Neutral Citation No. [2014] NIMaster 4 | *Ref:* 2014NIMaster4

Judgment: approved by the Court for handing down | *Delivered:* 14/03/2014
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Ilmar Cudars

Plaintiff;

and

McAleer & Rushe Limited

First Defendant.

Martin Meenagh

Second Defendant.

Martin Meenagh Formworks Limited

Third Defendant.

Master Bell

Introduction

[1] There are two applications before me in connection with the Writs issued in this action.

[2] The first application is an application by the first defendant by way of summons dated 28 October 2013 seeking an order "that the plaintiff's action against the first defendant be dismissed with costs pursuant to the provisions of Order 6 Rule 7 of the Rules of the Court of Judicature (NI) 1980 on the

grounds that the plaintiff has not served a valid Writ of Summons upon the first defendant."

[3] The second application is an application by the plaintiff by way of summons dated 6 December 2013 seeking :

(i) An order pursuant to Order 6 Rule 7 "extending the time limit for service of the plaintiff's first Writ of Summons".

(ii) An order pursuant to Order 32 Rule 12A disapplying the relevant limitation period insofar as it applies to the plaintiff's second Writ of Summons.

[4] In respect of the first defendant's application a grounding affidavit was sworn by Alexander Trimble on 28 August 2013. The plaintiff filed no affidavit in reply.

[5] In respect of the plaintiff's application a grounding affidavit was sworn by Jonathan Killen on 4 December 2013 and a replying affidavit on behalf of the first defendant was sworn by Alexander Trimble on 31 January 2014.

[6] At the hearing of the application I had the benefit of a skeleton argument and oral submissions by Mr Sinton for the first defendant, together with a skeleton argument by Mr Ham and oral submissions by Mr Scullion on behalf of the plaintiff.

Background Facts

[7] On 9 April 2008 the plaintiff was working as a labourer on a building site in Cookstown. There was a ladder propped up against metal shutters which are used for erecting reinforced concrete. The plaintiff moved the ladder and began to carry it away from where it had been. Unfortunately a large metal shutter had not been secured and it fell. This caused the plaintiff to fall and land heavily on his side. He suffered an injury to his left leg, left hip, thigh, knee and ankle.

[8] The plaintiff was employed on the building site by the first defendant. The second defendant had been subcontracted to erect the metal shutters at the site.

[9] A chronology of significant events in connection with the litigation is as follows :

(i) The date of the cause of action was 9 April 2008.
(ii) On 25 March 2009 a letter of claim was sent by the plaintiff to the first defendant.

(iii) On 8 April 2011 the first Writ was issued.
(iv) On 13 September 2012 the first Writ was served upon the first defendant.
(v) On 9 November 2012 the solicitors for the first defendant wrote to the plaintiff's solicitors pointing out that the first Writ had been served out of time and asking for confirmation that the action would be discontinued.
(vi) On 4 January 2013, having received no reply, the solicitors for the first defendant wrote to the plaintiff's solicitors asking for a reply to its letter of 9 November 2012.
(vii) On 17 January 2013, apparently following a telephone conversation between the parties' representatives, the solicitors for the first defendant wrote to the plaintiff's solicitors stating that they were unaware of who the insurers for the second and third defendants might be and that they were unable to assist with what the correct title of the second and third defendants might be.
(viii) On 22 February 2013 a second Writ was issued.
(ix) On 17 April 2013 the second Writ was served upon the first defendant. The covering letter accompanying the second Writ stated "Please be advised that we are discontinuing the first Writ served."

The Plaintiff's Application under Order 6 Rule 7

[10] Order 6 Rule 7 provides –

> "7. - (1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for 12 months beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.
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> (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] Paragraph 6/8/6 of the Supreme Court Practice 1999 ("The White Book") states :

"The principles to be deduced from the cases may be set out shortly as follows :

(1) It is the duty of the plaintiff to serve the Writ promptly. He should not dally for the period of its validity; if he does so and gets into difficulties as a result he will get scant sympathy.
(2) Accordingly there must always be a good reason for the grant of an extension. This is so even if the application is made during the validity of the Writ and before the expiry of the limitation period; the later the application is made, the better must be the reason.
(3) It is not possible to define or circumscribe what is a good reason. Whether a reason is good or bad depends on the circumstances of the case. Normally the showing of good reason for failure 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* [1988] 1 W.L.R. 309; [1988] 1 All E. R. 996 HL.)"

