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Judgment: approved by the Court for handing down | *Delivered:* **24/03/2017**

(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between

JOSEPH McGUINNESS

Plaintiff:

-v-

PATRICK BRADY

Defendant:

_____

STEPHENS J

Introduction

[1] This is an appeal from rulings made in relation to two interlocutory applications which were heard and determined by Master Bell on 26 January 2017. The interlocutory applications were:

(a) An application by the defendant for an order pursuant to Order 12 Rule 8 of the Rules of the Supreme Court (Northern Ireland) 1980 declaring that the writ has not been duly served on the defendant.

(b) An application by the plaintiff for an order pursuant to Order 6 Rule 7(2) extending the validity of the writ.

[2] Master Bell acceded to the defendant's application and dismissed the plaintiff's application. The plaintiff has appealed against both decisions. Mr Brian Fee QC, who appeared with Ms Nessa Fee on behalf of the plaintiff, conceded at the outset that the Master was correct to declare that the writ had not been duly served on the defendant. In relation to that part of the plaintiff's appeal I affirm the order of the Master. The issue between the parties is whether the validity of the writ should be extended.

Legal principles

[3] There was no dispute between Mr Fee on behalf of the plaintiff and Mr Michael Maxwell, who appeared on behalf of the defendant, as to the applicable legal principles. I was referred to the Supreme Court Practice 1999 at page 54 and paragraph 6/8/6 and to *Kleinwort Benson Limited v Barbrak* [1987] AC 597, *Brennan v Beattie and another* [1999] NIJB 54, *Bailey v Barrett and Others* [1988] NI 368 and *Sweeney v National Association of Round Tables* [2015] NI Master 6. In the White Book the principles to be deduced from the cases are summarised in ten separate paragraphs. I have considered all of those principles but only incorporate into this judgment the following:

(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 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 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.

[4] Examples of reasons which have been held to be good are summarised in paragraph 4 and examples of reasons which have been held to be bad are summarised in paragraph 5. Paragraph 5(b) is of significance in this case stating that an example of a reason which has been held to be bad is that legal aid is awaited. Paragraph 5(b) continues by stating that "this is not to say that delays caused by the operation of a legal aid system should never be taken into account. Delay caused by a failure of legal aid authorities to act or act reasonably may constitute good reason. Delay caused by the failure of the plaintiff or his solicitors to act timeously in applying for legal aid or for the removal of a legal aid restriction will not constitute good reason." Paragraph 5(d) is also relevant giving carelessness as an example of reasons which have held to be bad.

[5] Paragraph 8 reads as follows:

> "Where application for renewal is made after the writ has expired and after the expiry of a relevant limitation period the applicant must not only show good reason for the renewal but must give a

satisfactory explanation for his failure to apply for renewal before the validity of the writ expired."

[6] Paragraph 9 states that "the decision whether an extension to the validity of a writ should be allowed or disallowed is a matter for the discretion of the court dealing with the application. *Jones v Jones* [1970] 2 QB 576 shows that in exercising discretion the judge is entitled to have regard to the balance of hardship. The exercise of discretion however follows upon the showing of good reason by the applicant. Hardship to the applicant if the extension is disallowed is not a substitute for good reason."

[7] Finally 10 states that "where a plaintiff is faced with the sort of difficulty categorised in paragraph 5 of this note or for any other reason wishes to delay the action the proper and prudent course is to serve the writ and to apply to the defendant for an extension of time to serve the statement of claim or failing agreement with the defendant to apply to the court."

Date of expiry of the validity of the writ and the test to be applied

[8] In this case the validity of the writ expired on 29 June 2016 or on 30 June 2016. The application to extend the validity of the writ was made by summons issued on 17 November 2016 some 4½ months after the validity had expired. Accordingly in this case the plaintiff must establish a good reason for the grant of an extension and must give a satisfactory explanation for his failure to apply for renewal before the validity of the writ expired. If the plaintiff satisfies both of those requirements then the court must consider the balance of hardship.

The good reasons advanced on behalf of the plaintiff and the plaintiff's submissions as to the balance of hardship.

[9] Mr Fee on behalf of the plaintiff submitted that there were two good reasons:

(a) That there was delay on the part of the Police Service of Northern Ireland in providing a police report which meant that the plaintiff's solicitors were unable to identify the name or address of the defendant.

(b) That there was delay by the Legal Services Commission in considering and then in granting legal aid.

[10] In relation to hardship Mr Fee submitted that the writ was received by the defendant's insurers Axa on 30 June 2016 and that for all practical purposes it was the insurance company who were interested in this litigation. He submitted that as the insurers had received the writ within the period of its validity and had earlier been put on notice of a claim that any balance came down firmly in favour of the plaintiff.

Factual background

[11] On 30 June 2012 the plaintiff, Joseph McGuinness, a pedestrian, was struck by a taxi driven by the defendant, Patrick Brady. The road traffic collision occurred on the Grosvenor Road, Belfast. After the road traffic collision the plaintiff was taken by ambulance to hospital so that he did not know the identity of the defendant. The police attended the scene of the road traffic collision and carried out an investigation which included identifying the defendant by name and obtaining his address.

