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Judgment: approved by the Court for handing down | *Delivered:* **07/07/2014**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

Cahir O'Neill

Plaintiff;

and

Eddie Rowan trading as PLM Promotions

Defendant.

Master Bell

Introduction

[1] This application by the defendant is for an order under Order 12 Rule 8 declaring that the Writ has not been duly served and setting it aside or, alternatively, dismissing the action for want of prosecution. The plaintiff has not issued any summons to extend the validity of the writ. However both parties wish me to exercise my discretion under Order 2 Rule 1 to overlook irregularities. Counsel for the plaintiff frankly submitted, "There are mistakes everywhere" and counsel for the defendant, equally frankly, conceded that it was "hard to argue against that".

[2] The cause of action arose on 6 September 2008. (The plaintiff's solicitor's affidavit mistakenly states that the cause of action arose on 30 August 2008. However both the writ and the Statement of Clam refer to

6 September 2008.) The plaintiff was a visitor at the "Planet Love" music festival at Shanes Castle Estate in Antrim. He had been standing in tent number 6 on the site when, as a result of movement of other festival patrons, the plaintiff fell. Unfortunately, because the plaintiff's feet were stuck in mud, he injured his left leg when he fell, suffering a serious fracture to his tibia and fibula. The defendant was allegedly the occupier of the premises being used for the festival.

[3] On 10 October 2008 the plaintiff sent a letter of claim addressed to Planet Love Promotions, PO Box 388, BT28 9BS. In the usual way it set out the fact that the plaintiff had been injured, asked the defendant to accept liability and make proposals for his compensation. It suggested that a copy of the letter be passed to the defendant's insurers. There was then subsequent correspondence between the defendant's insurers and the plaintiff's solicitor dealing with matters such as the plaintiff's national insurance details, availability of A&E records, and an accident report.

[4] However on 27 May 2009 the plaintiff's solicitor received a letter from the defendant's solicitor in the following terms :

> "Cahir O'Neill v Eddie Rowan T/A PLM Promotions
>
> We refer to the above matter. Please note that we are now instructed to represent the Defendants in this case. Could you please address all future correspondence to us."

[5] During the remainder of 2009, all of 2010 and most of 2011 there was correspondence which passed between the two firms of solicitors on such subjects as medical evidence, the Entertainments Licence, Health and Safety policy and the plaintiff's employment details.

[6] With the three year anniversary of the plaintiff's injury fast approaching, a writ issued on 30 August 2011 against "Eddie Rowan trading as PLM Promotions of PO Box 338, BT28 9BS." (I note in passing that Order 10 Rule 1 does not allow for a writ to be served at a post office box address.) The writ was not served on Mr Rowan personally nor indeed sent to the Post Office box address referred to on the writ but was posted to the defendant's solicitor under cover of a letter dated 7 September 2011 which stated :

> "We refer to the above matter and enclose for your attention writ by way of service."

Hence the writ was posted one day outside the three year basic limitation period for personal injuries actions provided for by the Limitation (Northern Ireland) Order 1989.

[7] As to why the writ was dealt with in this way, the plaintiff's solicitor deposed that, when he received the letter dated 27 May 2009 asking for all future correspondence to be addressed to the solicitors, he "assumed this included service of the writ."

[8] The solicitor acting for the defendant has deposed that the writ which was posted did not arrive at their office. She has also deposed that, at the time the writ was posted, she did not have authority to accept service of the proceedings.

[9] The primary mode of service provided for by the Rules is personal service. However instead of being served personally, a writ may be served :

> (a) by sending a copy of the writ by ordinary first-class post to the defendant at his usual or last known address , or
> (b) if there is a letter box for that address, by inserting through the letter a copy of the writ enclosed in a sealed envelope addressed to the defendant.

[10] There are other methods of service which are provided for. Of particular note, Order 10 Rule 4 provides that service of a writ may be effected upon a solicitor if the solicitor indorses the writ with a statement that he accepts service on behalf of the defendant. In those circumstances the writ is deemed to have been duly served on the date on which the indorsement was made. Of course, in respect of this action, the defendant's solicitor asserts that the writ was not received and hence it has not been indorsed with a date of service by his solicitor.

