

Neutral Citation No: [2014] NIQB 85

Ref: WEA9306

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

Delivered: 20/05/2014

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

LIAM MULLAN

and

MARGARET MULLAN

Plaintiffs

V

MOUNTAINVIEW LTD

First Defendant

and

GREG Mc CARTNEY and KEVIN CASEY
practising as McCARTNEY & CASEY, Solicitors

Second Defendant

WEATHERUP]

[1] This is the plaintiffs' appeal against an Order of the Queen's Bench Master of 8 May 2014 setting aside the Order of the Chancery Master of 21 September 2012 extending the plaintiffs' Writ of Summons. Mr Toner QC appeared on behalf of the plaintiffs and Mr Lavery QC on behalf of the first defendant.

[2] The Writ was issued in the Chancery Division on 21 September 2012; the plaintiffs applied ex parte to the Chancery Master who, on 16 September 2013,

extended the plaintiff's Writ for a period of 4 months; the Writ was served on the defendants on 9 January 2014; the first defendant entered a conditional appearance and applied to set aside the Order of the Chancery Master extending time; the case was transferred to the Commercial List on 30 April 2014; on 8 May 2014, on an inter parties application, the Queen's Bench Master set aside the Order of 16 September 2012. The plaintiffs appeal is against that Order.

[3] The defendant contends that there was no good reason for the extension of the Writ in the first place. The plaintiffs' grounds for extension were stated to be that there was a related action which arose out of substantially the same facts with Mountainview Ltd as plaintiff and the Mullans as defendants. The related action commenced on 10 September 2012 and the Mullans entered an appearance on 24 September 2012, having issued their Writ in the present case on 21 September 2012.

[4] The plaintiffs' position is that the present Writ was issued as a protective Writ. The related case was transferred to the Commercial List and the Statement of Claim was directed to be served by 21 September 2013. The plaintiffs did not serve the Writ in the present action while awaiting the decision of Mountainview Ltd on whether to serve the Statement of Claim in the related action. If Mountainview Ltd served a Statement of Claim as directed, the Mullans proposed to serve the present Writ. If Mountainview Ltd did not serve the Statement of Claim as directed it was contemplated that the present Writ would not proceed. The Chancery Master accepted the grounds advanced by the plaintiffs and extended the Writ.

[5] The inter-parties matter then came on before the Queen's Bench Master. A solicitor's note was produced on the attendance before the Master on 8 May 2014. The Master referred to the discussion in the 1999 White Book and stated his conclusion that this was a case of carelessness by the solicitors. The Master did not believe there was good reason on the face of the affidavit which would have given the Chancery Master reason to extend time. The Master stated that he felt bound by the decision of Baly v Barrett, (1989) The Times May 18, and without good reason the Court should not extend the time within which to serve the Writ and therefore he set aside the Chancery Master's Order.

[6] Order 6 Rule 7(1) of the Rules of the Court of Judicature 1980 provides that a Writ is valid in the first instance for 12 months beginning with the date of its issue and Rule 7(2) provides that 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.

[7] The summary in the White Book 1999 at paragraph 6/8/6 sets out a number of applicable principles (summarised below) -

- “(i) 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 he gets into difficulties as a result, he will get scant sympathy.

- (ii) 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.
- (iii) 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.
- (iv) Examples of reasons which have been held to be good are:
 - (a) a clear agreement with the defendant that service of the Writ be deferred.
 - (b) impossibility or great difficulty in finding or serving the defendant, more particularly if he is evading service.
- (v) Examples of reasons which have been held to be bad are :
 - (a) that negotiations are proceeding.
 - (b) that legal aid is awaited.
 - (c) that there is difficulty in tracing witnesses or obtaining expert or other evidence.
 - (d) carelessness.
 - (e) that plaintiff trustees wished to make an application to the Court for an Order to safeguard their position as to costs.

- (f) the need perceived by the plaintiff's solicitors to serve a Statement of Claim with the Writ.
 - (vi) The application for renewal should ordinarily be made before the Writ has expired.
- (Leaving aside matters concerning limitation periods)
- (ix) The decision whether an extension to the validity of the Writ should be allowed or disallowed is a matter for the discretion of the Court dealing with the application."

[8] At 6/8/13 under the heading 'Order for Renewal' the White Book states that the common assumption that the Court, when granting an extension of validity of a Writ on an ex parte application, will grant such an extension as a matter of course for a maximum period allowed by the rule, is wrong, referring to Baly v Barrett (1989) The Times, May 18. Counsel for the plaintiffs referred to Baly v Barrett as a decision 'of its time' on the basis that nowadays a consideration of the overriding objective would produce a different outcome.

[9] On 16 September 2012, when the ex parte application came before the Chancery Master, the plaintiffs' reason for not having served the Writ was concerned with the progress of the related action. I am satisfied that there was no good reason for extension of the Writ. The plaintiffs applied for the extension within the period of the validity of the Writ and could have served the Writ.

[10] The extension was granted on an ex parte application. The defendant's response was by inter parties application to set aside the Order rather than challenging the Order by appeal. That was the correct approach. Valentine's Civil Proceedings: The Supreme Court, at paragraph 11.12 refers to such an approach being taken under Order 32 Rule 8 and under the inherent jurisdiction of the Court.

[11] This appeal from that inter-parties decision is a rehearing of the set aside application. I have stated that I find there was no good reason to extend the Writ in the first place. Nevertheless the Order was made on the application of the plaintiffs prior to the expiry of the Writ. Had there not been that Order extending the Writ I expect that the plaintiffs would have served the Writ. In the event the Writ was not served within the original 12 month period but was served within the extended period of 4 months granted by the Chancery Master. To set aside the extension of the Writ retrospectively seems to me to involve prejudice to the plaintiff who would not have been at risk of the expiry of the Writ if the Chancery Master's Order had not been made, given that I am satisfied that the Writ would have been served.

[12] Issues arise about the conduct of the related action and how the two actions and the respective pleadings might be accommodated together. I set aside those considerations for present purposes. In the circumstances that exist today I am satisfied that there is good reason to confirm the extension of the Writ. The good reason does not arise because of the circumstances that existed on 16 September 2013, when the matters relied on by the plaintiffs did not constitute good reason. The good reason arises because of circumstances that post-date 16 September 2013, namely the plaintiff not having served the Writ within the original 12 months because of the extension granted and then serving the Writ within the extended period.

[13] I am unable to agree with the Master that the position of the plaintiffs arose out of the carelessness of the plaintiffs or their solicitors. The plaintiffs came to Court to seek what was the appropriate Order, had it been the case that the plaintiffs had good reason to obtain that Order. In the event the Chancery Master agreed to grant the Order. In applying to the Master at that time the plaintiffs sought to regularise their position, as they saw it, because of the related action. Had the extension been refused on 16 September 2013 the plaintiffs would have served the Writ and not been at risk of losing the entitlement to proceed with the present action.

[14] Accordingly, I allow the appeal. I refuse the defendant's application to set aside the Order of 16 September 2013. There is good reason to extend the period for service of the Writ. Lest it be said that the Writ was not duly served on 4 January 2014 by the absence of good reason to extend the Writ at the date of the first Order, I extend the Writ to 4 January 2014. In so far as it might be necessary to do so I would extend the Writ for 12 months from 21 September 2013.