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Judgment: approved by the Court for handing down | *Delivered:* **14/10/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

PHILOMENA WALKER

Plaintiff;

And

HONOUR STEWART

Defendant.

GILLEN J

Application

[1] This is an application by the defendant by way of preliminary issue for a ruling of the court that the plaintiff's claim is statute barred having been issued outside the time limit specified in Article 7 of the Limitation (Northern Ireland) Order 1989 ("the 1989 Order").

Background Facts

[2] The plaintiff's claim arises out of a road traffic accident which occurred on 9 September 2003 .The plaintiff alleges that she was in collision with the defendant and suffered person injuries, loss and damage.

[3] By way of letter of 15 September 2003 the plaintiff's solicitors notified the defendant of the claim requesting her to furnish the correspondence to her insurance company.

[4] The defendant's insurers responded to the plaintiff's letter of claim promptly. By 3 December 2003 the defendant's insurers had written to the

plaintiff's solicitor seeking information and medical evidence in respect of the claim.

[5] By correspondence of 9 January 2004 the plaintiff's solicitors indicated that they were arranging to have the plaintiff medically examined and furnished details of the CRU.

[6] Further discussions then ensued between the plaintiff's solicitors and the defendant's solicitors. However the next correspondence before me after that of 9 January 2004 was a letter of 17 October 2006 from the plaintiff's solicitors to the defendant's insurance company apologising for the delay in forwarding further medical evidence .This was explained by a delay in obtaining an addendum report from Dr Stanley Hawkins. The report enclosed with that letter was apparently the first medical report received by the defendant. It is to be noted that by this time, the primary limitation period in respect of the plaintiff's claim had expired.

[7] The plaintiff's solicitor acknowledged that the matter was statute barred in correspondence of 20 October 2006 and the defendant was asked to confirm that no issue was to be taken with the limitation point.

[8] On 26 October 2006 the defendant insurers wrote to the plaintiff's solicitors indicating that no such assurance would be given in respect of the limitation issue.

[9] Ultimately the Writ of Summons was issued on 30 November 2006 i.e. approximately 2 ½ months following the expiration of the primary limitation period.

[10] Accordingly in this matter, the defendant has issued proceedings dated 23 August 2007 seeking a preliminary issue that the plaintiff's claim is statute barred. It is to be noted that in the plaintiff's Statement of Claim dated 24 January 2007 the plaintiff seeks leave to bring these proceedings pursuant to Article 50 of the 1989 Order.

[11] Mr Shane Donnelly of Ferris & Company, the solicitors on record for the plaintiff in these matters, has made an affidavit dated 4 December 2007 acknowledging that the primary limitation period in this case expired on 9 September 2006 and that proceedings were not issued until 30 November 2006.

[12] He asserts inter alia, that the insurers of the defendant were aware that a claim was being made within 6 days of the date of the accident, that discussions had taken place with the defendant's insurers on the case who were kept up to date with the efforts on the part of the plaintiff to compile medical evidence. In particular on 28 January 2005 the defendant's insurers

wrote to the plaintiff's solicitors confirming that once they received their own medical evidence they would be happy to "enter into negotiations on a without prejudice basis".

[13] Mr Donnelly notes that at this stage i.e. 28 January 2005, he had settled with the defendant's insurers a claim for the plaintiff's daughter arising out of the same accident on a full liability basis in May 2004.

[14] Mr Donnelly explained that he encountered delay in obtaining a neurological report from Dr Hawkins on behalf of the plaintiff largely due to the ill health of the plaintiff and the consequent cancelling of appointments. He also encountered difficulties eliciting responses from a number of telephone calls and letters sent to Dr Hawkins. He eventually received and sent the report from Dr Hawkins to the plaintiff's solicitors on 7 November 2006.

The Statutory Context

[15] It is well known that under the terms of Article 7 of the 1989 Limitation Order the basic limitation period of 3 years is preserved .Time should begin to run from either the date when the cause of action accrued or the plaintiff's date of knowledge.