[11] However, being unaware that the writ had not been received, the plaintiff's solicitor sent a Statement of Claim to the defendant's solicitor on 5 July 2012. This provoked a response from the defendant's solicitors on 4 December 2012 whereby they said that, after taking instructions from their clients, it transpired that there was no record of any writ having been served. They therefore asked for details of how it had been served. The plaintiff's solicitor replied in a letter dated 18 December 2012 that the writ had been served by first class post on the defendant's solicitor on 7 September 2011 and had not been returned. It stated that if an appearance was not entered in the action by the defendant within

seven days then an application to mark judgment in default would be made.

[12] On 17 January 2013 Master McCorry gave leave to the defendant to enter a conditional appearance. Further correspondence between the solicitors then followed after which the defendant's solicitors entered a conditional appearance on 23 January 2013.

[13] The purpose of a conditional appearance is to allow the defendant to dispute either the court's jurisdiction or the validity of the issue or the service of the writ. Having entered the conditional appearance on 23 January 2013, the defendant's solicitors did not, as they should have done, immediately make an application asking for a declaration that the writ had not been validly served. Instead, faced with correspondence dated 28 January 2013 from the plaintiff's solicitor noting their conditional appearance and looking forward to receiving their defence, the defendant's solicitors did in fact serve a defence and a notice for particulars on 24 April 2013. Subsequently, the plaintiff's solicitor served a reply to defence and a notice for particulars. It was only on the 24 June 2013 that the defendant issued a summons seeking an order under Order 12 Rule 8 declaring that the Writ was not duly served and setting it aside.

[14] At the hearing before me three issues were ventilated. I shall deal with each of these in turn.

Was the Writ validly served ?

[15] The two principal methods of service of a Writ are personal service on the defendant or by post at his home address. Neither of these methods were adopted. Instead, an alternative method was attempted, service upon his solicitor (with whom there had been pre-proceedings correspondence). Pre-proceedings correspondence between solicitors may employ a variety of different phraseology to describe the level of involvement which a solicitor has at that point in time with the matter and what instructions and authority a client has given him. In *Edgar v Donnelly and Donnelly* [2006] NIQB 96 the defendant's solicitors wrote to the plaintiff's solicitors and "asked that they noted their interest". In *Brown and others v Innovatorone plc and others* [2009] EWHC 1376 (Comm) the defendant's solicitors "asked that correspondence be sent to them". Neither phrases amounted to statements that they had authority to accept service. In the instant case, the statement in the letter "Could you please address all future correspondence to us" could not be read as meaning "We have authority to accept service". The plaintiff's solicitor's assumption that "Could you please address all future correspondence to us" meant that the writ should be served on

the defendant's solicitor was an assumption which he was not entitled to make. He should have clarified whether or not the defendant's solicitor had authority to accept service. As a matter of fact, the defendant's solicitor did not have instructions to accept service.

[16] Clearly therefore the Writ was invalidly served by the plaintiff. Of course if the plaintiff had attempted to serve the Writ much earlier and the lack of instructions to accept service had been realised much earlier, then the plaintiff's solicitor might have had time to remedy the matter by obtaining the home postal address of the plaintiff or attending at the plaintiff's office to serve the Writ personally. There is much wisdom in the words of the White Book where it states at paragraph 6/8/6 (1999 edition) :

> "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."

Did the defendant waive the irregularity ?

[17] The plaintiff argues that, by filing a defence and a Notice for Further and Better Particulars, the defendant has waived the irregularity that exists over service. The decision of *Fry v Moore* (1889) 23 QBD 395 was offered as an authority for the proposition that, where there had been an irregularity as to service of the writ, a defendant taking steps "which are inconsistent with there having been no proper service of the writ" may be "so inconsistent with the contention that the writ had not been properly served as to amount to a waiver of the irregularity".

[18] Counsel for the defendant submitted that, although service of the writ was being disputed, it was considered that the defendant was vulnerable to an application to mark judgment. In order to safeguard the defendant's interests a defence was therefore served on 24 April 2013. Paragraph 10 of that defence clearly pleaded :

> "The Writ of Summons in this action was not properly served, and as such the plaintiff's proceedings against the defendant should be struck out."

[19] The issue of a defence was clearly a step which ought not to have been taken. What should have occurred was that, after entering a conditional appearance, the defendant should have immediately issued its summons under Order 12 Rule 8 for a declaration that the writ had

not been duly served. Nevertheless it would, in my view, be harsh to conclude that a defence which contained a pleading that service of the writ was being contested was in itself a step which regularised the service of the writ. I am satisfied therefore that this step alone should not be taken as amounting to a waiver of the irregularity.

