

Neutral Citation No: [2007] NIQB 65

Ref: **STEC5913**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **7/9/07**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

FRANCIS JOSEPH McCUSKER

Plaintiff;

and

DECLAN MARTIN McCUSKER
as Personal Representative of ELIZABETH McCUSKER (deceased)

Respondent.

STEPHENS J

[1] This is an appeal by the plaintiff from an order made by Master McCorry on 18 April 2007. By that order Master McCorry declared that the plaintiff's writ of summons had not been duly served on the defendant. That declaration was made pursuant to Order 12 Rule 8 of the Rules of the Supreme Court (Northern Ireland) 1980.

[2] The plaintiff's application for the order was made by summons dated 15 April 2005. The documents filed in relation to that application were as follows:-

- (a) The affidavit of Patrick Eastwood, the defendant's solicitor, sworn on 15 April 2005.
- (b) The affidavit of Donard McCann, the plaintiff's solicitor, sworn on 4 May 2005.
- (c) The affidavit of Kieran Hann, a senior claims manager employed by Allianz Ireland plc, the defendant's insurers. His affidavit was sworn on 20 September 2005.

- (d) The affidavit of Francis Joseph McCusker, the plaintiff in this action. His affidavit was sworn on 31 January 2007.
- (e) The affidavit of Adrienne E Hutchinson, a legal secretary employed by the plaintiff's solicitor. Her affidavit was sworn on 2 February 2007.
- (f) The affidavit of Judith Connolly, who was previously employed by Allianz Ireland plc, the defendant's insurers. Her affidavit was sworn on 7 June 2007.
- (g) The affidavit of Margaret McCorry, the post administrator employed by Allianz Ireland plc. Her affidavit was sworn on 12 June 2007.

[3] For the purposes of this appeal the plaintiff was represented by Mr Horner QC and Mr McKay QC whilst Mr Cush represented the defendant. I am indebted for the way in which the appeal was presented and for the clear and concise submissions made by counsel.

[4] In these proceedings the plaintiff, Francis Joseph McCusker, alleges that on 1 April 1999 he was a passenger in a motor vehicle being driven by his wife, Elizabeth McCusker. That as a result of her negligence a road traffic accident occurred in Meeting Street, Magherafelt, County Londonderry in which the plaintiff sustained personal injuries.

[5] If a plaintiff wishes to avail of the ability to enforce a judgment direct against an insurer under the provisions of Article 98 of the Road Traffic (Northern Ireland) Order 1981, as amended by the Motor Vehicles (Compulsory Insurance) Regulations (Northern Ireland) 1989, then the plaintiff has to comply with the provisions of Article 98A(1)(a) of the 1981 Order. Those provisions are as follows:-

“98A-(1) No sum shall be payable by an insurer under Article 98 -

(a) in respect of any judgment unless, before or within 7 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;”

[6] Accordingly when bringing proceedings in relation to a road traffic accident plaintiff's solicitors serve 2 documents:-

- (a) A writ of summons on the defendant within its one year validity.
- (b) An Article 98 notice on the defendant's insurers to be given within 7 days of the commencement of proceedings.

[7] The writ in this case was issued on 27 March 2002 just within the primary limitation period. The plaintiff's solicitors state that the writ was served by virtue of the fact that it was enclosed with their letter to the defendant dated 15 April 2002. That the letter, with its enclosure the writ, was sent by ordinary first class post to the defendant's usual address pursuant to the provisions of Order 10 Rule 1(2) of the Rules of the Supreme Court (Northern Ireland) 1980.

[8] It is accepted on behalf of the defendant that the letter was received. However it is contended on behalf of the defendant, by the defendant's insurers, Allianz Ireland Plc, that the only document enclosed with the letter, was an Article 98 notice and that the writ was not enclosed. It is clear that an Article 98 notice was enclosed with that letter because the original letter and the notice are on the insurer's file. Indeed the mark of a paperclip can be discerned on both the original letter and the Article 98 notice enclosed with that letter. The plaintiff's solicitors did not intend to enclose the Article 98 notice with that letter. The issue is whether they also enclosed with that letter the document which they intended to enclose, namely the writ.

[9] The plaintiff's solicitors in another letter dated 15 April 2002 which was sent direct to the insurers, purported to comply with provisions of Article 98A(1)(a) of the Road Traffic (Northern Ireland) Order 1981 by enclosing with that letter an Article 98 notice. The Article 98 notice was dated 15 April 2002. It is self evident that they had failed to comply with the 7 day time limit set out in Article 98A(1)(a) as the writ had been issued on 27 March 2002. It is clear that mistakes were being made in the plaintiff's solicitor's office. They had not intended to, but did, send an Article 98 notice to the defendant. In relation to the Article 98 notice which they did send to the insurers they had failed to comply with the time limit. They had allowed a situation to develop where proceedings were issued just prior to the expiry of the primary limitation period.

