Neutral Citation no. [2006] NIQB 104 | Ref: **HIGF5701**

Judgment: approved by the Court for handing down (subject to editorial corrections)* | Delivered: 12.12.06

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

ROBERT HAMILTON

Plaintiff/ Appellant;

-and-

THE PERSONAL REPRESENTATIVE OF JONATHAN MARK DORNAN DECEASED

Defendant/ Respondent;

_____

HIGGINS J

[1] This is an appeal from the order of Master McCorry whereby he refused an application by the plaintiff to extend the validity of a Writ of Summons pursuant to Order 6 Rule 7 of the Rules of the Supreme Court (NI) 1980. The plaintiff sustained injuries in a road traffic accident which occurred around 0145 on 7 June 2002 on the Comber Road, Dundonald, County Down. The plaintiff was a passenger in a motor vehicle driven by the defendant who was killed in the accident and who was uninsured. The plaintiff sustained multiple and extensive injuries. A Writ of Summons was issued out of the High Court of Justice in Northern Ireland on 3 June 2005. A Notice to Insurers was served on the defendant, the personal representative of the deceased driver, on 6 June 2005 and on the Motor Insurer's Bureau (MIB) and Zurich Insurance Company (Zurich). The Writ of Summons was never served and expired after twelve months.

[2] On 22 June 2006 the plaintiff issued a summons seeking an order pursuant to Order 6 Rule 7 extending the validity of the Writ issued on 3 June 2005. The summons was supported by an affidavit sworn by the plaintiff's solicitor in which she stated that the Writ had not been served to allow ongoing discussions between the Plaintiff and the Defendant to take place.

She averred that due to an oversight no application was lodged to extend the validity of the writ before expiration of same twelve months from the date of issue. She claimed that no prejudice has been suffered by the Defendant.

[3] Mr Spence who appeared on behalf of the Defendant submitted that the plaintiff had to show good reason for failing to serve the Writ and that none had been shown. He drew attention to a letter written by the plaintiff's solicitor on 28 May 2005 in which she stated that she was mindful that the case would be statute barred in June of the same year.

[4] In July 2004 the plaintiff's solicitor wrote to the MIB enclosing an application for compensation under the uninsured driver's agreement along with a copy of the Police Report and a copy medical report. The MIB was advised that further medical evidence was being sought. In December 2004 Zurich responded as the investigating office appointed by the MIB. Zurich sought information relating to the plaintiff's employment and stated that their investigations were underway. On 17 January 2005 Zurich wrote to the plaintiff's solicitor informing her that they were prepared to enter into negotiations provided an Assignment and Agreement Form was signed by the plaintiff and requested all medical evidence together with CRU details. On 2 February 2005 the plaintiff's solicitors responded that they were seeking the plaintiff's instruction with regard to Zurich's proposals. On 7 February 2005 the plaintiff's solicitors wrote to Zurich supplying some of the information sought. On 22 March 2005 the plaintiff's solicitor wrote again noting that Zurich had not responded and asking when they would be in position to deal with the claim. On 24 March 2005 Zurich responded that they had already advised that they were prepared to deal with the claim and were awaiting confirmation that the medical evidence was complete. They stated that they were prepared to make an offer based on the one medical supplied to date however this report was regarded as inadequate due to the injuries sustained. The Plaintiff's solicitor replied on 27 May 2005 that the medical evidence was not yet complete. Zurich wrote again on 31 August 2005 requesting the medical evidence. On 20 September 2005 the plaintiff's solicitor responded that she hoped to furnish it shortly. On 20 June 2006 she wrote again enclosing two further medical reports.

[5] Order 6 Rule 7 of the Rules of the Supreme Court (NI) 1980 provides –

> "7. - (1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for 12 months beginning with the date of its issue and a concurrent writ is valid in the first instance for the period of validity of the original writ which is unexpired at the date of issue of the concurrent writ.

> (2) 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, beginning with the day next following that on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow."

[6] Order 6 Rule 7(2) was considered by the House of Lords in an appeal from the Northern Ireland Court of Appeal in Baly and another v Barrett reported at [1988] NI 368. Lord Brandon who gave the leading speech adopted the principles to be found in Kleinwort Benson Limited v Barbrak Ltd [1987]AC 597 which applied to the exercise of the discretion to extend the validity of a writ under the corresponding rule in the then Rules of the Supreme Court for England and Wales. These principles 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] 1 WLR 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.

[7] The issue for determination at the outset is whether or not there is good reason for the failure to serve the writ during its validity. If not, that is

an end to the application. If there is then the court has to determine whether, in the circumstances, to exercise its discretion to extend the validity of the Writ. On the issue of good reason Lord Brandon said in the Kleinwort Benson case at 622H –

> "The question then arises as to what kind of matters can properly be regarded as amounting to "good reason". The answer is, I think, that it is not possible to define or circumscribe the scope of that expression. Whether there is or is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the Judge who deals either with an ex parte application by a plaintiff for the grant of an extension, or with an inter partes application by a defendant to set aside an extension previously granted ex parte."

[8] Circumstances which have been held to be good reasons include a clear understanding with the Defendant that service of the writ be deferred or great difficulty in effecting service of the writ. Difficulty in tracing witnesses or obtaining evidence or mere carelessness has been held not to be good reason. In the instant appeal the plaintiff states that the writ was not served in order to allow discussions between the parties with a view to settlement to continue. Scrutiny of the correspondence and the affidavit would suggest that the writ was not served because the plaintiff's solicitor was awaiting medical reports to furnish to the insurance company in the expectation that negotiations would follow. Whichever was the dominant reason, awaiting the medical reports or to allow negotiations, neither is a good reason not to serve the writ – see The Mouna 1991 2 Lloyds Reports 221 and the White Book paragraph 6/8/4.

