**Neutral Citation : [2022] NIMaster 1**

| *Ref:* | **2022NIMaster1** |
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*Judgment: approved by the Court for handing down (subject to editorial corrections)*

| *Delivered:* | **16/03/2022** |
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**IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**

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**BETWEEN:**

**CYNTHIA BEATTIE TRADING AS BEATTIES TRANSPORT**

**Plaintiff;**

**and**

**MAN TRUCK AND BUS SE**

**First Defendant**

**and**

**MAN SE**

**Second Defendant**

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**Miss Jones represented the Plaintiff**
**Mr Dunlop QC and Mr Shields represented the Defendants**

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**Master Bell**

[1] This is an application for a declaration pursuant to Order 12 rule 8 of the Rules of the Court of Judicature (NI 1980) ("the 1980 Rules") and the inherent jurisdiction of the court that the notice of writ of summons herein has not been validly served. The facts of the case involved the impact of the post-Brexit arrangements and the difficulties associated with suing an entity outside this jurisdiction.

[2] The plaintiff was represented by Miss Jones and the defendants were represented by Mr Dunlop QC and Mr Shields. I am grateful to counsel for their written and oral submissions which were of considerable assistance. I have already indicated to counsel and the solicitors at the oral hearing that I am granting the defendants' application and awarding them their costs. However, in the light of the fact that the decision and the reasoning behind it might be useful to practitioners to highlight the Brexit issue, I am delivering the reasons in the form of this written judgment.

[3] This story begins in July 2016 when the European Commission reached a decision that the defendants, together with a number of major manufacturers including DAF, Daimler, Renault, Volvo and Iveco, had been operating collusive arrangements on the pricing of trucks (decision 2017/C 108/05). The operation of this cartel was unlawful. During the period this cartel was operating the plaintiff alleges that she bought a truck from MAN. As a result the plaintiff issued a notice of writ of summons dated 23 February 2021 claiming loss and damage under section 2 of the European Communities Act 1972, Chapters I and II of the Competition Act 1998, and section 47F and Schedule 8A of the Competition Act 1998. The notice of writ recorded the addresses of the two defendants as being their registered office at PO Box 50 06 20, 80976, München, Germany.

[4] As a result of Brexit, the position is that, after 31 December 2020, the end of the transition period, Regulation (EC) no 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters is no longer applicable between the UK and the EU Member States. Instead, the Hague Convention of 1965 on the service abroad of judicial and extrajudicial documents in civil and commercial matters has become applicable between the UK and those EU Member States which are part of the Hague Convention.

[5] The most usual method of service of documents under the Hague Convention is to route those documents through the appropriate Central Authority. In respect of Germany, different Central Authorities have been designated for each of the German *Länder* and requests for service must be addressed to the Central Authority of the *Land* where the service is to be effected, which on the facts of this litigation means that service must take place through the Präsident des Oberlandesgerichts München, Prielmayerstrasse 5, 80097, München.

[6] Article 10 of the Hague Convention does allow for personal service of documents "provided the State of destination does not object." Germany, in common with many European States, has registered its objection to this mode of service and hence that mode of service cannot be used.

[7] On 30 April 2021 the plaintiff's solicitors wrote to the Foreign Service Section of the Courts and Tribunal Service at the Royal Courts of Justice. With their covering letter the plaintiff's solicitors enclosed a copy of the notice of the writ of summons, a notice of the writ of summons which had been translated into German, a Certificate of Translation, and a Request for Service Abroad of Judicial or Extrajudicial Documents under the Hague Convention 1965. Their documentation was entirely in the correct form and they correctly identified the particular German Central Authority which the documents needed to be sent to.

[8] On 1 July 2021 the Foreign Service Section sent a written acknowledgment to the plaintiff's solicitors that it had received the documents for service and that a Certificate of Service would follow in due course. Also on 1 July 2021, the Foreign

Service Section sent a letter of request to Germany seeking service of the documents and asking for the return of a duly completed certificate of service. Unfortunately, due to human error in the Foreign Service Section, instead of the documents being sent to the Central Authority in München, the letter and documents were sent to the defendants' registered office in München. Unfortunately, the Foreign Service Section did not send a copy of their outgoing letter to Germany to the plaintiff's solicitors and so the plaintiff's solicitors were unaware of the mistake that had been made. (Since the hearing in this case I have communicated with the manager in charge of the Foreign Service Section of the Courts and Tribunal Service that a copy of the outgoing letter to a Central Authority should be copied to the solicitor making the application. This will henceforth be the Section's practice.)

[9] Had this been the only problem with the service of the notice of the writ of summons, there would have been a strong argument for not setting aside service. It would have been likely that I would have been minded to exercise the Order 2 discretion to cure this irregularity. In *Patterson v Trustees of St Catherine College* [2003] NIQB 25 Nicholson LJ stated that he was satisfied that he did have power under Order 2 rule 1 of the 1980 Rules to validate irregular service of the writ and/or to deem service of the writ good on defendants. That was a case where the solicitors made an error in respect of the service. In this case, the solicitors did everything correctly and the error was made by the Court Service sending the documents to the wrong address.

[10] However, there is an additional difficulty in the case before me. The plaintiff did not make an application to the court and obtain leave to serve the notice of the writ of summons outside the jurisdiction. The defendant submits that this is not an error which should be cured by the exercise of the Order 2 Rule 1 discretion.

