

**Neutral Citation No: [2017] NIQB 129**

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

**Ref: MAG10481**

**Delivered: 01/12/2017**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**2015 No. 64239**

**BETWEEN:**

**THOMAS SPROULE**

**Plaintiff**

**-and-**

**CALDWELL MOTOR FACTORS LIMITED**

**Defendant**

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**MAGUIRE J**

**Introduction**

[1] The court has before it an appeal by Caldwell Motor Factors Limited (“the appellant”) against two orders made by Master Bell on 12 June 2017.

[2] The background to the making of these orders can be encapsulated shortly as follows:

- (i) Thomas Sproule (the now respondent) issued a writ on 3 July 2015 against the now appellant. However, the writ was not served at the time of its issue on the appellant.
- (ii) The writ related to repairs to a premium bicycle which had been purchased by the respondent. It was the appellant which had carried out repairs to the bicycle. In July 2012, on the respondent’s first outing after the repairs, the problem which, *inter alia*, had given rise to the

repairs, recurred with the consequence that the respondent was thrown from the bike. As a result, the respondent sustained personal injuries, including broken ribs, a collapsed lung, a fractured shoulder and other injuries.

- (iii) In the usual way, the appellant was informed by the respondent's solicitors of the claim and over time there has been correspondence and discussion between the respondent's solicitors and the appellant's solicitors and insurers. While it is clear that a copy of the writ of 3 July 2015 was provided to the appellant's solicitors at that time, the writ itself was not served, despite reminders from the appellant's solicitors about the need to do so in view of the limitation period.
- (iv) The respondent's solicitors on 30 June 2016 by way of service posted the writ to the appellant's solicitors. This is vouched for by the solicitor in the respondent's firm who dealt with the case. However, the writ was not received by the appellant's solicitors, a point in turn vouched for in affidavits filed on behalf of the appellant.
- (v) In the above circumstances, the appellant made an application to the Master on 19 October 2016 under Order 12 Rule 8 to have the writ set aside on the ground that it had not lawfully been served on the appellant within the period (of one year) prescribed by the Rules.
- (vi) Unsurprisingly, this step engendered a response from the respondent which was that he made an application to the Master on 7 March 2017 seeking an order under Order 6 Rule 7(2) extending the validity of the writ. It will be noted that this application was made long after the one year period of validity of the writ had expired.
- (vii) Before the Master it was decided that the extension sought should be granted. Consequently the appellant's application to set aside the writ failed.
- (viii) A Notice of Appeal, bringing about this appeal, was lodged on 15 June 2017 by the appellant.

[3] Mr Gary McHugh BL appeared for the appellant at the hearing of the appellant's appeal. Mr Michael Neeson BL appeared for the respondent. The court is grateful to both counsel for their helpful written and oral arguments.

[4] As a result of their submissions it is possible to narrow down the issues in this appeal considerably.

### **Deemed service**

[5] Both counsel were in agreement that provisions contained in the Rules of the Supreme Court of Judicature dealt with the issue of deemed service, which was relevant to this appeal. The deemed service rule is found in Order 10 Rule 3. This indicates that in a case like this, where the postal service is used to effect service, “the date of service shall, unless the contrary is shown, be deemed to be the seventh day after the date on which the copy was sent to ... the address in question”.

[6] As the posted writ did not arrive with the appellants at all and appears to have gone missing in the post, both parties were agreed that the effect of Order 10 Rule 3 would be that the writ could not be deemed served until 7 July 2016.

[7] Clearly, service on the above date means that the writ by this time had expired, as it was originally taken out on 3 July 2015 and over a year therefore had elapsed (as per Order 6 Rule 7).

[8] There was thus no issue that the deemed service of the writ in this case was out of time.<sup>1</sup>

### **Limitation**

[9] While of less centrality to the appeal, it is also to be noted that while the writ was issued within three years of the incident giving rise to the claim the service of the writ, on the above analysis, was effected outside the limitation period which would appear to have expired in July 2015 at the latest.

### **The real issue in the case**

[10] The parties helpfully focused their submissions on what was viewed as the real issue in the case which was whether the court should extend the validity of the writ in accordance with Order 6 Rule 7(2).

[11] Order 6 Rule 7(2) states as follows:

“(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

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<sup>1</sup> The court also notes that it is doubtful if there is an affidavit complying with Order 10 Rule 1(b) in this case.

before that day or such later day (if any) as the court may allow.”

[12] The attention of the court was drawn to relevant sources dealing with the interpretation of this provision. In particular reference was made to:

- (a) Paragraph 6/8/6 of the Supreme Court Practice 1999 Volume 1 pp. 54-56 (“The White Book”).
- (b) Valentine: Civil Proceedings the Supreme Court (1997) at 6.07.
- (c) Relevant case law: In particular, Kleinwort Benson Limited v Barbrak Limited, the Myrto (No. 3) [1987] 2 WLR 1053; and McGuinness v Brady [2017] NIQB 46.

[13] There was no dissent to Stephens J’s summary of legal principles at paragraphs [3]-[7] in McGuinness. These paragraphs read as follows:

“[3] There was no dispute ... as to the applicable legal principles. I was referred to the Supreme Court Practice 1999 at page 54 and paragraph 6/8/6 and to Kleinwort Benson Limited v Barbrak, Brennan v Beattie and another [1999] NIJB 54, Baley v Barrett and Others [1988] NI 368 and Sweeney v National Association of Round Tables [2015] NI Master 6. In the White Book the principles to be deduced from the cases are summarised in ten separate paragraphs. I have considered all of those principles but only incorporate into this judgment the following:

- (1) 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.
- (2) 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 writ and before the expiry of the limitation period; the later the application is made, the better must be the reason.
- (3) 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 failing 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.