[10] The defendant's insurers contend on behalf of the defendant that all the plaintiff's solicitors had achieved by their two letters dated 15 April 2002 was to serve an Article 98 notice on the defendant rather than a writ, and to send to the insurer an Article 98 notice which notice was out of time and ineffective. Accordingly that two Article 98 notices had been served rather than a writ on the defendant and an Article 98 notice on the insurers.

[11] It is accepted that the defendant received the plaintiff's solicitor's letter dated 15 April 2002. As I have set out the issue is factual and that is whether the writ was or was not also enclosed with that letter. If it was then the writ was served on the defendant. If it was not then the writ has not been served.

[12] In order to address that issue it is necessary to bear in mind the distinction between the defendant and the defendant's insurers. The decisive issue is whether the writ was served on the defendant, not whether the defendant's insurers received the writ. If the defendant received the writ but did not send it on to the defendant's insurers then that might affect her insurance cover depending on the wording of her policy, but it would not alter the fact that the writ was served on her. Similarly if the defendant's insurers mislaid the writ in opening the post or dealing with their own documents then that also would not affect the fact that the writ had been served on the defendant.

[13] The two letters from the plaintiff's solicitors dated 15 April 2002 were both signed by "Adrienne Murphy pp Donard McCann LLB". Mr McCann had personal carriage of the plaintiff's claim. He averred that his firm operated a strict policy in which all correspondence particularly that which enclosed documents of importance such as, as in this case, a writ, are checked by a solicitor before sending. He went on to aver that, "I would not allow a letter to be sent to the defendant enclosing a writ unless the same was actually enclosed". However it subsequently became apparent that in April 2002 he was heavily involved in a matter at trial. Adrienne Hutchinson nee Murphy was at the time a legal secretary in his practice. She has sworn an affidavit to the effect that letters of substance such as serving legal proceedings were checked by either Mr McCann, or if he was not available by the other solicitor in the practice at the time, Mr McLernon. In view of the mistakes that have been made in the plaintiff's solicitors' office I have considerable reservations in relation to whether this evidence establishes that the writ was enclosed with the letter to the defendant dated 15 April 2002. I do not rely on that evidence.

[14] The defendant and the plaintiff both lived together as husband and wife at 72 Ballygillen Road, Coagh. Unfortunately the defendant died on 27 January 2003. She received the plaintiff's solicitor's letter dated 15 April 2002 and she must have delivered that letter to her insurers together with at least the one document that it is accepted was enclosed with it, namely the Article 98 notice. It is not known whether she sent those documents to her insurers by post or personally hand delivered them or asked someone else to deliver them on her behalf. It is not known how those documents entered Allianz House.

[15] Kieran Hann is a senior claims manager for Allianz Ireland Plc and in that capacity he reviewed the file in relation to the plaintiff's claim on 22 April 2002. At that time he noted that "the writ had not been served but that a notice had been served". He chose to make no enquiries of the defendant as to

whether the writ had been received by her. There was no evidence that he carried out any contemporaneous enquiries to determine whether the writ had been mislaid in the offices of Allianz Ireland plc. I consider that he was motivated by the fact that if he had made enquiries of the defendant that she would have told her husband, the plaintiff, and thereafter the writ would have been duly served.

[16] The plaintiff's solicitors wrote to Allianz Ireland Plc on 20 August 2002 threatening to mark judgment if an appearance was not entered. Mr Hann replied on 28 August 2002 stating that the Article 98 notice had been served out of time and relying on the 7 day time limit for such a notice. He did not then say that the writ had not been served because at that stage the writ was still valid and could have been served. This stance was endorsed by David McChesney, a member of the management group of Allianz Ireland Plc by his letter dated 15 October 2002.

[17] The importance of the Article 98 notice is to enable the plaintiff to enforce any judgment direct against the insurer and to prevent the insurers avoiding or cancelling the insurance policy. In this case the Article 98 notice was immaterial as the defendant's insurers were not in August 2002 considering avoiding or cancelling their policy of insurance. The content of Mr Hann's letter dated 28 August 2002 was a distraction from what Mr Hann perceived to be the real issue and that was whether the writ had been served on the defendant. In the event it was a successful distraction. The plaintiff's solicitors should have proceeded to mark judgment in default of appearance which may have prompted the defendant's insurers to reveal their hand at an earlier stage. The plaintiff's solicitors did not do so. Time was then taken up with two issues. The first was that another firm of solicitors on behalf of the estate of the defendant engaged in correspondence with the defendant's insurers to confirm that she had insurance cover. The second related to a change in the title of the proceedings in view of the unfortunate death of the defendant.

