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	ICOS No: **2019/107484**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **16/06/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S DIVISION

_____

BARCLAYS BANK (UK) PLC

Plaintiff

v

E.SURV LIMITED (02264161)

Defendant

_____

Laura King (instructed by Wilson Nesbitt Solicitors) for the Plaintiff
Hugh MacMahon (instructed by Carson McDowell Solicitors) for the Defendant

_____

HUDDLESTON J

Application

[1] The defendant appeals Master Bell's Order of 4 April 2022 which dismissed the defendant's application for:

(a) An Order under Order 32 Rule 8 of the Rules of the Court of Judicature (NI) 1980 to set aside the ex parte order of the Master dated 13 November 2020 which extended the validity of the plaintiff's writ of summons for a period of six weeks; and

(b) An order, pursuant to Order 12 Rule 8:

(i) declaring that the writ has not been duly served on the defendant; and/or

(ii) setting aside service of the writ, and/or

(iii) setting aside the writ itself.

[2] The plaintiff argues that the proper course is that the defendant ought to have appealed against the decision made by Master Bell on 13 November 2020 by which the extension to the writ was originally granted as opposed to making an application to set aside. To that extent there is a dispute on process.

[3] On the question of an appeal the application before this court includes an application to extend time (to the extent necessary) under Order 3 Rule 5 for any such appeal which, application, for the avoidance of doubt, is acceded to as I have considered that it is in the interests of justice that I do so (per *Davis v NIC* [1979] NI 19 applied).

Background/Chronology

[4] The writ of summons in dispute between the parties was issued on 14 November 2019 and claimed damages for loss and damage sustained by the plaintiff arising out of the alleged negligent misstatement and/or breach of contract of the defendant in the provision of a valuation of 4 Harbour View, Marine Parade, Warrenpoint ("the Property").

[5] Given its date of issue, the writ of summons was valid for service until 13 November 2020. On 10 November 2020 (ie 3 days before the expiry of its validity) the plaintiff's solicitors made an ex parte application to extend its validity by a period of six weeks. That application was grounded on an affidavit sworn by Ms Lindsey Paul, Solicitor, in Wilson Nesbitt. On 13 November 2020 an order was issued extending the validity of the writ for the period requested.

[6] On 16 November 2020, however, the Central Office wrote to the plaintiff's solicitors in respect of the ex parte application. That letter, given what had by then happened (ie the grant of the extension), is in somewhat unusual terms:

> "The judge has considered your recent ex-parte application and has directed the following:
>
> (i) The plaintiff must demonstrate "good reason" for failure to serve the writ within the period of validity before the court can exercise its discretion. **Good reason is not demonstrated in the grounding affidavit.** The Master will permit the plaintiff to file a supplementary affidavit demonstrating good reason **otherwise the application must be struck out**."

[7] Chronologically what happened next was that the solicitors resealed the writ on 25 November 2020 and served it by first class post on the defendant on that day. It is the defendant's case that this was the first notification that it had of the existence

of the claim. There was no earlier pre-action correspondence in respect of the matter in compliance with the Practice Direction or otherwise.

[8] Ms Paul filed a second affidavit on 23 December 2020 – presumably in response to the letter from the court office dated 16 November 2020 - and in it purported to provide the "good reason" which the court office had advised was absent from the initial affidavit.

[9] Subsequent to service of the writ Carson McDowell came on record for the defendant and obtained a copy of the application for leave to extend the writ and a copy of the second affidavit from the plaintiff's solicitors. As a result, it began correspondence with the plaintiff's solicitors in respect of both (a) the contents of the affidavit but also (b) the underlying reasons upon which the application had been made.

[10] Wilson Nesbitt provided a copy of the letter from the court office of 16 November 2020 on 18 May 2021 and, at the same time, clarified that the impugned valuation which was the subject of the litigation was, in fact, one dated 2 December 2008 (and upon which the loan that was secured on the property had been advanced). On 5 August 2022 the plaintiff's solicitors then informed Carson McDowell that the valuation referred to in the second affidavit was a "retrospective" valuation of 16 November 2016 (prepared by a third party valuer) (ie not the 2008 valuation). They asserted that this was the plaintiff's date of knowledge for the purposes of calculating the limitation period under the Limitation (NI) Order 1989 ("the Limitation Order").