[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**
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> **(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.**
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> **(4) In acting under this Article, the court is to have regard to all the circumstances of the case and in particular to –**

(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;**

(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;**

(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 this application

[17] In Taylor v. Taylor, The Times April 14, 1984 the Court of Appeal has held that a trial judge must have regard to all the circumstances of the case, when considering whether to exercise his discretion to exclude a limitation period, not merely the 6 matters in particular contained in sub sections (a)-(f) of the corresponding discretionary power to override time limits set out in s.33 of the Limitation Act 1980.

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

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

[20] Clearly the issue of the potential negligence of the plaintiff's solicitors in failing to issue proceedings within the primary limitation period surfaced in this case. Two cases in the Court of Appeal in England and Wales had perhaps given rise to the view that there was no rule of law that a solicitor's fault was to be visited on his client. In DAS v. Ganju [1999] Lloyd's Rep Med 198204, in a claim for medical negligence, the Court of Appeal said that remarks in Whitfield v. North Durham Health Authority [1995] PIQR P361 should not be interpreted as meaning that anything done by the claimant's lawyers should be visited on their client. Further in Corbin v. Penfold Metallising Co Ltd [2000] Lloyd's Rep Med 247251 the Court of Appeal again said that the delay in commencing proceedings arising through no fault of the claimant but as a result of delay by his solicitors could not invoke any rule of law that a solicitor's fault was to be visited on his client.

[21] I have dealt with the case of DAS and that of Corbin in brief compass because both cases were the subject of discussion and of some criticism in the House of Lords in Horton v. Sadler [2006] UKHL. That case concerned a road traffic accident against an uninsured driver. The Motor Insurers' Bureau ("MIB") nominated solicitors to act as its agent. Two days before expiry of the limitation period proceedings were issued, but the claimant's solicitor had failed within the time provided to comply with a condition precedent to the MIB liability by giving notice that proceedings were to be commenced. In order to avoid the difficulty a second claim was issued, albeit the limitation cut off date had passed. An application followed under s.33 of the 1980 Limitation Act to disapply the primary limitation period.

[22] In Horton's case, Lord Carswell said of the case of DAS and Corbin at paragraph 53 –

> ". . . In DAS v. Ganju . . . and Corbin v. Penfold Metallising Co Ltd, the Court of Appeal expressed the view that there was no rule that the claimant must suffer for the solicitor's default. If this is interpreted, as it was in Corbin, as meaning that the court is not entitled to take into account against a party the failings of his solicitors who let the action go out of time, that could not in my view be sustained and the criticism voiced in the notes to the reports of DAS and Corbin would be justified. The claimant must bear

> responsibility, as against the defendant, for delays which have occurred, whether caused by his own default or that of his solicitors and in numerous cases that has been accepted: see, EG, Firman v. Ellis [1978] QB 886, Thompson v. Brown [1981] 1 WLR 744 and Donovan v. Gwentys Ltd [1990] 1 WLR 472. The reason was articulated by Ward LJ in Hytec Information Systems Ltd v. Coventry City Council [1997] 1 WLR 1666, 1675, a case of striking out, when he said:
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> > "Ordinarily this court should not distinguish between the litigant himself and his advisers. There are good reasons why the court should not: first, if any one is to suffer for the failure of the solicitor it is better that it be the client than another party to the litigation; secondly, the disgruntled client may in appropriate cases have his remedies in damages or in respect of the wasted costs: thirdly, it seems to me that it would become a charter for the incompetent . . . were this court to allow almost impossible investigations in apportioning blame between solicitor and counsel on the one hand, or between themselves and their client on the other"."

[23] Lord Carswell went on to say in Horton's case at paragraph 53(c) –

> > "That said, whereas the claimant will suffer obvious prejudice if the limitation period is not disapplied, this may be reduced by his having a cause of action in negligence against his solicitors. The extent of that reduction will vary according to the circumstances, but even if he has an apparently cast iron case against the solicitors the factors referred to by Lord Diplock in Thompson v. Brown, at p 750 require to be borne in mind."