[18] I have considered the evidence as to how post is dealt with when it is received in Allianz House, Belfast. Margaret McCorry is a post administrator employed by Allianz Ireland plc. She was on duty in that capacity on 18 April 2002. The plaintiff's solicitor's letter dated 15 April 2002 to the defendant is date stamped as being received by Allianz Ireland Plc on 18 April 2002. She was the person who date stamped the letter. Her practice can be summarised as follows:-

- (a) She collects the mail from the second floor of Allianz House and brings it to the first floor.
- (b) She puts all the mail through the letter opening machine.

- (c) She removes all the contents from the envelopes to ensure that all documents in an envelope have been removed.
- (e) If there is more than one document and if they have not been stapled together then she staples them.
- (f) She applies the date stamp.
- (g) The documents are sorted into three distinct categories namely claims, cheques and non payment. Claim documents include notices, writs, claim forms and correspondence.
- (h) The claims documents are then taken to the post room for sorting and distribution to the relevant claim handler.

[19] The question arises as to whether the letter dated 15 April 2002 from the plaintiff's solicitors to the defendant together with its enclosure or enclosures, were sent or delivered to Allianz Ireland Plc by the defendant in the same brown envelope in which they were sent to the defendant by the plaintiff's solicitors. If not whether they were in another envelope or whether they were not in any envelope at all at that stage. There is no evidence about this primarily because no enquiry was made by the defendant's insurers at the time. The defendant's insurers have not set out what the procedures would have been if the documents were left in loose at the reception desk. I am asked by the defendant's insurers to infer that the documents were in the same brown envelope or some other envelope and that the envelope would have been processed by Margaret McCorry on the first floor of Allianz House. If I accept that the letter dated 15 April 2002 with its enclosures, whatever they might have been, were in an envelope when they were received by the defendant's insurers, then I am asked by the defendant's insurers to infer that the writ was not in that envelope and that it was not overlooked by Margaret McCorry. That she did not inadvertently attach the writ to another set of papers with which she was dealing. For instance I am asked to exclude the possibility that the defendant not only received the Article 98 notice but also received the writ and that she did not either deliberately or by mistake send on to the defendant's insurers only the notice whilst retaining the writ. I am asked to exclude the possibility that she herself may have mislaid the writ or that she became confused and in that confusion she concluded that the only document which she was obligated to pass on to the insurers was the notice to insurers rather than the writ itself. In short I am asked to infer that the procedure adopted by the defendant's insurers leads to the conclusion that on the balance of probabilities the writ was not served on the defendant.

[20] It is necessary in all office environments to have procedures for ensuring that documents are not mislaid or overlooked. The procedures put in place by

Allianz Ireland Plc are a reflection of their appreciation that the mundane task of opening post has to be rigorously controlled to minimise the risk of documents going astray. I consider that there was a failure by Allianz Ireland Plc to appreciate that their own procedures could have failed. If there had been such an appreciation then Mr Hann would have instituted an enquiry within the office on 22 April 2002 when he believed that only the Article 98 notice had been served on the defendant. He did not institute such an enquiry. It is evident in this case that the defendant's procedures are not always followed. For instance the other letter from the plaintiff's solicitors direct to the defendant's insurers dated 15 April 2002 enclosing the Article 98 notice was not date stamped by the defendant's insurers. In addition he chose not to make any enquiries of the defendant.

[21] I consider that there were failures by the plaintiff's solicitors. Their procedures were unsatisfactory. I also consider that the defendant's insurer's procedures and enquiries fell short of what would have been appropriate. In those circumstances I am not prepared to draw the inferences suggested on their behalf. In deciding the issue on this appeal I do not rely on either the plaintiff's solicitor's procedures or on the procedures in the offices of Allianz Ireland Plc.

[22] The plaintiff has sworn an affidavit in which he deposes that he remembers his wife, the defendant, saying that she had received a summons in the post from his solicitors. That his wife then produced a large A4 brown coloured envelope which contained papers. He looked at these documents and to the best of his recollection the writ was one of the documents enclosed in the envelope. I bear in mind that his recollection was years after the event. He gave the documents back to his wife in order that she could send them to her insurance company. He cannot say what happened to the papers after he left them with his wife. I bear in mind that he has nothing financially to gain by that evidence. If the writ was served then he can proceed with his action. If the writ was not served then he has a clear case in negligence against his solicitor and that liability has been expressly accepted. I accept his evidence and accordingly I accept that the writ was served on the defendant.

[23] I allow the appeal and hold that the writ was duly served on the defendant.