferson Solicitors."

On the same date they wrote to C & H Jefferson in similar terms –

> "I refer to the above and enclose herewith copy Writ of Summons by way of service upon you.
>
> Please note we have also served a copy of the Writ directly on Margaret Donnelly and Samuel Donnelly and on Allianz Northern Ireland."

[5] On 29 June 2004 the defendants' insurers wrote to the plaintiff's solicitors informing them that they had not instructed C & H Jefferson to accept service of proceedings in this case. The letter went on to state –

> "We have not been able to contact the defendants at 19 Rathlin Gardens and we note it was acknowledged in your letter June 4 2004 that the defendants do not live at that address. Please let us know where and when the writ of summons was served on the defendants."

[6] On 2 July 2004 the defendants' solicitors wrote to the plaintiff's solicitors the following terms –

> "As you are, no doubt aware, we do not have authority to accept service of the proceedings on behalf of the defendants.
>
> We note that you have purported to serve the defendants at 19, Rathlin Gardens, Londonderry. We would point out that, as referred to in your letter of 4 June 2004, the defendants no longer live at that address and proper service cannot, therefore, have been effected at that address. Please advise when and where the Writ of Summons was served upon the defendants in accordance with the Rules of the Supreme Court."

[7] On 7 July the plaintiff's solicitors wrote to the defendants' solicitors stating that the writ of summons was served on the defendants at the address 8 Iniscairn Court, Creggan, Derry. The letter did not disclose how and or when it was served. On 8 July 2004 the insurers wrote to the plaintiff's solicitors informing them that the defendants' solicitors were not authorised to accept service and again requested information as to when and where the writ of summons was served. On 13 July 2004 the plaintiff's solicitors replied that the writ of summons was "served directed (sic) on your clients at their present address at 8 Iniscairn Court, Creggan, Derry". (This should read 'directly'.) On 5 August 2004 the plaintiff's solicitors wrote to the insurers stating that "the Summons (sic) herein was served on your clients on 22 June 2004". In the belief that the defendants had been served personally at their home address on 22 June 2004, the insurers instructed the defendants' solicitors to enter an appearance. On 11 August 2004 the Memorandum of Appearance was entered.

[8] On 4 November 2004 the defendants issued a summons pursuant to Order 21 Rule 1 seeking leave to withdraw the memorandum of appearance entered on 11 August 2004. On 4 February 2005 Master McCorry granted leave to withdraw the memorandum of appearance and ordered the defendants to enter a conditional memorandum of appearance within 7 days. He also ordered that the defendants apply to set aside the writ of summons

within 14 days of entering the conditional memorandum of appearance. The plaintiff appealed that part of Master McCorry's order granting leave to withdraw the memorandum of appearance dated 11 August 2004. On 18 February 2005 Weir J dismissed the appeal and affirmed the Master's order and ordered the defendants to apply to set aside the writ of summons within 14 days. This application and the plaintiff's application for leave to extend the validity of the writ of summons were due to come on for hearing on 10 June 2005 but were adjourned due to the unavailability of counsel. On the same date an affidavit sworn by the solicitor on behalf of the defendants was served.

[9] Where a writ of summons is sent by ordinary first class post, or put through the letter box, the date of service shall be deemed to be the seventh day after the date on which the copy of the writ of summons was sent by post or inserted through the letter box, unless the contrary is shown – see Order 10 Rules 2 and 3. As the writ of summons was sent by ordinary first class post on 22 June 2004 it is deemed to have been served on 29 June 2004, regardless of the date on which it in fact was delivered to the address or opened by the occupant. The writ of summons was issued on 27 June 2003 and remained valid for 12 months commencing with the date of its issue – see Order 6 Rule 7(1). Therefore it expired on 26 June 2004, prior to the date on which it would be deemed to be served on the defendants. The plaintiff's solicitors suggested that they understood from the correspondence that the defendants' solicitors would accept service and sent copies of the writ of summons to them and the insurers on the same date, 22 June 2004. If the defendants' solicitors had authority to accept service, Order 10 Rules 2 and 3 would have applied also to those attempts to serve the writ of summons by ordinary first class post. Thus the defendants are entitled to a declaration that the writ of summons, issued out of the Supreme Court of Judicature, on 27 June 2003 was not duly served.

[10] Under Order 6 Rule 7(2) the court has power to extend the validity of a writ of summons where it has not been served. Order 6 Rule 7(2) states –

> "7(2) Where a writ has not been served on a defendant, the Court may by order 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, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow."

[11] It was submitted by Mr Maxwell, who appeared on behalf of the defendants, that as over 12 months have elapsed since the date on which the validity of the writ of summons expired, the Court no longer has power to

renew the writ of summons. The wording of Order 6 Rule 7(2) is clear. The Court may extend the validity of a writ of summons where an application for an extension is made before the day on which the validity of the writ of summons would expire, or such later date as the Court may allow. There is no 12 months restriction on the later date on which the court may hear an application for extension of the validity of the writ of summons; it is in the discretion of the Court. The 12 months period mentioned in Rule 7(2) relates to the maximum period of time for which a writ of summons may be extended at any one time.