[9] In Easy v Universal Anchorage Co Ltd [1974] 1 W.L.R. 899 Lord Denning, M.R. said at page …… -

> "The plaintiffs' solicitors are under a duty to their client to serve the writ in time, even though negotiations are still in progress. Negotiations for a settlement do not afford any excuse for failing to serve a writ in time or to renew it."

[10] Lord Denning was quoted with approval in The Mouna, supra. In that case the plaintiff's solicitors issued a protective writ and advised the defendant's 'insurers' that it would not be served in the meantime. The 'insurers', in response to a letter asking whether solicitors on behalf of the defendant would be nominated, replied that the plaintiff should submit claim

documents direct to the insurers for consideration without prejudice. Negotiations continued throughout the next twelve months until the validity of the writ expired. The plaintiff obtained an order extending the validity of the writ for twelve months and then served the writ on the defendants who applied to set aside service on the ground that there was no good reason to extend the validity of the writ. At first instance it was held that the 'insurers' had acquiesced in the delay at the outset and gave no indication that their attitude had changed. This was held to be a good reason for extending the validity of the writ and it would be a great injustice to grant the relief sought by the defendants. On appeal it was held that the mere fact that negotiations were under way was not of itself a good reason for extending the time for service of a writ. However if a defendant by words or conduct had led the plaintiff to believe that the defendant consented to an extension of the validity of the writ or would do so, that might well be a ground for inferring an agreement to that effect. In the absence of such an agreement something less was insufficient. Consideration was given to a decision of Brandon J (as he then was) in The Owenbawn 1973 1 Lloyds Reports 56. At page 60 Brandon J said

> "…..although it may not be possible to say that there is an express or implied agreement, nevertheless there has been conduct by the defendant leading the plaintiff to suppose it would be all right to defer service of the writ, with the result that the defendant can be said to have been a party to the delay in serving the writ even though there is no express or implied agreement.
> ……
> Counsel for the plaintiffs has not been anxious to put his case as high as saying that there is to be spelt out of the letters to which I have referred an agreement between the parties that service of the writ should be deferred. He has put the matter more broadly, saying that, if one looks at the whole of the negotiating process, there was an agreement to defer litigation until it was obvious that a settlement could not be achieved. Despite his diffidence in the matter, I am of the opinion that, upon a fair construction of these letters, there was an agreement that service of the plaintiff's writ should be deferred so long as negotiations were continuing. If I am wrong about that, then I am of the opinion that there was, at the least, conduct by the defendants in response to conduct by the plaintiffs of such a character as to lead a reasonable solicitor acting for the plaintiffs to believe that service of the writ could be deferred."

[11] The decision of Brandon J in The Owenbawn was not referred to in either Easy v Universal Anchorage or Kleinwort Benson Limited v Barbrak (The Myrto), supra. In The Mouna the Court of Appeal were invited to hold that the second criterion of Brandon J was wrong in law. Glidewell LJ, who gave the main judgment of the court said at page 229 –

> "For my part, I am not absolutely certain what 'being a party to the delay' in the circumstances in which there is no inference that the defendant agreed to the delay means. The fact of negotiations in themselves is not a good reason, the authorities show. In my view, if by words or conduct a defendant has led the plaintiff to believe that the defendant consents to an extension of validity of the writ, or will do so, that may well be a ground for inferring an agreement to that effect. But in the absence of such an agreement or, of course fraud, then something less is, in my judgment, not enough. If that means that the second part of the dictum of Mr Justice Brandon in The Owenbawn was incorrect in law then I would so hold."

[12] Thus in the absence of an express agreement, the word or conduct, or both of the defendant must be such as to justify the inference of an agreement that the defendant consents to an extension of validity of the writ or will do so. In respect of the correspondence relied upon in The Mouna Glidewell LJ said at page 229 -

> "I cannot read anything more into the correspondence that (sic) that the defendants' representatives were content to negotiate, and if while they negotiated time slipped by and the plaintiffs' solicitors did nothing about it, it was not their, the defendants', representatives' responsibility to remind them of the fact. In other words, if the plaintiffs' solicitors were mislead, I think it was because they mislead themselves."

[13] The plaintiff's solicitor was conscious of the limitation period in May 2005 and the protective writ was issued with a day or two to spare. Over twelve months was allowed to elapse before anything further was done. It is insufficient to say as counsel for the plaintiff did that the application to extend time was made within two weeks of the expiry of the validity of the writ. The plaintiff has to show good reason why no application was made to extend time before the validity of the writ expired and why several further weeks

were allowed to pass before the application was made. This has to be seen in the context of a case in which the limitation period had expired over twelve months previously. There is no express agreement to extend the validity of the writ. There is nothing in the correspondence or the conduct of the parties which would justify the inference of such an agreement. In the absence of such an agreement the mere fact that medical reports were awaited and that the insurance company was willing to negotiate, are not good reasons in themselves why no application to extend the validity of the writ was made and are not good reasons why the court should extend the validity of the writ. In circumstance such as the present appeal the insurance company is undoubtedly the beneficiary. A saving in costs is made as they do not have to engage solicitors. Solicitors acting on behalf of plaintiffs should be aware of the difficulties that may arise through deferral of the service of a writ in order to save the costs of an insurance company. The better practice should be that once a writ is issued it should be served immediately, particularly when a substantial part of the limitation period has expired.

[14] In an application to extend validity of a writ a plaintiff must show good reason before the court can exercise its discretion to extend validity of a writ. In this appeal the plaintiff has failed to show good reason. Therefore the appeal is dismissed and the decision of the Master affirmed with costs.