[12] The plaintiff first attended with his solicitors in August 2012. The plaintiff's solicitors wrote to the police for a copy of the police report on 23 April 2013 and the report was eventually provided to them by the police on 21 June 2014. The report provides the name of the defendant and his address, but unbeknownst to the plaintiff's solicitors the defendant no longer resided at that address. On 29 July 2014 the plaintiff's solicitors wrote a letter of claim sending it to the defendant at that address but received no reply. They then through their own enquiries determined that the defendant's insurers were Axa. That information was not contained in the police report. On 17 November 2014 they sent the letter of claim to Axa. Axa denied all liability on 28 February 2015, no doubt relying on that part of the police report in which the defendant described the plaintiff as falling onto the road in front of his taxi. The plaintiff's solicitors took instructions from the plaintiff and determined that he wished to proceed. On 30 June 2015 they issued a writ of summons and also applied for emergency legal aid. The legal aid authorities replied to the effect that there was no urgent reason for the application stating that it would deal with it as an ordinary application. On 25 September 2015 the Legal Services Commission refused legal aid and on 13 October 2015 the plaintiff's solicitors appealed their decision. Eventually legal aid was granted on 20 June 2016 and the plaintiff's solicitors were informed of this on 23 June 2016. On the following day 24 June 2016 they attempted to serve the defendant by sending the writ by first class post to the address identified in the police report. There were two problems with that attempt to serve the defendant. The first was that the defendant did not reside at that address. The second was that in accordance with the rules service by first class post would have been deemed to have occurred on 1 July 2016 after the validity of the writ had expired. As I have indicated Mr Fee accepts that the writ was not duly served on the defendant. On the same day as the plaintiff's solicitors sent the writ by first class to the defendant it also sent a copy to Axa which they received on 30 June 2016. These two applications then followed.

Consideration as to whether the plaintiff has established a good reason

[13] The first reason relied by the plaintiff was the delay between 23 April 2013 and 21 June 2014 in obtaining a police report. There was delay in obtaining the police report because the report had not been finalised by the police who had not concluded their investigations. However, the reason why they had not concluded their investigations was that they wished to, but were unable to interview the

plaintiff. So it was the plaintiff delaying the provision of the police report. Furthermore, if all the information that the plaintiff's solicitors were seeking was the name and address of the defendant that could have been obtained from the police in advance of the police report by the simple expedient of writing to the police asking for the information. Finally, the correspondence to the police from the plaintiff's solicitors contains a number of mistakes including giving the wrong date of the road traffic collision, writing to the wrong address and failing to refer the police to earlier correspondence.

[14] The reason why the delay in obtaining the police report was advanced as a good reason was that it would have revealed the name and address of the defendant. It was suggested that absent the defendant's name and address the plaintiff's solicitors could not apply for legal aid or could not notify the defendant's insurers and could not commence proceedings. But as I have indicated the name of the defendant could and should have been obtained at a much earlier date. The involvement of the insurers and the legal aid application could and should as a consequence all of occurred at a much earlier date and in my estimation well within a period of one to two years after this road traffic collision occurred.

[15] The second reason relied on by the plaintiff were difficulties in obtaining legal aid. I have no doubt that the legal aid authorities are under considerable pressure of work and it has been my experience in these courts that there is a considerable volume of business bearing down on the legal aid authorities. However, the concentration by the plaintiff's solicitors here are on the events immediately prior to 30 June 2016. This ignores the fact that all these steps could and should have been undertaken at a much earlier stage. On that basis I reject the suggestion that this amounts to a good reason as opposed to the outworking of an earlier inappropriate approach to the investigation of this case.

[16] I also reject this as a good reason relying on the tenth paragraph in the White Book which states that where a plaintiff is faced with the sort of difficulty characterised in 5(b), that is legal aid is awaited, the proper and prudent course is to serve the writ on the defendant without obtaining legal aid. The plaintiff's solicitors could and should have served the writ without obtaining legal aid. They assert that they did not do so because this would have exposed the plaintiff to an order for costs if he did not have the protection of a legal aid certificate. I consider that to be reasoning after the event rather than a thought process that occurred at the time. I come to that conclusion because there is no evidence as to the plaintiff's finances. The suggestion is that the plaintiff's solicitors did not wish to jeopardise the plaintiff's personal finances. However, he is entitled to and has the benefit of a legal aid certificate, there is no suggestion that he had any asset that was vulnerable if the plaintiff's solicitors took the simple step of serving the writ as suggested in the White Book.

[17] I also consider that the plaintiff has provided no satisfactory explanation for the failure to renew the writ before the validity of the writ expired. The plaintiff

could and should have applied for emergency legal aid to bring such an application. That application could and should have been made at least six months before the writ expired. I do not consider that the plaintiff has established a good reason or a satisfactory explanation and on that basis alone I would affirm the order of the Master and dismiss this appeal.

Balance of hardship

[18] In case I am incorrect in that decision I set out my views in relation to the balance of hardship. The plaintiff submits and I agree that in practical terms Axa are the interested party, but I do not consider that they are only interested party. The defendant has his own driving record with potential impacts for instance on his own insurance premiums to consider. However, fundamentally this is a claim involving recollection of events which occurred nearly half a decade ago. The medical evidence and the liability evidence are bound to have been affected by that delay. I consider that the balance comes down in favour of the defendant. I would refuse to extend the validity of the writ also on that alternative ground.

Conclusion

[19] I affirm both orders of the Master.