[12] Order 6 Rule 7 is in the same terms as Order 6 Rule 8 of the former Rules of the Supreme Court that applied in England and Wales. The principles to be applied in applications for extension of the validity of a writ of summons under Order 6 Rule 8 were considered and stated by the House of Lords in two cases - Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No.3) 1987 2 AER 289 and in Waddon v Whitecroft-Scovill Ltd 1988 1 AER 996. The same principles were applied to Order 6 Rule 7 in Baly v Barrett 1988 NI 368 an appeal to the House of Lords from the Northern Ireland Court of Appeal. In Baly v Barrett Lord Brandon summarised them at page 416 as –

> "1. The power to extend the validity of a writ should only be exercised for good reason.
>
> 2. The question whether good reason exists in any particular case depends on all the circumstances of that case. Difficulty in effecting service of the writ may well constitute good reason, but it is not the only matter that is capable of doing so.
>
> 3. The balance of hardship between the parties can be a relevant matter to take into account in the exercise of the discretion. This only arises if matters amounting to good reason for extension, or at least capable of so amounting, have been established. *Waddon v Whitecroft Scoville Ltd.* [1988] 1WLR 309.
>
> 4. The discretion is that of the judge and his exercise of it should not be interfered with by an appellate court except on special grounds the nature of which is well-established."

[13] Where a limitation period is involved a further principle is relevant. Where the application for extension is made at a time when the writ of summons is no longer valid and the relevant period of limitation has expired, not only is good reason necessary, but the applicant must also give a

satisfactory explanation for his failure to apply for an extension of time before the validity of the writ of summons had expired.

[14] It was submitted on behalf of the plaintiff that there was good reason why the writ of summons was not served, namely that the defendants could not be located and that the greater hardship would be caused to the plaintiff should the validity of the writ of summons not be extended. It was only after the conditional memorandum of appearance was entered that the issue of the validity of the writ of summons was raised. The defendants were not prejudiced as the insurers and their solicitors had known of this pending action for some time.

[15] It was contended on behalf of the defendants that no good reason had been put forward. Rather there had been gross delay generally, over many years, and the present solicitor had left service of the writ until close to the end of the period of validity of the writ of summons. The present application was made after the period of validity had expired and no good reason had been demonstrated why this application was not pursued prior to the expiry of that period. To extend the period of validity of the writ would deprive the defendants of the benefit of a defence under the Limitation Order.

[16] The first question that arises is whether there was good reason why the writ of summons was not served before its validity expired. Only if good reason is shown does the Court then go on consider, in the exercise of its discretion, where the balance of hardship lies.

[17] The plaintiff's solicitors took over this case in March 1999. The writ of summons was issued in June 2003. The solicitors were well aware that the writ had not been served. In October 2003 they were informed that personal service was necessary. In late May or early June 2004 they sought to serve the defendants at Rathlin Gardens, Londonderry. This was the address of the defendants at the time of the road traffic accident, almost 10 years previously. It appears that it was assumed the defendants still lived at this address. Only when the attempt at service in early June failed, did the plaintiff's solicitors seek an alternative address. They found it relatively quickly. Despite the proximity of the date of expiry of the validity of the writ of summons, the solicitors chose to effect service of the writ of summons by first class post. Clearly this would have the effect of postponing service until after the date of expiry of the writ of summons. The plaintiff's solicitors had every opportunity from June 2003 to identify the address of the defendants. After the passage of nine years it was inappropriate to assume the defendants still lived at the address noted in the police report. Almost three years had elapsed since the plaintiff had achieved his majority and over nine years since the date of the road traffic accident. There is no evidence of any efforts being made to ensure the defendants still resided at Rathlin Gardens, prior to 22 June 2004. Once the address at Iniscairn Court had been identified the solicitors, who are

located in Londonderry, could easily have arranged personal service. They did not do so. In all those circumstances, the failure to identify the address of the defendants until 22 June 2004 (with service by first class post then undertaken), was not a good reason for service of the writ of summons not being perfected during the validity of the writ of summons.

[18] If, contrary to what I have held, failure to identify the address of the defendants was a good reason, where would the balance of hardship lie? The plaintiff would lose the chance of recovery of damages from the defendants. On the other hand the plaintiff should have a reasonable cause of action against his solicitors for failure to prosecute his action promptly. The plaintiff's action could have been pursued any time after March 1994. On the other hand the defendants would be asked to defend a case almost twelve years after the incident, although only a short period of time after the latest date permitted by law. However, it would take the case beyond the period permitted under the Limitation Order, and deprive the defendants of the advantage of that legislation. The defendants stress the limited nature of the police report and that fact that the first named defendant did not make a statement at the time. It is submitted that the first named defendant was entitled to think this incident might be in the past. While these points are relevant they are not determinative of the issue. What is decisive is the passage of time since March 1994, which has been enhanced by the failure to serve the writ of summons promptly, after it was issued. A further factor is the defendants' entitlement to any benefit accruing from the Limitation Order. Taking that into account is not inconsistent with the Court's powers under Article 50 to disapply the provisions of the Limitation Order. If the plaintiff has a cause of action against the defendants and he is denied pursuing it in these proceedings he will have the right to pursue those responsible for that situation. In all those circumstances the balance of hardship falls, in my view, on the defendants. Therefore I decline to extend the period of validity of the writ of summons.