[12] In the case before me, the grounding affidavit by Mr Killen offers no reason for the failure to serve the first Writ and no reason as to why an extension should be granted. In essence he simply avers that the first defendant is unlikely to be prejudiced in the preparation of a defence.

[13] The plaintiff's skeleton argument also offers no good reason for the extension of the validity of the Writ. In his oral submissions counsel for the plaintiff conceded that there was no particular reason which he could offer as to why the first Writ was not served in time, nor any reason which he could offer as a good reason for the validity of the Writ to be extended.

[14] In the absence of a good reason appearing from either the grounding affidavit or the submissions of counsel, the application to extend the period of the validity of the Writ must fail and I therefore dismiss this aspect of the plaintiff's application.

The Plaintiff's Application to Disapply the Limitation Period

[15] Article 7 of the Limitation Order (Northern Ireland) 1989 provides that actions in respect of negligence may not be brought after the expiration of the period of three years from the date on which the cause of action accrued or from the date of knowledge (if later) of the person injured.

[16] The court may allow an action to proceed, notwithstanding the expiry of the relevant period of limitation, by overriding the prescribed time limits.

The circumstances in which the court may exercise its discretion are contained in Article 50 of the 1989 Order, which provides:

> "50. - (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –
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> (a) the provisions of Article 7, 8 or 9 prejudice the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this paragraph would prejudice the defendant or any person whom he represents,
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> the court may direct that those provisions are not to apply to the action, or are not to apply to any specified cause of action to which the action relates.
>
> (4) In acting under this Article, the court is to have regard to all the circumstances of the case and in particular to –
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> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) the extent to which, having regard to the delay, the evidence is adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by Article 7, 8 or, as the case may be, 9;
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> (c) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
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> (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

Principles governing the application of the 1989 Order

[17] The principles governing the manner in which this Order is to be applied and in particular the exercise of the discretion under Article 50 are well known and are applied in cases such as, for example, *Walker v Stewart* [2009] NIJB 292, *Taylor v McConville* [2009] NIQB 22 and *McFarland v Gordon* [2010] NIQB 84. These principles include:

(i) The discretion under Article 50 is expressed in the widest terms.

(ii) The exercise of the court's discretion to "disapply" the time limits prescribed by the 1989 legislation is unfettered (*Thompson v. Brown* [1981] 1 WLR 744.)

(iii) The burden of proof in an application under Article 50 rests upon the plaintiff. (*Barrand v. British Cellophane, The Times, February 16, 1995*).

(iv) Ordinarily the court should not distinguish between the litigant himself and his advisors. That said, the prejudice the plaintiff may suffer if the limitation is not disapplied may be reduced by his having a cause of action in negligence against his solicitors.

(v) Discretion can in an appropriate case be exercised in the plaintiff's favour even where the delay is substantial, but in such cases careful consideration must be given to the ability of the court to hold a fair trial. (*Buck v English Electric Company Limited* [1977] 1 WLR 806). Even 5 or 6 years delay raises a presumption of prejudice to a defendant but this presumption is rebuttable. As a general rule however the longer the delay after the occurrence of the matters giving rise to the cause of action, the more likely that the balance of prejudice will swing against allowing the action to proceed by disapplying the limitation period.

[18] However what is at the heart of Article 50 is whether it would be equitable to allow an action to proceed and, in fairness and justice, the obligation of a tortfeasor to pay damages should only be removed if the passage of time has significantly diminished his opportunity to defend himself. The basic question therefore to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet the claim on the merits notwithstanding the delay in the commencement. (*Cain v Francis* [2009] 3 WLR 551).

