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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **13/10/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

CHRISTINA CARDY

Plaintiff

AND

BELFAST HEALTH SOCIAL CARE TRUST

AND

SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST

AND

BAYER PLC

Defendants

Mr Neeson BL (instructed by Arthur Cox Solicitors) for the Third Defendant. Mr McIlroy BL (instructed by Ó'Muirigh Solicitors) for the Plaintiff.

Master Harvey

Introduction

[1] This is an application by the third defendant ("the defendant") for an order pursuant to Order 12 Rule 8 of the Rules of the Court of Judicature (Northern Ireland) 1980 ("the Rules"), setting aside service of the writ.

[2] At a late stage, the plaintiff then issued their own summons seeking to extend validity of the writ pursuant to Order 6 Rule 7 or alternatively, under Order 2 Rule 1, an order that the proceedings were validly served on the defendant.

[3] These applications are usually heard "back-to-back", and the parties were in agreement that the court should deal with them adopting this approach. The

defendant's solicitor helpfully lodged a well-structured electronic bundle for use at the hearing. I thank all involved for their assistance to the court.

Background

[6] The proceedings were commenced by writ of summons dated 22 December 2021. The plaintiff claims damages for personal injuries, loss and damage alleged to have been sustained due to negligence of the first and second defendants in respect of medical care and services provided by them in connection with the insertion of an "Essure device" (a female sterilization device) from 4 March 2012. The plaintiff further alleges causes of action against the third defendant based upon alleged misrepresentation, negligence and breach of statutory duties in respect of the development and manufacture of the device.

The defendant's submissions

[7] The defendant's submissions can be summarised as follows. The writ was issued on the 21 December 2021. It should have been served within 12 months under the Rules or an application brought to extend its validity before the expiry of this period. Although purportedly sent by post on the 5 December 2022, it was in fact received by the defendant on the 23 January 2023.

[8] The proceedings were not served in accordance with the Rules nor in accordance with the terms of the Companies Act 2006, having been addressed to a place other than the registered office of the defendant and served outside of the jurisdiction. As service was not in accordance with the Rules or the 2006 Act, no deeming provision or presumption of service arises. The writ was defective, service was not effected and it should, therefore, be set aside.

[9] The plaintiff is unable to identify any good reason for an extension of the validity of the writ. In the event an extension is granted, the defendant will suffer prejudice as it will lose the ability to raise a limitation defence which would arise if the plaintiff was unsuccessful here and forced to issue fresh proceedings.

[10] This is not an exceptional case, there was more than one mistake committed by the plaintiff which were not minor defects. This included failing to serve pre-action correspondence and attempting to serve proceedings at the wrong address. The defendant can rebut the presumption of service by post with unchallenged evidence the writ was received over a month after its validity expired.

[11] When assessing the balance of hardship between the parties, the plaintiff's other causes of action against the remaining defendants would survive if the court refuses to use its discretion to validate service of the writ.

The plaintiff's submissions

[12] The plaintiff conceded that the address on the writ of summons which is also the address at which the solicitor purportedly served the writ by post was incorrect.

This mistake arose when the file was being handled by a previous solicitor in the firm. No evidence is available indicating how this occurred, unfortunately the mistake was not rectified and was then repeated by the current solicitor with carriage of the case. The plaintiff's counsel, therefore, conceded that the writ and service thereof were both defective and did not comply with the Rules.

[13] The plaintiff accepts that the defendant's registered address is "400 South Oak Way, Reading, RD2 6AD." It is also accepted that the address on the writ states "400 Oak Green Way, Reading, RGZ 6AB."

[14] There is a series of related cases all involving the same firms of solicitors for both plaintiff and defendant. In total, there were six related writs involving other patients/plaintiffs, stating the same aforementioned incorrect address but in each case, they were received and acknowledged, with lawyers instructed and unconditional appearances entered. No objections were raised nor technical issues pursued with regard to service. The defendant, therefore, acquiesced to the approach of the plaintiff's solicitor in using this address. It is also clear that the post office was able, on a number of occasions, to deliver all correspondence to the appropriate address, despite the factual inaccuracies.

[15] It is submitted on behalf of the plaintiff that, despite the incorrect address being used, the court should deem the writ as having been served in advance of the 22 December 2022, by which date it would have been invalidated as this was 12 months post issue. Moreover, the stamp on the envelope containing the writ, confirms delivery of the letter on the 5 December 2022, which is within its period of validity.

[16] The defendant has claimed that its solicitor had previously provided consent to accepting service of proceedings at their office in Northern Ireland, however, the correspondence from the defendant's solicitor relates to other cases, not the present one.

[17] As can be seen from the authorities, the court has a broad power to deal with an irregularity. This has a broad definition within the Rules and the court can correct that irregularity, particularly where it relates to service and has occurred within the period of validity of the writ, which is the case here.