[11] Further correspondence ensued between the parties after which the defendant brought an application for leave to enter a conditional appearance on 13 October 2021 and in respect of which the Notice of Appeal was served on 8 April 2022.

Preliminary Points on Procedure

[12] Dealing with first principles Order 32 Rule 8 simply states that "the court may set aside an order made ex parte." This has been extensively considered in the courts from which the following principles can be distilled:

(a) An ex parte order is essentially a provisional order made by a judge on the basis of evidence and submissions emanating from one side only which is then subject to review. The judge, in undertaking any such review, is not dealing with the matter as an appeal but is essentially reviewing the order (*WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721 and the White Book (32/6/30)). On this point the court also derived help from the consideration of Horner J in the case of *Galloway v Frazer and others* [2018] NIJB 31 in which he adopted the test set out by McCloskey J in *Ewing v Times Newspapers Ltd* [2010] NIQB 65, confirming that an ex parte order is a provisional order which is made subject always to the further review of the

court. That review is not a rehearing of the subject matter but is a consideration if the order was in fact properly made at the time it was made (see *ISC Technologies v Guerin*);

(b) It is well-established law and totally uncontroversial that in all ex parte applications the applicant is under a duty to make full and fair disclosure of all material facts. The rationale for that is obvious – the information provided is all that the judge has upon which to consider the ex parte application and the exercise of his discretion. Failure, therefore, to make full disclosure may, of itself, be a vitiating circumstance leading to the order itself being set aside – see *Bloomfield v Serenyi* [1945] 2 All ER 646.

[13] It is fair to say in the present case there is a dispute between the parties as to whether the duty to make full and fair disclosure has, in fact, been satisfied (as per *Re Maloney's Application for Judicial Review* [2000] NIJB 195).

[14] Generally, applications for extension such as the one under consideration involve a two-stage analysis:

(i) The court must be satisfied that there is a good reason to extend time; and

(ii) If so satisfied, then it must consider whether it is appropriate to exercise its discretion on the facts – including any consideration of the balance of prejudice or hardship as between the parties.

(iii) It logically follows that disclosure is an important issue for consideration.

The Arguments

[15] With those comments in mind, however, the defendant in the present case has essentially argued that the ex parte order of Master Bell should be set aside on the basis that it should not have been granted and that the application was itself based both on incorrect and inadequate material. They say that essentially for two reasons:

(i) Incorrect material

The defendant says that there was material non-disclosure or a misrepresentation (albeit innocent) on the part of the plaintiff of what are material facts. As matters have transpired the allegedly negligent valuation is dated 2 December 2008. That being the case the contractual limitation period would have expired on 2 December 2014. It is suggested that in purporting to rely on the second valuation (ie the one dated November 2016) a material fact was not made known to the Master which, in effect, amounted to a misrepresentation of the facts and deprived the defendant of the potential of a limitation defence.

That issue is really a question of the applicable limitation period. In general, the limitation period under consideration would be six years. In its application, however, the plaintiff relied on the alternative three year limitation period which commences on the date of knowledge (as per Article 11 of the Limitation Order). In effect, it is asserted that the plaintiff acquired the requisite knowledge on the date of the retrospective valuation of 16 November 2016. That being the case that date, a fiori, would be the latest date upon which the plaintiff could have acquired the requisite knowledge for the purposes of Article 11. As to that point the defendant, however, argues that the actual date of knowledge (and, therefore, commencement of the alternative limitation period) may have expired somewhat earlier – a point which they say is corroborated by the nature of the chain of correspondence between the plaintiff and its solicitors and in reliance of the principles set out in *Nykredit Mortgage Bank Plc v Edward Erdman* (No.2) [1997] 1 WLR 1627.

It was, nonetheless, on that basis that the writ was initially issued on 14 November 2019 (ie two days before the three year limitation period would have expired on 16 November). The defendant makes the case, therefore, that when the order was made on 13 November, thereby extending the validity of the writ the defendant was deprived of a limitation defence under Article 11. They further argue that the limitation period, in any event, had most certainly expired when the second affidavit was filed.

