Neutral Citation no. [2003] NIQB 74 | *Ref:* **CAMF4072**

Judgment: approved by the Court for handing | *Delivered:* **18/12/03**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEENS BENCH DIVISION

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BETWEEN

PAUL ROBERT CLYDE

PLAINTIFF;

-and-

R.N.HUTCHINSON

DEFENDANT.

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CAMPBELL LJ

The background

[1] This is an appeal by the defendant from the Master's order that the validity of the writ of summons in this action be extended for a period of nine months commencing on 20 November 2002.

[2] The writ of summons was issued on 21 November 2001 and generally indorsed with a claim for damages for personal injuries, loss and damage sustained by the plaintiff by reason of the negligence of the defendant in and about the treatment and care of the plaintiff on or about 19 November 1998. It was not served on the defendant.

The principles to be applied

[3] Under the Rules of Court the writ was valid for the purpose of service, in the first instance, for a period of 12 months beginning with the date of issue. Where a writ has not been served on a defendant the court may extend its validity from time to time for a period not exceeding 12 months under Ord.6 r.7 (2).

[4] In *Baly and another v Barrett* [1988] NI 368 at 416 Lord Brandon referred to Ord.6 r.7 (2) and to the principles to be applied when exercising the court's discretion on an application for the extension of the validity of a writ where the question of limitation of action is involved. These principles which are to be found in *Kleinwort Benson Limited v Barbrak Ltd* [1987]AC 597 are:

1. The power to extend the validity of a writ should only be exercised for good reason.

2. The question whether good reason exists in any particular case depends on all the circumstances of that case. Difficulty in effecting service of the writ may well constitute good reason, but it is not the only matter that is capable of doing so.

3. The balance of hardship between the parties can be a relevant matter to take into account in the exercise of the discretion. This only arises if matters amounting to good reason for extension, or at least capable of so amounting, have been established. *Waddon v Whitecroft Scoville Ltd.* [1988] 1WLR 309.

4. The discretion is that of the judge and his exercise of it should not be interfered with by an appellate court except on special grounds the nature of which is well-established.

[5] Where the application for extension is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired not only is good reason necessary but the applicant must also give a satisfactory explanation for his failure to apply for extension before the validity of the writ has expired. (*Kleinwort Benson v Barabrack(*supra)at page 623).

The history

[6] The plaintiff's solicitor, Mr Brendan Kearney, in his first affidavit, explains that the claim is for damages for alleged negligence on the part of the defendant in providing dental treatment to the plaintiff between 1990 and 1998. He goes on to say that he did not serve the writ of summons as he was waiting for confirmation from a consultant that his client had a cause of action.

[7] Mr Kearney states that he instructed his secretary to serve the writ of summons on 20 August 2002 but countermanded this instruction as he wished to see the report from the consultant before service. By this time his secretary had recorded the writ as having been served on the computerised office records. As a consequence Mr Kearney overlooked the fact that the writ

had not been served by 21 November 2002. Once he realised that this was so he claims that he brought the application at the first opportunity.

[8] In a subsequent affidavit Mr Kearney states that he received the consultant's report on 3 September 2003 and as it was unhelpful he commissioned a report from another expert on 28 October 2002. It was his intention to serve the writ before 21 November 2002 if the report from the second expert had not been received. He was confident that the computerised record system would remind him to do so.

[9] On 4 December 2002 he realised that the date for service had passed. He was expecting to receive the report from the second expert in the near future as the plaintiff was due to attend him for an examination on 3 January 2003. The expert, a Mr Greene, asked to see the notes and because of the time that it took to obtain them it was 14 February 2003 before they were sent on to Mr Greene. His report was received on 25 February 2003 and an ex-parte application was made to the Master on 21 March 2003. The Master required a summons to be issued and this was done on 13 May 2003.

[10] A period of over 3 ½ months passed between the date on which Mr Kearney first realised that the writ had not been served and the initial application to the Master. This does not fit easily with the assertion by Mr Kearney in his first affidavit that " upon realising that the writ should have been served I have brought this application at the first opportunity."

[11] I do not consider that the error in the solicitor's office constituted good reason. There had been delay in serving the writ and by countermanding the instruction for service to take place in late August Mr Kearney was allowing the time for doing so to go to the limit. The cost of service of a writ is modest, I was told under £10, and it is not a good reason to delay service pending receipt of a medical report to avoid incurring such an expenditure.

[12] If, contrary to this view, the mistake in the solicitor's office did constitute good reason the situation is compounded by the continuing failure to take steps to remedy the situation by bringing an application for an extension at the first opportunity. As Eveleigh LJ said in *Doble v Haymills (Contractors) Ltd* 132 SJ 1063

> "Where there has been delay … it is incumbent upon the solicitor to act with all expedition".

Article 6

[13] The authorities that I have mentioned were decided prior to the coming into force of the Human Rights Act 1998 and it is necessary therefore to consider whether Or.6 r 7 is compatible with Article 6 of the Convention

and the plaintiff's entitlement to have his civil rights determined in a fair and public hearing.

[14] In *Tejedor Garcia v Spain* 1998 26 EHRR 440, at para. 31 the Court reiterated:

> "..that it is in the first place for the national authorities, and notably the courts, to interpret domestic law and that the Court will not substitute its own interpretation for theirs in the absence of arbitrariness. This applies in particular to the interpretation by courts of rules of a procedural nature such as time-limits governing the filing of documents or the lodging of appeals. Although time-limits and procedural rules governing appeals by the prosecution must be adhered to as part of the concept of a fair procedure, in principle it is for national courts to police the conduct of their own proceedings."

[15] As the Court noted in *Stubbings and Others v United Kingdom* 1997 23 EHRR 213 at para. 48

> "This right of access is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State…….[the Court] must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore a limitation will not be compatible with Article 6(1) and does not pursue a legitimate aim if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

[16] The legitimate aim of the rule is to regulate the court's procedure and to ensure that proceedings are not issued and left in a state of suspense with the defendant unaware that they exist. By making a writ valid for the purpose of service, in the first instance, for only 12 months it might be argued that Or. 6 r 7(1), is incompatible with Article 6. When this rule is read in conjunction with Or. 6 r 7(2) it is apparent that by giving the court jurisdiction to consider the merits of a particular case and to extend the validity of the writ from time to time in the exercise of its discretion, the rule is flexible and there is an absence of any arbitrariness.

[17] I am satisfied that Or. 6 r. 7 does not impair the essence of the right under Article 6 and that there is proportionality between the legitimate aim that it pursues and the means of doing so.

[18] For these reasons I allow the appeal.