[20] However on the same date the defendant took another step also. He issued a Notice for Further and Better Particulars raising 31 different matters. In my view this was a step too far. Effectively this invited the plaintiff to continue the engagement between the parties. It did therefore did amount to a waiver of the irregularity in respect of service of the writ and on this basis alone I would have been prepared to dismiss the defendant's application.

Has the conditional appearance become an unconditional appearance?

[21] Order 12 provides

> "7. – (1) A defendant to an action may with the leave of the Court enter a conditional appearance in the action.
> (2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 8, and the Court makes an order thereunder.
>
> *Application to set aside writ, etc.*
> 8. A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within the time limited for service of a defence, apply by summons or motion for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the writ or notice on him out of the jurisdiction.
>
> *Application by defendant where writ not served*
> 8A.—(1) Any person named as a defendant in a writ which has not been served on him may serve on the plaintiff a notice requiring him within a specified period not less than 14 days after service of the notice either to serve the writ on the defendant or to discontinue the action as against him.

> (2) Where the plaintiff fails to comply with a notice under paragraph (1) within the time specified, the Court may, on the application of the defendant by summons, order the action to be dismissed or make such other order as it thinks fit.
> (3) A summons under paragraph (2) shall be supported by an affidavit verifying the facts on which the application is based and stating that the defendant intends to contest the proceedings and a copy of the affidavit must be served with the summons.
> (4) Where the plaintiff serves the writ in compliance with a notice under paragraph (1) or with an order under paragraph (2) the defendant must enter an appearance within the time limited for so doing."

[22] The effect of these provisions was that the defendant had six weeks to make its application under Order 12 Rule 8.

[23] The plaintiff submits that, having filed a conditional appearance and not taking action to have service set aside until the issue of its summons on 24 June 2013, the defendant's conditional appearance became an unconditional appearance.

[24] The plaintiff has referred me to the decision in *Somportex Ltd v Philadelphia Chewing Gum Corporation* [1968] 3 All. E.R. 26. This decision concerns when a conditional appearance becomes an unconditional appearance.

[25] I conclude that the plaintiff's submission is correct and indeed counsel for the defendant conceded that there was no argument which he could mount against the plaintiff's proposition. Because of the defendant's inaction his conditional appearance has become an unconditional appearance.

Should I extend time, out of time, for an application under Order 12 Rule 8, thus preventing the conditional appearance becoming an unconditional appearance ?

[26] However that is not the end of the matter concerning whether the appearance has become unconditional. The defendant offered the decision in *Keymar v Reddy* [1912] 1 K.B. 215 for my consideration. Counsel submitted that even though the six week time period had elapsed, I could extend time, out of time, for the Order 12 Rule 8 application to be made, thus having the effect of preventing the conditional appearance becoming an unconditional appearance.

[27] *Keymar v Reddy* is in my view an out of date authority which has no bearing on the matter at hand. At the time the decision of the English Court of Appeal was made the procedural rules were entirely different. Not least, the concept of a conditional appearance had not been incorporated into the English rules.

[28] In *Davis* v *Northern Ireland Carriers* [1979] NI 19 Lord Lowry observed that where a time limitation is imposed by rules of court the court may exercise a discretion to extend it and where it does so it should consider :

1. whether the time is already past (a court will look more favourably on an application made before time has elapsed).
2. if time has elapsed, the extent to which the party is in default
3. the effect on the opposing party (and in particular if he can be compensated in costs)
4. whether a hearing on the merits has taken place or would be denied by the refusal of the application)
5. whether there is a point of substance to be made which could not otherwise be put forward
6. whether the point is of general not merely particular significance
7. that the rules of court are there to be observed.

[29] In this instance, the time limit imposed under the Rules was 6 weeks whereas the time elapsing between the filing of the conditional appearance and the defendant's application was just over 21 weeks. The defendant is therefore 15 weeks in default. The effect on the opposing party of extending the time limit is significant in that it would have the effect of preventing the conditional appearance becoming an unconditional appearance. A hearing on the merits in the action as a whole has not yet taken place. There is no point of substance to be made which might otherwise not be put forward. The point raised is not one of general significance. Weighing these factors together I consider that I ought not to exercise my discretion to extend the time limit.

[30] I therefore dismiss the defendant's application, award costs to the plaintiff and certify for counsel.