[18] The court should seek to do justice to the case which will include whether the defendant had knowledge of the proposed proceedings.

Legal principles

[19] In a recent case heard by this court, involving applications under the same rules as the present action, *Bradley and Bradley v Rodgers & Ors* [2022} NIMaster 11, at pages 10-20, I set out the applicable legal principles from the Rules and main authorities. I do not intend to rehearse all of them here other than to highlight some of the key points. Both counsel helpfully provided a bundle of authorities, almost all of which

were also cited in *Bradley,* as well as some additional cases which were considered by me even if not expressly referred to in this judgment. In oral submissions, defence counsel added the case of *Sproule v Cardwell Motor Factors Limited* [2017] NIQB 129 which I also considered.

Extending the validity of the writ - Order 6 Rule 7

[20] Order 6 Rule 7 of the Rules is in the following terms:

> (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.
>
> (3) Before a writ, the validity of which has been extended under this rule, is served, it must be sealed with a seal showing a period for which the validity of the writ has been so extended.
>
> (4) Where the validity of a writ is extended by order made under this rule, the order shall operate in relation to any other writ (whether original or concurrent) issued in the same action which has not been served so as to extend the validity of that other writ until the expiration of the period specified in the order.

[21] The principles for such applications are set out at paragraph 6 in the judgment of Maguire J in *Mooney v Rodgers* [2020] NIKB 41 (being derived from the judgments of Master Bell and Stephens J in *Capital Home Loans Ltd v Vallely (solicitor)* [2016] NI Master 3 and *McGuinness v Brady* [2017] NIQB 46 respectively):

> "(i) 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.
>
> (ii) 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 the writ and before the expiry of the limitation period; the later the application is made, the better must be the reason.
>
> (iii) Whether a reason is good or bad depends on the circumstances of the case and 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 ….

(iv) Good reasons include difficulty or impossibility in finding or serving a defendant particularly where he is evading service, or agreement with the defendant to defer service. Bad reasons include: negotiations in the absence of agreement to defer service; difficulty tracing witnesses or obtaining evidence; carelessness; that legal aid is awaited.

(v) …

(vi) The application to renew the writ should be made within the appropriate period of validity, but the court has power to allow extension after expiry as long as the application is received during the "first period of expiry" (i.e. the year following) … This is arguably subject to a wider power to allow later extension according to a number of propositions.

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

(viii) Whether or not to extend validity is a matter for the discretion of the court and on exercising that discretion the court is entitled to have regard to the balance of hardship ….

(ix) The application to extend involves a two stage enquiry. At the first stage the court must be satisfied that the plaintiff is demonstrating good reason for the extension and a satisfactory explanation for failing to serve before its validity expired. Only if it is so satisfied will the court proceed to the second stage by considering the circumstances of the case including the balance of hardship."

Curing the irregularities - Order 2 Rule 1

[22] Order 2 Rule 1 of the Rules, is in the following terms:

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein.

(2) Subject to paragraph (3), the court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs

> or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."

[23] The White Book at Paragraph 2.1.6 notes that Order 2 Rule 1 is framed so as to give the court the widest possible power to do justice. The breadth of this rule is clearly set out in the dicta of Steyn LJ (as he was) in the English Court of Appeal case of *Khokhar and another v Post Office Counters Limited* [1994] Lexis Citation 2102 at page 6 of the transcript wherein it was noted that the beneficial power should be wide and not be emasculated or produce injustice so that (at page 122):

> "The principle governing Ord 2 r1 of the Supreme Court Rules … is simply that the judge must exercise his discretion in accordance with justice and he should exercise that discretion liberally where there is no prejudice whatever to the defendant arising from a departure from the requirements of the rule."

[24] Moreover, Hutchinson LJ in *Tavera v MacFarlane* [1996] PLQR 292d, the court, referencing *Khokhar,* noted that the exercise of such a discretion stands alone and is regardless of the success or otherwise of any other application, thereby giving a judge power:

> "which he was entitled to exercise, even in the light of his view that an application to extend the validity of the writ had to be rejected…"

[25] In *Patterson v The Trustees for the time being of St Catherine's College* [2003] NIQB25, at paragraph 32 LJ Nicholson stated:

> "I was entitled to exercise my discretion under Order 2 Rule 1 whether or not the court was willing to exercise powers under Order 6 Rule 7."

The overriding objective

[26] Finally, the court must also consider the overriding objective under Order 1 Rule 1a of the Rules, to inter alia, deal with cases justly and have regard to this rule when interpreting any rule.