[11] Mr Dunlop submitted that there were two relevant authorities on this point. Firstly, in *Leal v. Dunlop Bio-Processes International Ltd.* [1984] 1 WLR 874 a plaintiff served a writ out of the jurisdiction without first obtaining the leave of the court to do so. One of the questions to be decided by the Court of Appeal for England and Wales was whether this amounted to an irregularity which could be cured by a discretion exercised under Order 2 rule 1 of the 1980 Rules. May LJ stated:

> "… I confess that I have changed my mind more than once about the correct answer to the questions, first, whether the issue and purported service of a writ out of the jurisdiction without prior leave of the court can be treated as an irregularity and must not be considered a nullity; and secondly whether the court has power under the Rules of the Supreme Court to grant such leave retroactively. In the end, I have come to the conclusion that the wording of Ord. 2, r. 1, and Ord. 12, rr. 7 and 8, is now so wide that the answer to both these questions must be in the affirmative. Nevertheless, I hope and expect that

> it will only be in the exceptional case that the court will validate after the event the purported service in a foreign country without leave of process issued by an English court."

Slade LJ agreed with this position:

> "Finally, and more generally, I would specifically express my agreement with May LJ's view that only in the exceptional case should the court, in the exercise of the discretion which we have held to exist, validate, after the event, the purported service in a foreign country without leave of process issued by an English court. In most cases breaches of the requirements of Ord. 6, r. 7, or Ord. 11, r. 1, relating to the leave of the court, are not in my opinion likely to be breaches which can be lightly disregarded."

The second authority offered by Mr Dunlop was *Kenneth Allison Ltd. and Others v A. E. Limehouse & Co. (a firm)* [1992] 2 A.C. 105 in which Lord Goff stated that it may fairly be claimed that the rules constitute a comprehensive, consistent and coherent code of procedure. He then went on to consider the rules on service:

> "When, in these circumstances, I look at the rules relating to service which I have summarised, the basic position appears to me to be clear. Ord. 10, r. 1(1) prescribes a mandatory rule which must be followed, subject to the provisions of the Act and of the Rules. In the rules are to be found a whole range of exceptions to rule 1(1). There are the two alternative modes of service under Ord. 10, r. 1(2); and the need for service may be obviated, as must very often be the case, where the defendant's solicitor places the requisite endorsement on the writ under Ord. 10, r. 1(4). Where circumstances justify it, an order for substituted service may be obtained. Special provision is made for special cases; in particular, in the case of a partnership, it is not necessary to serve all the partners, for the plaintiff may take advantage of one of the alternatives in Ord. 81, r. 3(1). But the rules themselves do not contemplate any alternative mode of service other than those specified."

[12] On the basis of those authorities Mr Dunlop submitted that, while the court could validate after the event a purported service in a foreign country where leave had not previously been obtained, this could only be done in an exceptional case. This case, he argued, was not such a case as the plaintiff had not provided affidavit evidence of any fact on which the valid exercise of a judicial discretion might be

based. Hence, he submitted, the exceptionality test could not be satisfied in this case. On behalf of the plaintiff, although Miss Jones suggested that prior to Brexit no leave was necessary and there was some doubt in academic circles as to whether the need to seek leave for service of a writ outside the jurisdiction was an intended outcome of the legislation, she conceded that such leave was now necessary.

[13] What then should be the appropriate order made by this court? The summons issued by the defendants sought two remedies. The first relief sought was a declaration pursuant to Order 12 rule 8 of the 1980 Rules and the inherent jurisdiction of the court that the notice of writ of summons had not been validly served. The second relief sought was, alternatively, for an order pursuant to Order 12 rule 8 of the 1980 Rules and the inherent jurisdiction of the court for a declaration that the Court of Judicature in Northern Ireland does not enjoy jurisdiction to hear and determine the plaintiff's claims. Miss Jones argued that, if it had only been the first remedy which had been sought, the plaintiff, upon considering the law, would have reluctantly conceded the point without a hearing. However, she explained that the second relief sought by the defendants was such that the summons had to be contested. (As matters transpired at the hearing, the defendants did not press for the second relief to be granted.)

[14] In terms of the relief sought, the defendants modified their position somewhat at the hearing and asked for the remedy that the plaintiff's writ be struck out. Mr Dunlop pointed out that the notice of writ was dated 23 February 2021 and that therefore, by the date of hearing on 10 March 2022, it had exceeded its one year period of validity. Certainly the notice of writ is no longer capable of being served, but Miss Jones submitted that it was capable of being revived by an application under Order 6 rule 7 of the 1980 Rules. She suggested therefore that applications might be made for both leave to serve the notice of writ outside the jurisdiction and also to extend the validity of the notice of writ. If granted, steps could then be taken for the service of papers in Germany. As a result she therefore sought simply for service of the notice of writ to be set aside. While an application to extend the validity of the notice of the writ of summons may not be without difficulty in terms of showing good cause, I agree with her submission that the plaintiff ought to be afforded the opportunity to consider whether such an application ought to be made. I therefore decline to strike out the notice of writ and instead I set aside service.

[15] In terms of costs, had the application simply been successful on the basis of the improper service, I would have ordered costs to be costs in the cause. Given, however, that the failure to seek leave to serve outside the jurisdiction issue was the decisive issue in this application, the defendants must have their costs. I also certify for senior and junior counsel.