[24] It is relevant in the present case to look closely at the factors in Thompson v. Brown [1981] 1 WLR 744 referred to by Lord Carswell. In that case the claimant had not issued his Writ until some 37 days after the expiry of the 3 year limitation period but the defendant had no defence at all on the merits of the case. Lord Diplock pointed out that where the "time elapsed after

the expiration of the primary limitation is very short, what the defendant loses in consequence of a direction might be regarded as being in the nature of a windfall".

[25] Lord Diplock went on to deal with the prejudice to the plaintiff by being prevented from proceeding with his action in the context of being able to recover in an action for negligence against his own solicitor for the value of his lost prospects of success. At page 750e he said –

> "But even where, as in the instant case . . . if the action were not allowed to proceed the plaintiff would have a cast iron case against his solicitor in which the measure of damages will be no less than those which he would be able to recover against the defendant if the action were allowed to proceed, some prejudice, although it may be only minor, will have been suffered by him. He will be obliged to find and to instruct new and strange solicitors; there is bound to be delay; he will incur a personal liability for costs of the action up to the date of the court's refusal to give a direction under Section 2d; he may prefer to sue a stranger who is a tortfeasor with the possible consequences that may have on the tortfeasor's insurance premiums rather than to sue his former solicitors with corresponding consequences on their premiums. It was suggested that it might be more advantageous to a plaintiff to sue his own solicitor rather than the original tortfeasor since he could recover in an action against the solicitor interest on damages from the date on which the writ against the tortfeasor would have been issued if reasonable diligence had been shown, whereas against the tortfeasor he could only recover interest on damages from the later date, after the expiry of the primary limitation period, at which the writ was actually issued. This, however, is fallacious; he can recover the difference in the interest on damages between the earlier and the later date in a separate action against his solicitor for negligence even if the action against the first tortfeasor is allowed to proceed".

[26] Mr Dunlop, who argued this case on behalf of the defendant with characteristic economy and cogency, submitted that times have now moved on since Lord Diplock's comments. The landscape of the relationship between solicitor and client has also altered. With the development of a more consumer

based economy, claimants regularly invoke the assistance of different solicitors and there is much less embarrassment now in suing a professional adviser who is unlikely to be anything other than a passing professional acquaintance.

[27] Mr Dunlop sought to take the potential sting of the plaintiff having to bear the costs of the case being dismissed by asserting that he was confident that his clients would not seek costs against the plaintiff if the case were dismissed at this stage. In his view the plaintiff would not be prejudiced because this came down to a question of deciding which professional insurance company would indemnify the plaintiff i.e. the insurance company representing the defendant driver or the insurance company representing the plaintiff's solicitor against whom he had iron cast case. He pointed out that it was not without significance that there was no affidavit from the plaintiff embracing the difficulties envisaged by Lord Diplock.

Conclusion

[28] I have come to the conclusion that this is an appropriate case in which the court should exercise its discretion to extend the time limit for bringing proceedings in this case pursuant to Article 50(4) of the 1989 Order.

[29] The length of the delay on the part of the plaintiff is comparatively modest. The reasons for the delay on the part of the plaintiff's solicitor – namely that his attempts to obtain appropriate medical evidence were frustrated by the lack of response from his medical expert – failed to explain adequately why he did not issue proceedings in the interim. Nonetheless the defendant's insurers had been informed that medical reports were awaited and the defendant's insurers had confirmed that once they had been received they would deal with the plaintiff's solicitors. To that extent therefore the defendant's insurers were aware of the delay and its cause and still intended to negotiate once the evidence was received. Whilst therefore the reasons for the delay do not justify the failure to observe the primary limitation period, nonetheless they appear to me to have a genuine basis for at least some of the period of delay up to the expiry of the primary limitation period. Liability does not seem to be an issue in this case despite the denial of liability in the proceedings .These factors persuade me that it is equitable to exercise my discretion in favour of the plaintiff.

