

THE HIGH COURT

[2021] IEHC 319
[2018 No. 6697 P]

BETWEEN

ABDULLAH ABDULRAHMANN ALROUJI AND OTHERS

PLAINTIFFS

AND

**LAING O'ROURKE IRELAND LIMITED, JOHN PAUL-PJ HEGARTY JV DESIGNATED
ACTIVITY COMPANY, MICHAEL PUNCH AND PARTNERS LIMITED, BILLINGS DESIGN
ASSOCIATES LIMITED, TRAYNOR O'TOOLE ARCHITECTS LIMITED (IN LIQUIDATION),
TRAYNOR O'TOOLE PARTNERSHIP AND OTHERS**

RESPONDENTS

JUDGMENT of Mr. Justice Meenan delivered on the 7th day of May, 2021.

Background

1. This is an application brought by the fourth named defendant (Billings) seeking the following reliefs: -
 - (i) An order pursuant to O. 8, r. 2 of the Rules of the Superior Courts 1986 ("RSC") setting aside the Order made by the High Court (MacGrath J.) on 8 July 2019 whereby the plenary summons herein was renewed for a period of three months from 8 July 2019; and
 - (ii) In the alternative an order pursuant to O. 8, r. 2 of the RSC setting aside said Order insofar as it pertains to the claim against Billings.
2. There are some 200 plaintiffs named in these proceedings against some 22 named defendants. A certain number of the defendants named in the summons were outside the jurisdiction. A concurrent plenary summons was issued at the same time for service of the defendants within the jurisdiction. The summons and concurrent summons were issued on 23 July 2018.
3. In addition to the within proceedings, there are seven other sets of proceedings. The first of these proceedings was issued in 2016. The proceedings concern building defects which have allegedly led, *inter alia*, to water ingress and damage to the apartments/units and the common areas in The Cubes development at Beacon South Quarter, Sandyford, Dublin 18. The Beacon South Quarter is a mixed use development of commercial, industrial and residential accommodation.
4. The applicant in these proceedings, Billings, is named as a defendant in a number of the other sets of proceedings.

Service of the summons

5. As Billings is a named defendant in other proceedings, it is necessary to look at the correspondence that passed between DAC (DAC Beachcroft), Solicitors for Billings, and Clyde & Co., Solicitors for the plaintiffs: -
 - (i) On 1 June 2019, Clyde & Co. wrote an "O'Byrne letter" to Billings. This letter identified, but was limited to, some eight defects in respect of which a claim was being made;

- (ii) On 10 June 2019, Clyde & Co. wrote to DAC referring to the fact that DAC were on record in five other sets of proceedings and enclosed a copy of the within concurrent plenary summons. The letter sought confirmation from DAC that they had authority to accept service of the proceedings;
 - (iii) DAC replied by letter of 14 June 2019 stating that they had sought their client's instructions and would revert as soon as possible. In the meantime, they requested Clyde & Co. not to serve Billings until they had responded; and
 - (iv) By letter, dated 28 June 2019, DAC referred to the letter of 10 June 2019 attaching a copy of the concurrent plenary summons and confirming authority to accept service.
6. Clyde & Co. used the services of Hibernian Legal (International) Ltd ("Hibernian Legal") for the purposes of serving the proceedings. Whilst in correspondence with DAC, Clyde & Co. were giving instructions to Hibernian Legal concerning service on Billings. In an affidavit in this application Mr. Barry Brady, Legal Executive of Hibernian Legal, stated that initially they were instructed not to serve Billings (as per the correspondence from DAC) but that on 28 June 2019 he received an email from Clyde & Co. informing him that DAC had confirmed that they had authority to accept service of the proceedings. In reply, Mr. Brady stated that he informed Clyde & Co. that he had received the instructions and would arrange to have DAC served on 1 July 2019. However, due to an oversight, Mr. Brady failed to attend at the offices of DAC, so no service took place. He stated that he did not realise this oversight until on or about 12 August 2019, when he was reviewing the file for service.
7. Another problem arose concerning service of the within concurrent plenary summons. It became apparent that two of the defendants no longer resided at the addresses given but had, apparently, moved to England. This would require an amendment of the said summons. As the said summons was due to expire on 22 July 2019, it was decided to make an *ex parte* application to court not only to amend the summons but also to have the summons renewed.

***Ex parte* application**

8. The *ex parte* application was made to the Court on 8 July 2019. As both Clyde & Co. and Hibernian Legal were under the mistaken belief that Billings had been served, through their Solicitors, the application related only to amending the summons to set out the addresses of the two defendants in England and to renew the summons. The reason for the renewal was stated in the Order to be: -

"In circumstances where there are complexities and delays involved in the service of proceedings on some of the defendants residing outside the jurisdiction."

Order 8 of the RSC

9. Order 8 is entitled "*Renewal of Summons*", and provides: -

"1. (1) No original summons shall be in force for more than twelve months from the day of the date thereof ... but if any defendant therein named shall not have been served therewith, the plaintiff may apply before the expiration of twelve months to the Master for leave to renew the summons.

(2) The Master on an application made under sub-rule (1), if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent summons be renewed for three months from the date of such renewal inclusive.