These points, they say, are important factors to be taken in account by the court in deciding whether (a) sufficiently good reasons had been provided to support the ex parte application and (b) the question as to whether or not the discretion should be exercised. In furtherance they say that the first affidavit merely asserts that the writ was issued for protective purposes (without the provision of any detail) and that, in the second affidavit, the plaintiff's solicitor intimated and appeared to (incorrectly) clarify that the alleged negligent valuation took place on 16 November 2016.

To those points the plaintiff says that if there was non-disclosure it was essentially innocent and submits "that the omission of the date of the negligent valuation did **not** leave the court under a **misapprehension** as to the fact limitation would be a problem if the writ was not extended." The argument is advanced, essentially, that the first affidavit was clear insofar as, on its face, it was apparent that the writ had been issued on a protective basis and that taking a purposive approach it was clear that limitation was of concern or an issue in the matter generally.

(ii) Inadequate reasons

The defendant argues that inadequate reasons had been provided to justify the extension and that issue has never been addressed subsequently. They say that in her first affidavit Ms Paul asserted that she sought instructions

from Barclays to serve the writ on numerous occasions viz 11 February, 27 March, 4 June, 29 September, and 3 November 2020. The copy emails between Ms Paul and those who instruct her have been furnished by way of confirmation. As it transpires authority was only given on the last date.

Notwithstanding it is now accepted that the plaintiff's solicitors did, in fact, have time to serve the writ before it expired on 13 November 2020. Due to Ms Paul's misinterpretation of the provisions and requirements of Order 11 Rule 1(3)(a), however, Ms Paul felt that there needed to be a clear 21 days. That was incorrect.

Aside from that the defendant asserts nonetheless, that essentially within the first affidavit, no sufficient reason was given for the extension and that clearly, the Master was also of the same view - which led to the court office letter of 16 November 2020 seeking further reasons – even though the order granting the extension had, by then, issued.

In terms of Ms Paul's second affidavit, the defendant asserts that the principal excuse given for ongoing delay is that it was the plaintiff's intention to undertake an internal investigation based on counsel's recommendation, that this investigation was interrupted by the Covid-19 pandemic and resultant lock-down resulting in delay. It is asserted that staffing issues, working from home arrangements and furlough impacted on the investigations and so caused that delay. From a consideration of the text of the email exchanges between the plaintiff and Ms Paul it is clear, however, that in truth the issue was simply "overlooked."

[16] The defendants say fundamentally that the excuses which have been provided are not sufficient and that when considered as a whole, the affidavits do not contain a sufficient or, indeed, any particularised factual basis to provide an explanation as to why the plaintiff was unable to provide instructions until 3 November 2020. In particular, they say:

(i) That there is no explanation as to whether or not the recipient or recipients of email exchanges were on furlough and, if so, for what period?

(ii) That there is no indication as to whether or not an attempt was made to contact the recipient or recipients by telephone or otherwise;

(iii) That there is no affidavit from the relevant offices of the plaintiff asserting that correspondence was overlooked due either to Covid-19 or any other vitiating circumstance;

(iv) That there was no explanation as to why or how working from home arrangements impacted directly upon the decision that Ms Paul asked of them; and

(v) No detail or timeline given as to the particular investigations.

[17] The defendant says that their misgivings about the plaintiff's purported reliance on Covid-19 (simpliciter) as a justifying reason for its default is emphasised further by paragraphs 21 and 22 of the skeleton argument which has been filed in this case and simply seeks to assert that all businesses were impacted by the pandemic in ways that are now difficult to articulate which they say is insufficient.

[18] In short, the defendant argues that the plaintiff has never actually shown good reason for the extension of time and so the secondary consideration of the question of the balance of hardship etc in terms of exercising the court's discretion does not arise.

[19] In response the plaintiff says that the client should not be punished for a legal misunderstanding that the writ had to be served more than 21 days before it expired and that to argue that the grounds upon which the application was filed are inadequate is more akin to an appeal of the Master's decision and that in applying the "balancing test" the defendant has only suffered a delay of 11 days (on the facts) and the defendant has not brought to light any fact which would materially impinge upon the reasons advanced by the plaintiff, in particular, they say that even if the date of the negligent valuation had been disclosed the application should, on the facts, still have been granted.