[30] In coming to this conclusion I have followed the admonition of Lord Carswell in Horton's case that the court is entitled to take into account against the party the failing of his solicitors which has resulted in a limitation date being missed. I accept entirely that there is no rule that the plaintiff cannot suffer for his solicitor's default. Having done that however in this instance, I am still persuaded that it was appropriate to exercise my discretion in the plaintiff's favour.

[31] I pause to observe in this context that I do not agree with the submission of Mr Dunlop that the passage of time and the nature of the consumer based economy in which we now live has diluted to any material degree the strength of the points raised by Lord Diplock in Thompson v. Brown (see paragraph 25 of this judgment). I agree with the submission of Mr Lavery that it will always remain a burden if not an embarrassment for a plaintiff to find and instruct new solicitors with attendant delay and perhaps personal liability for costs of the action up to the date of the court's refusal to give a direction under Article 50. In this instance this plaintiff is 57 years of age and I am told has recently suffered a stroke. Inevitably the burden and stress of bringing a fresh claim would be prejudicial to the plaintiff notwithstanding that prima facie she would appear to have a cast iron case against her solicitor.

[32] In determining this case I have considered whether the evidence adduced or likely to be adduced by the plaintiff or the defendant was likely to be less cogent than if the action had been brought within the time allowed by Article 7 of the 1989 legislation. Mr Dunlop frankly acknowledged that whilst any delay can impact upon evidence, it might be difficult in this particular instance for the defendant to demonstrate that the evidence was likely to be less cogent because of the delay. The fact of the matter is that the defendant has already settled in full certain other claims arising out of this accident. Hence I found great weight in the submission of Mr Lavery QC, who appeared on behalf of the plaintiff with Mr R Lavery, that although there has been a denial of liability in the defence the probabilities are that liability witnesses will not be even required at the hearing of this action.

[33] Article 50 empowers the court to direct that the primary limitation period shall not apply to a particular action or cause of action. This is by way of exception, for unless the court does make a direction the primary limitation period will continue to apply. The effect of such a direction, and its only effect, is to deprive the defendant of what would otherwise be a complete defence to the action, viz that the Writ was issued too late. A direction under the Article must therefore be always highly prejudicial to the defendant, for even if he also has a good defence on the merits he is put to the expenditure of time, energy and money in establishing it, while if, as in the instant case, he has no defence as to liability he has everything to lose if a direction is given under the Article. On the other hand if, as in the instant case, the time elapsed after the expiration of the primary limitation is very short, what the defendant loses in consequence of a direction might be regarded as being in the nature of a windfall (see Thompson v. Brown per Lord Diplock at p 750b-d).

[34] I have arrived at my decision notwithstanding the fact I have recognised that the conduct of the defendant after the cause of action arose has in my view been blameless. Moreover the plaintiff has not been acting under any disability and no question of latent injury arises in this case.

[35] Finally, turning to Article 50(4)(f), I have considered the steps taken by the plaintiff to obtain medical or other expert advice and the nature of any such advice that he may have received. Clearly the plaintiff's solicitor in this instance did delay in passing on the medical evidence to the defendant insurers but eventually it was received. Medical evidence had been obtained in mid 2004 and does not appear to have been processed to the defendant until June 2006. Nonetheless I do not consider this has occasioned any prejudice to the defendant and indeed the defendant does not attempt to rely upon any such prejudice either in the affidavit evidence or in the oral hearing before me.

[36] In all the circumstances therefore I have come to the conclusion that the plaintiff has discharged the burden upon her of satisfying me on all the available evidence that it would be equitable to disapply the limitation period in this case .I allow the claim to proceed. Consequently I dismiss the preliminary issue raised by the defendant.

[37] This preliminary issue was a discrete matter raised by the defendant. It could have been dealt with by the plaintiff at the hearing of the action. The defendant having lost the preliminary issue, costs must follow the event and I therefore award the costs of this application to the plaintiff.