2. In any case where a summons has been renewed on an *ex parte* application, any defendant shall be at liberty before entering an appearance to serve notice of motion to set aside such order."

10. The application for a renewal was made prior to the expiry of the twelve months referred to, so the relevant rule is O. 8, r. 1(2) of the RSC which allows for renewal where the Master, or in this case the Court, is "*satisfied that reasonable efforts have been made to serve such defendant, or for other good reason...*".

Consideration of application

11. This application is brought under O. 8, r. 2 of the RSC. To this extent, the Court's jurisdiction in hearing such an application was recently stated by Butler J. in *Klodkiewicz v. Marcin Palluch & Anor.* [2021] IEHC 67 as follows: -

"21. That said, it may be useful to identify at the outset a number of propositions, largely undisputed by the parties, which provide the framework within which the core issues fall to be examined. Firstly, as the defendant points out, an application under O. 8, r. 2 is not an appeal from the order made under O. 8, r. 1; it requires the full *de novo* consideration of whether the summons ought to be renewed. The judge hearing the *inter partes* application cannot be bound by the views formed by the judge who granted the *ex parte* order as this would be contrary to natural justice (see Hogan J. in *Monaghan v Byrne* [2016] IECA 10). ..."

12. An unusual feature in this application is that there was no issue concerning service on Billings when the *ex parte* application was made. As mentioned previously, Clyde & Co. had the mistaken belief that Billings had, in fact, been served. Though the reason for the renewal concerned other defendants, I am satisfied that the effect of the Order was to renew the summons against all defendants. In respect of the defendants whose situation formed no part of the *ex parte* application, they are afforded the protection of O. 8, r. 2 of the RSC, which provides: -

"In any case where a summons has been renewed on an *ex parte* application, *any defendant* shall be at liberty ... to serve notice of motion to set aside such order." (Emphasis added).

13. As the *ex parte* application for renewal was brought before the expiration of the twelve months, the Master (or in this case, the Court) may renew the original or concurrent summons "if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason...". In this case, I am satisfied that reasonable efforts were made to serve Billings for the following reasons: -
- (a) A copy of the concurrent summons was served, within the twelve months, both on Billings itself and also their Solicitors, DAC. The whole point of serving proceedings is that the defendant has knowledge of the case that it has to meet;
 - (b) Within the twelve months DAC requested Clyde & Co. not to take any steps to serve whilst instructions were taken;
 - (c) Clyde & Co. took all reasonable steps to effect service by instructing Hibernian Legal to effect service. At all stages Hibernian Legal were informed as to the situation concerning Billings, including not to take any steps whilst DAC were taking instructions as to acceptance of service; and
 - (d) It is correct that Hibernian Legal, due to an oversight, did not effect service as requested. However, it does not follow from this that because of the error "reasonable efforts" had not been made to serve Billings.
14. The issues of "reasonable efforts" to serve and "other good reason" can overlap. This is clear from the following passage from the judgement of Finlay Geoghegan J. in *Chambers v. Kenefick* [2007] 3 I.R. 526, where she stated: -

"That good reason was the fact that the plenary summons had been issued on the 25th June, 2002, a copy of the plenary summons was delivered to the defendant's insurers on the 2nd September, 2002, i.e. within a period of approximately less than two and a half months after the issue of the plenary summons, and on the 12th September, 2002, solicitors instructed by the insurers acknowledged that they had authority to accept the service. Combined with those facts, and as part of the good reason is the fact that the failure to serve the summons was due to inadvertence and oversight upon the part of the plaintiff's solicitor. I think in the light of the Supreme Court decision in *O'Brien v. Fahy* (Unreported, Supreme Court 21st March, 1997) it is necessary for me to explain the manner in which I consider it as part of a good reason. It is not the inadvertence which constitutes the good reason, but rather it is that such inadvertence and oversight is the explanation for which the summons, a copy of which had been furnished, was not formally served. It appears to me important for this reason. If, contrary to the facts of this case, there had been a deliberate withholding of the service of a summons then the fact that the defendant through his insurers had received a copy of the summons might not of itself constitute a good reason. Therefore, it is the fact that the copy summons had been delivered, coupled with the fact that the failure to subsequently formally and properly serve under the rules was simply due to inadvertence, which I have concluded constitutes a good reason."

15. In their submissions, Billings claimed that it has suffered prejudice. In particular, reference was made to the death in June, 2012 of Sean Billings, who was the person who allegedly had primary responsibility for involvement in the construction of the property the subject of these and other proceedings. I find it difficult to accept that this amounts to prejudice in that this sad event occurred some four years prior to the issue of other proceedings concerning properties. If such was prejudicial, one would have expected an application being made to the Court to dismiss all of the proceedings on the grounds that a fair trial was no longer possible. It appears that no such application was made.

Conclusion

16. By reason of the foregoing, I dismiss the application herein. As this judgment is being delivered electronically, the parties have fourteen days to make submissions on costs. I should say that the submissions ought to be short, and that the recent statutory changes and subsequent decisions of both the High Court and the Court of Appeal have been opened to the Court on several previous occasions.