[4] Examples of reasons which have been held to be good are summarised in paragraph 4 and examples of reasons which have been held to be bad are summarised in paragraph 5. Paragraph 5(b) is of significance in this case stating that an example of a reason which has been held to be bad is that legal aid is awaited. Paragraph 5(b) continues by stating that 'this is not to say that delays caused by the operation of a legal aid system should never be taken into account. Delay caused by a failure of legal aid authorities to act or act reasonably may constitute good reason. Delay caused by the failure of the plaintiff or his solicitors to act timeously in applying for legal aid or for the removal of a legal aid restriction will not constitute good reason.' Paragraph 5(d) is also relevant giving carelessness as an example of reasons which have held to be bad.

[5] Paragraph 8 reads as follows:

'Where application for renewal is made after the writ has expired and after the expiry of a relevant limitation period the applicant must not only show good reason for the renewal but must give a satisfactory explanation for his failure to apply for renewal before the validity of the writ expired.'

[6] Paragraph 9 states that 'the decision whether an extension to the validity of a writ should be allowed or disallowed is a matter for the discretion of the court dealing with the application. Jones v Jones [1970] 2 QB 576 shows that in exercising discretion the judge is entitled to have regard to the balance of hardship. The exercise of discretion however follows upon the showing of good reason by the applicant.

Hardship to the applicant if the extension is disallowed is not a substitute for good reason.'

[7] Finally 10 states that 'where a plaintiff is faced with the sort of difficulty categorised in paragraph 5 of this note or for any other reason wishes to delay the action the proper and prudent course is to serve the writ and to apply to the defendant for an extension of time to serve the statement of claim or failing agreement with the defendant to apply to the court'."

[14] The court considers it helpful, in particular, to set out below a quotation from the White Book about how to approach a case of extension of the validity of the writ:

"Applications involve a two stage inquiry. At stage one the court must be satisfied that there was a good reason to extend time, and also that the plaintiff has given a satisfactory explanation for his failure to apply before the validity expired. If the court was so satisfied then it should proceed to stage two and decide whether or not to exercise its discretion in favour of renewal by considering all the circumstances of the case including the balance of prejudice or hardship. The two stages should not be treated as watertight compartments and matters which may be relevant at one stage may be relevant at the other ...".

[15] In the light of all of the above, the task for the court will therefore be to apply the above principles to the facts of this case.

### **The court's assessment**

#### **Good Reason**

[16] In line with the statements of law above, the court will consider first whether the respondent has established good reason why the court should provide an extension. Whether a good reason is established is fact specific and will depend on the particular facts of the case.

[17] The obvious question which must be asked is whether there is an acceptable explanation for not serving the writ within the period of its validity? On this point, Mr Neeson argued that the case, on proper analysis, was one in which there had been extensive contact and correspondence with the appellant's solicitors and with

the insurers. He pointed out that at the time the writ was taken out a copy of it was shared with the appellant's solicitors, though he accepted that this could not be viewed as service. He also submitted that if the postal service had operated properly the writ would have been received either within the period of the writ's validity or, at the most, shortly thereafter.

[18] The court has no difficulty in accepting that there appears to have been regular contact over a prolonged period between the respondent's solicitor and the appellant's solicitor and, before that, with the insurers, but it struggles to be able to accept that this represents any good reason for the failure to serve the writ within time on the appellant's solicitors.

[19] The difficulty in this case is that when the correspondence between the parties is considered, the court is unable to locate any explanation of substance for the failure to serve in time. As stated in the respondent's skeleton argument: "The reason for the delay in the writ being posted...is not clear".

[20] The reality of this case, it seems to the court, is that once the writ had been taken out on 3 July 2015 its service should have been the subject of regular reviews. Plainly, it should have been served well before the end of its one year life or there ought to have been proceedings to renew it before the period expired. If the above had occurred, there would have been no need to gamble with the vagaries of the postal service.

[21] Given that the limitation period had expired at the date of deemed service the problems for the respondent are compounded, especially in the absence of a good reason for the failure to seek an extension, prior to the expiry, of the writ's validity, a situation expressly referred to at paragraph 8 of Stephens J's judgment in McGuinness and in the quotation from the White Book above.

[22] Even if the matter is viewed more broadly, this is a case in which it is difficult to locate any convincing reason why an extension should be granted. The case does not come within any of the examples of reasons for extending time found in the White Book at paragraph 6/8/6, though this is not definitive of possible good reasons. It is not a case of the appellants lying in wait for a slip-up, as it is clear from the correspondence that, more than once, the appellant's solicitor broached with the respondent's solicitor the need to serve the proceedings. Nor is it a case where the identity of the defendant was in issue. Indeed the appellant's solicitors had in good time indicated that they would accept service on behalf of their client.

[23] It follows from the above discussion that the result of the stage one exercise must be that no good reason for an extension of time has been established which, in turn, means that the application to extend the validity of the writ, in the court's judgment, must fail. This approach is not just that advocated in the White Book but appears to the court to be binding as a result of the decision of the House of Lords in

Baly and another v Barrett and others (referred to above) which was an appeal from Northern Ireland: see Lord Brandon's speech at 418H-419B.

[24] This conclusion renders it unnecessary for the court to determine the stage two issue of whether it should exercise its discretion in favour of renewal, as satisfaction of the stage one enquiry is an essential element before one reaches this point.

### **Conclusion**

[25] The court reverses the order of the Master in respect of extending the validity of the writ. Accordingly, it will make an order dismissing the respondent's application. It follows from this that it will make an order in favour of the appellant in respect of its application to set aside the writ.

[26] The court will hear the parties on the issue of costs.