Determination

[20] The debate as to whether the original application should have been an appeal or properly an application to set aside an ex parte per se, has been already fully explored by those cases to which I was referred but, in particular, Horner J in the case of *Galloway,* but most particularly when he adopted Hoffman J in the *ISC Technologies* case. The present determination is not a rehearing of the application to the Master on the exercise of a fresh direction but is very much a question of whether the order was rightly made at the time when it was made.

[21] In looking at that question, from a procedural point of view, I am, first and foremost, concerned that notwithstanding the initial extension of the period of validity of the writ the court office wrote (three days later) seeking further information and indicating that it would otherwise be "struck out." Clearly the view was initially taken that insufficient information had been provided – even though the initial extension was made. The further information sought was not actually provided until the second affidavit of 23 December 2020. Whilst I agree with the plaintiff that the substance of the application (ie the protective nature of the writ and the significance of a limitation period) was evident from a purposive consideration of the affidavit, nonetheless, the actual details around why the extension was needed and the full circumstances for seeking it were, I find, insufficiently fleshed out – as did the Master (initially). It would have been very straightforward, in my view, to

set out the exact basis upon which the extension of validity had been sought. That opportunity was missed, not just in the first affidavit, but also in the second affidavit.

[22] However, of more specific concern is the fact that in **neither affidavit** has the opportunity been taken to express exactly the detail and substance upon which the delay arose or the reasons why an extension was sought. There is clearly a recitation of the attempts to obtain instructions from the plaintiff but other than simple reliance on the Covid-19 pandemic there is no attempt to articulate (as the defendant has pointed out) the exact nature of the vitiating circumstances which would, in my view, entitle a court, to properly consider the basis upon which it might properly extend the validity of the writ.

[23] In essence, when one looks at it, all the court has been provided with is that requests were made for instructions but that they were not forthcoming due to the Covid-19 pandemic. The truth is evident from a consideration of the emails, namely that the matter was simply "overlooked" by the plaintiff's staff.

[24] Carelessness, of itself, is not a matter which is particularly persuasive to the courts in matters such as this. The simple reality is that the plaintiff/its own officers failed to provide timeous instructions to their solicitors in terms of the service of a writ which, in itself, had initially been issued almost 12 months earlier on a protective basis. As both parties appear to accept the principles set out by Master McCorry in *Sweeney v National Association of Round Tables – Enniskillen Branch* [2015] NI Master 6, cannot be improved upon. It was the duty of the plaintiff to serve the writ promptly. Where that does not happen, then reasons must be articulated as to the failure to serve the writ during its original period of validity and, it follows, that the later within that period of validity the application is made for any extension of this period, the greater the need for the court to seek cogent and sufficient reasons to satisfactorily explain the failure to do so.

[25] In the present instance I am not so concerned with Ms Paul's misinterpretation of the period required to serve a writ or that, in fact, it could have been effectively served within the initial period of validity. I am more concerned by the fact that notwithstanding the opportunities provided by Master Bell, the plaintiff overall has failed to demonstrate a good reason why its internal officers failed to provide timeous instructions. The suggestion that they withheld doing so pending further investigation internally, I do not find particularly compelling. It would have been entirely open to the plaintiff to serve the writ and then follow with a detailed Statement of Claim amending it as necessary either by consent from the other party or with order from the court. In those circumstances the first element of the 'test' in my view has not been met.

[26] At the end of the day the application was made as an ex parte application and was, therefore, essentially a provisional order. An opportunity was given to provide justification beyond the initial affidavit. A consideration of the second affidavit does

not really advance the matter further. The onus, at all times, remained on the plaintiff to demonstrate good reason and, in my view, it failed to do so. In that context, the order extending time cannot be justified and by direction of this court will be set aside and the appeal allowed.

[27] I agree with the defendant that the decision in *Mullan v Mountainview* does not assist the plaintiff.

[28] If necessary, I will hear the parties in relation to the matter of costs.