Conclusion

[27] At the hearing, as stated previously, the plaintiff conceded at the outset that service of the writ was not in accordance with the Rules and was, therefore, defective. As a result, in this judgement I will not address the service issues under Order 10 Rule 1, Order 11 Rule 5, Section 1139 of the Companies Act 2006 or Section 24 of the Interpretation Act (Northern Ireland) 1954 which were helpfully set out in the defendant's skeleton argument, understandably prepared prior to the issuing and receipt of the plaintiff's belated application.

[28] As such, the case turned on the applications to extend validity or cure the irregularities with service.

[29] I was not satisfied that good reason was shown for not serving the writ within its period of validity. It is simply not clear as to what caused the delay from issue of the writ in December 2021 to purported service in December 2022. Counsel contended there were ongoing investigations, but no real detail emerged, despite my probing of this issue, as to what exactly was going on. Similarly, there were clear gaps in the affidavit on behalf of the plaintiff as it failed to adequately address this issue. The only justification seemed to be the gathering of records and applying for legal aid funding, neither of which in my view constitute good reason for delaying service of the writ. This was despite the initial haste with which the plaintiff's solicitors handled the case. They were first instructed in June 2021, at a time when covid restrictions were to some extent still in place. They sought to act reasonably quickly, seeking their clients notes and records and issued the writ within six months. After this, progress slowed to a glacial pace.

[30] In the absence of good reason, or a supplemental affidavit providing further evidence by way of explanation, I do not believe the test under Order 6 Rule 7 is met. The application has been brought late in the day, nine months after the validity of the writ would have expired, and some five months after the defendant's application to set aside. No satisfactory explanation has been provided to the court for any of these delays, either in the serving the writ as they waited until the 11th hour to do so which is classic "dilly dallying", or in bringing the applications in response to the defendant's summons. An Order 6 Rule 7 application could have been made to the court much sooner, on an ex- parte basis, and during the initial validity period of the writ. This was not done, either due to carelessness or an acceptance that there was no good reason which could form the basis of an affidavit to justify an extension.

[31] This means the balance of hardship cannot be assessed. Undoubtedly, if it was a consideration, it may well favour the plaintiff. The consequences of not extending validity (or deeming service good), are that despite the purported date of knowledge occurring relatively recently, in or around 2020/21, at least part of the plaintiff's action against the manufacturer of the product will become statute barred. Her claim in negligence and misrepresentation, both against this defendant and the remaining defendants would, however, survive but the nature of her claim is more than purely medical negligence. It involves a device manufactured by the (third) defendant called an "Essure device" which is a flexible metal coil placed inside each of the tubes to the ovaries. It causes scar tissue to form which blocks the tubes to the ovaries to prevent pregnancy. It is likely that one of the central issues in the claim will relate to the design, manufacture, production and supply of this device. Due to the 10-year rule for such actions, the plaintiff may lose the opportunity to pursue this crucial aspect of her case, albeit as was conceded during the hearing by her counsel, she could potentially pursue her own lawyers in a professional negligence claim.

[32] The next matter for the court to consider is the plaintiff's application to cure the irregularities with service of the writ, pursuant to Order 2 Rule 1.

[33] This includes consideration as to whether this claim is wholly exceptional in all the circumstances requiring an examination of the factual background. There is the use of the erroneous address in all the other cases which was never highlighted, the fact that on every occasion, including this one, the correspondence and documents reached its recipient, proceedings were issued and served at this address with no objection raised or any prejudice alleged, the related claims involve the same medical device and no doubt broadly similar allegations meaning the defendant is well aware of the focus of the plaintiff's claim and cannot claim to be taken aback.

[34] The present action cannot, therefore, be viewed in isolation. If one were to look at the case differently as a single, standalone action viewed in isolation, the circumstances would look rather different. The plaintiff issued a writ, with no pre-action letter of claim and used the wrong address for service on the defendant, with the defendant credibly alleging it received the writ outside its period of validity. In such a scenario, where no other mitigating factors or wider context existed to justify exercise of the court's discretion in all the circumstances of the case, the plaintiff could expect scant sympathy, but each case, as is often said, turns on its own facts and this action has a unique factual matrix.

[35] The defendant avers that it had previously indicated that its solicitors in Northern Ireland (Arthur Cox) had authority to accept service of this plaintiff's proceedings. The plaintiff did not accept this, claiming that the defendant had previously consented to its solicitors accepting service in other similar cases but not this action. I prefer the plaintiff's evidence on this point, as having reviewed the chain of email correspondence it is not as clear as first suggested.

[36] There was no pre-action correspondence, in contravention of the clinical negligence protocol meaning the first step taken in relation to the proceedings was the issuing and service of a writ. This was done on a "protective" basis as the plaintiff instructed her solicitor in or around the summer of 2021 and they were no doubt conscious of a potential limitation issue.

