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

Delivered: 14/9/16

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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**BETWEEN:**

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**Plaintiff**

**and**

**The Superior General of the Sisters of Nazareth**

**First Named Defendant**

**and**

**The Bishop of the Diocese of Down and Connor**

**Second Named Defendant**

**and**

**Father Sean Cahill**

**Third Named Defendant**

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**Master Bell**

**Introduction**

[1] This judgment concerns *ex parte* applications on behalf of the first and second defendants, acting through the same firm of solicitors, for leave to enter conditional appearances under Order 12 Rule 7 of the Rules of the Court of Judicature.

[2] The plaintiff's claim is for damages and personal injuries by reason of negligence, breach of duty, assault, battery and trespass by the defendants, their servants and agents between 1972 and 1973 in and about the care, management, and control of the plaintiff while he resided at Nazareth House, Belfast.

[3] Two writs have been issued by the plaintiff against these defendants. The first writ was issued on 9 October 2014. This writ was served on the first defendant on 21 October 2015. On the same day the plaintiff's solicitor sent an email to the first defendant's solicitor which stated:

"I understand that you act for the defendants in this matter.

The Writ is ever so slightly out of time for service due to the fact client has legal aid application ongoing and we have been unable to serve.

Can you confirm if you would consent to service of this writ out of time ? It is only 11 days. I await hearing from you."

[4] The first defendant's solicitor informed the plaintiff's solicitor that she would have to seek the consent of her client to accept late service. However that consent was not given.

[5] On 12 November 2015 I granted applications from the defendants under Order 12 Rule 7 for leave to enter conditional appearances in order that the late service issue could be the subject of an application to set aside the writ. Conditional appearances were entered by the defendants and subsequently the defendants made an application to set aside the service of the first writ and, counsel for the plaintiff not objecting, this application was granted on 17 June 2016.

[6] On 14 June 2016 the plaintiff then issued a second writ against the three defendants. It is in identical terms to the first writ. The first and second defendants now seek leave to enter conditional appearances in order to challenge the second writ.

[7] The solicitor for the first defendant offers two grounds for the making of this application. Firstly, she says that the service of an identical second writ in the same action is an abuse of the court process and that the second writ is not a valid writ. Accordingly she does not believe that the second writ should be "validated" by the issuing of an unconditional appearance on behalf of the first defendant. Secondly, she says that she wishes to challenge the validity of the writ on limitation grounds.

[8] A solicitor in the same firm who acts for the second defendant has filed an affidavit setting out identical grounds for a similar application on behalf of his client.

[9] The solicitor for the first defendant in oral submissions as to appropriateness of this application offered two authorities for it. Firstly, she offered the material in paragraph 7.09 of Valentine's "Civil Proceedings – The Supreme Court" which states :

"A defendant who wishes to dispute the Court's jurisdiction or the validity of the issue or service of the writ should apply to set aside the writ without appearing, or seek leave to enter a conditional appearance under Order 12 Rule 7. Application is made *ex parte* to a Master and the defendant must show a *bona fide* desire or ground for setting aside the writ or the service. The appearance stands as an unconditional appearance unless the court otherwise orders or the defendant applies within the time limited for serving a defence under Order 12 Rule 8 to set aside the writ or service. The time limit can be extended. A conditional appearance ranks as an ordinary appearance for all purposes save that the defendant may make such application. It bars judgment in default; but is not *per se* a submission to the jurisdiction of the Court."

[10] The second authority offered by the solicitor for the first defendant for this application was the decision in *Tubridy v Finnegan* [1983] NI 340.

### **Consideration**

[11] When served with a writ by a plaintiff, a defendant must respond by entering an appearance in order to avoid having default judgment entered against him. An appearance is sometimes referred to as an "unconditional appearance" (as, for example, in Order 10 Rule 5 of the Rules of the Court of Judicature). The alternative method of response is by entering a conditional appearance. In order to enter a conditional appearance a defendant must first obtain the leave of the court.

[12] Order 12 Rule 7 provides:

"(1) A defendant to an action may with the leave of the Court enter a conditional appearance in the action.

(2) A conditional appearance, except by a person sued as a partner of a firm in the name of that firm and served as a partner, is to be treated for all purposes as an unconditional appearance unless the Court otherwise orders or the defendant applies to the Court, within the time limited for the purpose, for an order under rule 8, and the Court makes an order thereunder."