Applying the principles to the present case

The length of, and the reasons for, the delay on the part of the plaintiff

[19] The date of the cause of action was 9 April 2008. The second Writ was issued on 22 February 2013, almost two years out of time. Counsel for the plaintiff submitted that it was difficult to say what the reasons for the delay were in this case. He could not formally offer a reason. He could only speculate that, in the light of the correspondence from the first defendant's solicitor, the first Writ had been served outside the period of its validity and a decision was then taken to issue a second Writ. Counsel for the first defendant submitted that the grounding affidavit offers no reason for the delay. He suggested that it might be possible to infer from paragraph 4 of Mr Killen's affidavit that the reason for the issue of the second Writ was that the error in respect of the first Writ had been drawn to the plaintiff's solicitor's attention. Counsel argued that, having had this error drawn to his attention on 9 November 2012, action should have been taken to remedy the difficulty as a matter of urgency. However nothing happened for over two and a half months until a second Writ was issued.

The extent to which, having regard to delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is likely to be less cogent

[20] Liability in this action has not been conceded. Counsel for the plaintiff submitted that the only witnesses likely to be called on behalf of the plaintiff at any trial would be the plaintiff himself and Mr Andrews, a consultant orthopaedic surgeon, who had already furnished a report. Counsel for the plaintiff was unable to indicate to me how crucial recall would be at any trial or whether any particular credibility issues were likely to arise. Counsel for the first defendant indicated that it was likely that his client's witnesses would include other employees who were present at the time. He did not, however, have any information regarding this issue or information as to whether a proper investigation had been carried out by the first defendant as to their likely testimony. Counsel for the first defendant emphasised that after the passage of time there was a rebuttable presumption that prejudice had

occurred and that the plaintiff had not rebutted it. On that basis, he submitted, the court should not disapply the limitation period.

The conduct of the defendant after the cause action arose

[21] Both counsel agreed that the first defendant had been blameless in regard to the difficulty that had arisen.

The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action

[22] Both counsel submitted that this factor did not apply in this action.

The extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages

[23] Counsel for the plaintiff submitted that he could not advise the court as to when the plaintiff personally attended with his solicitor but did observe that his letter of claim was dated 25 March 2009, some eleven months after the date of cause of action. Counsel for the first defendant submitted that the court was not entitled to make an artificial distinction between when the plaintiff personally performed an action and when his solicitor did something.

The steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice

[24] Counsel for the plaintiff observed that the medical report from Mr Andrews was dated 30 August 2010, some two years and four months after the date of the cause of action. Counsel for the first defendant submitted that the plaintiff personally could not be criticised for this particular delay.

Other circumstances

[25] Counsel for the plaintiff submitted that the court should not give the first defendant the benefit of a technicality. He submitted that, in all the circumstances, the first defendant had not shown that he would be prejudiced "all that much" by a refusal to disapply the limitation period. Indeed he submitted that to refuse the plaintiff's application would cause greater prejudice than to allow it.

[26] Counsel for the first defendant submitted an alternative view, suggesting that the first defendant would be prejudiced by being denied an absolute defence in the action. He indicated that the plaintiff had an alternative remedy, namely to sue his solicitor for professional negligence.

Conclusion

[27] The essential question facing the court is whether it is fair and just in all the circumstances, bearing in mind that the onus of proof rests on the plaintiff, to expect the first defendant to meet the claim against it on the merits in this action notwithstanding the delay in commencement. I explored with the parties the extent, if any, to which the defendant has been disadvantaged in investigating the claim and in assembling evidence. Although I would be surprised if an investigation had not taken place following an injury on site, there was no evidence before me that an investigation had taken place and that, for example, photographs had been taken of the scene or witness statements taken from those who had observed the event. Although pressed on whether an investigation had taken place, counsel for the first defendant was unsighted on this point. I have also looked at the causes for the delay and have concluded that the plaintiff is clearly without good cause for the delay in issuing the second Writ. On balance therefore I have come to the conclusion that the plaintiff has not discharged the burden of satisfying me on all the available evidence that it would be equitable to disapply the limitation period in this case and I therefore dismiss his application to disapply the limitation period.

[28] In respect of the first defendant's application for an order pursuant to Order 6 Rule 7 that the plaintiff's action be dismissed, this application is misconceived. Order 6 Rule 7 does not grant me a power to dismiss the action. In the light however of my decisions in respect of the plaintiff's applications, there is no need to deal with the first defendant's application in any further way and I dismiss it without any further order.

[29] In the light of my decision on the plaintiff's summons, I award costs to the first defendant and certify for counsel.