[37] I pause to observe that I reminded the parties of the provision for standstill agreements in the clinical negligence protocol which helps to avoid the premature and protective issuing of writs when investigations have not been completed. I have noted with disappointment that there is currently only a limited use of such standstill agreements in clinical negligence claims in this jurisdiction which is unfortunate as cases are appearing before me for first review in the Master's court when there has barely been a letter of claim never mind an expert report obtained. The use of standstill agreements in appropriate cases would allow the plaintiff time to apply for legal aid, obtain medical records, secure expert evidence and take all steps necessary to determine if there is a valid cause of action, thereafter, serving a pre-action protocol

compliant letter of claim. The standstill agreement would better protect their client's position, saving the cost of the stamp on a writ, avoiding unnecessary court reviews, escalating costs and from a defendant's perspective, potentially weeding out unmeritorious claims at an earlier stage.

[38] It is often said that "context is everything." While there was no evidence the defendant was on notice of the issues encountered by this plaintiff prior to receiving the writ, it certainly cannot claim to be taken by surprise by the substance of the complaints raised. Bayer PLC appear to have known of the problems allegedly suffered by other patients with the product which forms the basis of this claim for 2-3 years. The issue attracted media attention and there are a number of related claims before this court. The plaintiff stated:

> "World-wide, women have claimed the device has led to complications and unexpected side effects."

[39] In the court bundle, I was provided with redacted but clear evidence the writs in those cases contained the same incorrect address for the defendant, they were sent to that incorrect address as was other correspondence. In each case, the documentation found its way to the intended recipient, although by what means it is not clear, and in all instances the company was able to instruct its lawyers promptly. No applications were brought to the court raising issues with the service of the writs in the other actions. In each case, the defendant waived this by entering unconditional appearances. It had knowledge of the related proceedings, the nature of the cause of action, the alleged problems with the device in question and is involved in other litigation on the same issue.

[40] In the related cases, neither the defendant nor its lawyers appear to have ever sought to bring the error with the address to the attention of the plaintiff's solicitor. On balance, it must have been obvious to the defendant, as I was provided with several examples of court proceedings and correspondence having been sent to them at that address from 2018 until the present time. I can only speculate as to why no issue was raised but I do not conclude it was evidence of the defendant "lying in wait" for a slip up.

[41] The court has the widest power to cure irregularities. This should be reserved for exceptional cases. The plaintiff's solicitor served the writ, within its period of validity, at what they perceived to be the last known or usual address for the defendant. While this was clearly an error, it repeated an error made many times previously. In addition, the Royal Mail stamp on the envelope notes receipt on the 5 December 2022, albeit it was purportedly not seen by the defendant until some weeks thereafter.

[42] The loss of any potential limitation defence by the defendant is a factor the court should consider when weighing up prejudice. I note that whilst the device was

inserted in 2012, the date of knowledge in relation to a potential claim was arguably several years after this date. The plaintiff asserted that:

> "…Issues with Essure device were not widely known or raised until in and around 2020/2021 when such matters were raised in the public consciousness. The plaintiff in this matter did not approach her solicitor until the summer of 2021. "

[43] If the plaintiff fails in this application, the claim under the Consumer Protection (NI) Order 1987 would arguably be defeated by the 10-year rule in accordance with Article 8 of the Limitation (NI) Order 1989. Nevertheless, given that, on balance, the date of knowledge for limitation purposes is the period from 2020/2021, even if the court did not exercise its discretion in favour of the plaintiff in these applications, the remaining claims under negligence and misrepresentation would survive. As a result, the defendant would still have to defend the plaintiffs claim, either in whole or in part. On balance, I do not conclude the circumstances of this case resulted in any substantive prejudice to the defendant.

[44] In line with the authorities, if a plaintiff dilly dallies, they should get scant sympathy. The plaintiff in this case took risks in relation to late service of the writ in the leadup to Christmas, the busiest postal season, and bringing late applications before the court.

[45] The plaintiff can be considered very fortunate the circumstances of this case, and wider context make it wholly exceptional, leading the court to conclude that, on balance, in the interests of justice, this is an appropriate case in which to exercise the widest possible discretion to cure the irregularities. As noted in *Patterson*, which although distinguishable on the facts from the present case as it involved circumstances where the plaintiff was misled by the defendant's insurers, the court concluded it has power to use the discretion under Order 2 Rule 1 even when rejecting an application to extend validity.

[46] I therefore refuse the defendant's application under Order 12 Rule 8 and the plaintiff's application under Order 6 Rule 7. I grant the plaintiff's application under Order 2 Rule 1, curing the irregularities with service of the writ.

[47] I grant leave to amend the writ to reflect the correct address of the third defendant as set out in paragraph 13 of this judgment.

[48] I will hear from counsel in relation to costs on a date to be fixed by the parties in consultation with the Master's office.