[13] Paragraph 7.02 of Valentine states:

“If the defendant believes that the action is beyond the Court’s jurisdiction or defective in the issue or service of the writ, he should apply to set aside the proceedings, entering only a conditional appearance.”

I agree that this sentence from Valentine represents an accurate statement of practice regarding conditional appearances. The question is whether it is a proper description of what the first and second defendants complain of in this case.

*Defects in the issue or service of the writ*

[14] As Carswell J observed in *Bradford v Department of the Environment and Others* [1986] 41 the entry of an unconditional appearance by a defendant can have important consequences, since it may constitute the waiver of an irregularity such as failure to serve the writ of summons within the prescribed time. For example in *Doyle v Patterson* [1934] IR 116, an action to recover possession of certain premises in County Dublin for non-payment of rent, O’Byrne J held that an incorrect indorsement was cured by the entry of an unconditional appearance and hence the defendant could not rely on it in view of the appearance which he had entered. Hence Order 10 Rule 1(5) provides:

“Where a writ is not duly served on a defendant but he enters an unconditional appearance in the action begun by the writ, the writ shall be deemed to have been duly served on him and to have been so served on the date on which he entered the appearance.”

Although there were defects in the service of the first writ in this case (as explained by the plaintiff’s solicitor’s email), there is no indication in the grounding affidavits by the solicitors for the first and second defendants that there were defects in the service of the second writ.

[15] In my view the decision in *Tubridy* to which I was referred provides no assistance with regard to this application. *Tubridy* concerned a claim for personal injuries arising out of a road traffic accident and was an application under Order 6 Rule 7 for an order extending the validity of the writ and for an order on a preliminary issue of law as to whether the plaintiff’s claim was barred under the Statute of Limitations Act (Northern Ireland) 1958. The court in *Tubridy* made no decision in respect of conditional appearances and the term does not even appear in the judgment.

### *Action is beyond the Court's jurisdiction*

[16] A second purpose for seeking leave to enter a conditional appearance is to challenge the jurisdiction of the court. Frequently defendants will argue *forum non conveniens* and assert that the proceedings ought to be heard in a different jurisdiction. This is not an argument which is being made in the application before me.

### **Conclusion**

[17] The purpose of entering a conditional appearance is therefore for the purpose of making the type of application referred to in Order 12 Rule 8 which provides:

“A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within the time limited for service of a defence, apply by summons or motion for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the writ or notice on him out of the jurisdiction.”

Hence the Rules envisage that, once leave to enter a conditional appearance has been granted, the defendant will apply for one of the following orders:

- (i) An order to set aside the writ;
- (ii) An order to set aside service of the writ;
- (iii) An order to set aside notice of the writ;
- (iv) An order declaring that the writ or notice has not been duly served on him; or
- (v) An order discharging a previous order giving leave to serve the writ or notice on him out of the jurisdiction.

[18] However the first and second defendants do not wish to make any such application. There appears to be a confusion in their minds between two remedies : setting aside and striking out. Where there has been an abuse of the process of the court, the remedy provided for under Order 18 Rule 19 is not the remedy of the writ being set aside. Rather the remedy is that the pleading or the indorsement is struck out. However a strike out is not one of the applications referred to in Order 12 Rule 8 which ought to be made following the filing of a conditional appearance.

[19] In order to make an application under Order 18 Rule 19 that the issuing of an identical writ is an abuse of the process of the court, the first defendant must submit to the jurisdiction of the court. He does so by the entering of an unconditional appearance. A defendant cannot therefore seek leave to enter a

conditional appearance for the purpose of arguing that there has been an abuse of process.

[20] Likewise, in order to raise a defence under the Limitation (Northern Ireland) Order 1989 that the issuing of the second writ should be barred by the court, the first defendant must submit to the jurisdiction of the court. He does so by the entering of an unconditional appearance. A defendant cannot therefore seek leave to enter a conditional appearance for the purpose of mounting a limitation defence.

[21] The entering of an unconditional appearance in this action would visit no unfortunate consequences upon the first and second defendants. They will still be entitled to make an application that the pleadings and the indorsement on the writ ought to be struck out on the basis that they are an abuse of the process of the court. Likewise they will still be entitled to raise a limitation defence at trial. Accordingly there is no reason to grant leave to enter a conditional appearance and these applications are refused.