Neutral Citation Number: [2010] IEHC 443

THE HIGH COURT

1998 6995 P

BETWEEN

SANDY LANE HOTEL LIMITED

PLAINTIFF

AND

TIMES NEWSPAPERS LIMITED, ZOE BRENNAN AND WENDY LEIGH

DEFENDANTS

JUDGMENT of Kearns P. delivered on the 10th day of December, 2010.

This is an application for an order pursuant to Order 15, rule 2 of the Rules of the Superior Courts, 1986 substituting "Sandy Lane Hotel Co. Limited" (hereinafter referred to as "the proposed plaintiff") for "Sandy Lane Hotel Limited" (hereinafter referred to as "the plaintiff") as the plaintiff in this action.

The plaintiff is a holding company formed in 1996 which is registered under the laws of St. Lucia. The proposed plaintiff is the wholly owned subsidiary of the plaintiff. The proposed plaintiff is the owner and operator of a world-renowned hotel business, the Sandy Lane Hotel, in Barbados. The plaintiff herein claimed damages for libel against the defendants arising from the publication of an article in the Sunday Times on the 1st March, 1998. The first defendant is the publisher of the article and the second and third defendants are journalists and authors of the article.

The proceedings were instituted against the defendants by way of plenary summons dated the 15th June, 1998, with affidavits being exchanged by the parties in April, 2001. The proceedings were dormant until June, 2004 when a Notice of Intention to Proceed together with a Notice of Trial were served.

Following a review of the discovery made by the plaintiff, it emerged that the plaintiff's name on the title to the proceedings was incorrectly stated as being "Sandy Lane Hotel Limited" and not "Sandy Lane Hotel Company Limited". The plaintiff then brought an application pursuant to O. 63, r. 1 (15) of the Rules of the Superior Courts for an order correcting the name of the plaintiff in the proceedings. The High Court granted the order sought. The defendants successfully appealed that order to the Supreme Court where Hardiman J. delivered judgment (with Fennelly and Macken JJ. concurring) on the 16th November, 2009. As a result of the Supreme Court's refusal to amend the title, this application was brought under Order 15 of the Rules of the Superior Courts.

SUBMISSIONS OF THE PLAINTIFF

Counsel for the plaintiff relied on three arguments when requesting the Court to grant the order sought as follows: First, that a *bona fide* mistake in the nomination of the plaintiff had occurred in this case; second, the change of name of the plaintiff was necessary for the proper determination of the libel proceedings initiated in 1998, and third, contrary to the submission of the defendants, delay in moving for relief should not be allowed to defeat the application.

It was counsel's submission that the action was commenced in the name of the wrongly described plaintiff through a *bona fide* mistake. This was not a case of the plaintiff choosing the wrong party to take the action and then later seeking to bring in a different party and counsel relied upon the decision of Shanley J. in *Southern Mineral Oil Ltd. (in liquidation) v. Cooney (No. 2)* [1999] 1 I.R. 237. In that case Shanley J. had placed particular reliance on the test propounded by Millet J. in *Re Probe Data Systems* [1989] B.C.L.C. 561 at p. 563 in relation to the equivalent English rule at p. 247 which concluded that "[t]he mistake must have been a mistake as to the name or identity of the intended party".

Counsel further submitted that the present application could be distinguished from the facts of *Southern Mineral Oil Ltd. (in liquidation) v. Cooney (No. 2)* on the basis that there was a genuine mistake as to the name or identity of the intended party.

Furthermore, counsel relied heavily upon the decision of Geoghegan J. in *Kennemerland v. Montgomery* [2000] 1 I.L.R.M. 370. The facts in that case satisfied Geoghegan J. that the proceedings were brought in the name of the wrong plaintiff due to a *bona fide* error and he accepted the affidavit evidence tendered on behalf of the applicant to that effect.

It was also submitted that the defendants acted at all times on the basis that they were being sued by the entity which owned and operated the Sandy Lane Hotel, *i.e*. the proposed plaintiff. The defendants did not plead that the plaintiff was not the owner of the Sandy Lane Hotel or its business or that it had no standing to sue.

Counsel submitted that the order sought pursuant to O. 15, r. 2 should be granted by this Court as it was clearly necessary for the proper determination of the real matters in dispute.

Counsel further submitted that the Statute of Limitations 1957 (as amended) could not be successfully invoked by the defendants as a means of defeating this application. It was submitted that it is not appropriate for this Court, at this juncture of the proceedings, to seek to determine the issue of whether or not the Statute of Limitations applies in the event that the proposed plaintiff is substituted

for the plaintiff. Counsel argued that estoppel would ultimately arise and bar a defence on the Statute of Limitations on the basis of the clear acceptance by the defendants that they were being sued by the entity which owned and operated the Sandy Lane Hotel, *i.e*. the proposed plaintiff.

Counsel noted the important distinction between Order 15, rule 2 and Order 15, rule 13. Where a court adds a defendant pursuant to r. 13, the proceedings as against that defendant are deemed only to have begun on the making of the order adding that party as defendant. Therefore, the Statute of Limitations will apply to determine whether or not the plaintiff's claim against the added defendant is statute barred as at the date of the making of the order adding the defendant. In contradistinction to this, O. 15, r. 2 does not make such a provision. The rationale underpinning the distinction lies in the fact that, in circumstances where the wrong person has been added as plaintiff through a *bona fide* mistake, the defendant has nonetheless been properly served with proceedings putting him on full notice of the case being made against him and putting him in a position to meet that case. Counsel argued that substituting the proposed plaintiff for the plaintiff ultimately causes no prejudice or injustice to the defendant. The underlying cause of action remains and would remain the same. Furthermore, the interests of justice demand that the error be corrected without the defendant being able to benefit from the "windfall" of a defence on the Statute of Limitations that was not available at the date of the writ.

Counsel referred to the case of *Kennemerland v. Montgomery* [2000] 1 I.L.R.M. 370. In that judgment, Geoghegan J. rejected the submission that he ought not to substitute a new party under O. 15, r. 2 on the grounds that the action at the suit of that new party was statute barred. Geoghegan J. further rejected the defendant's reliance on the judgment of the Supreme Court in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd*. [1998] 2 I.R. 519 as that case concerned an application to add a defendant under O. 15, r. 13 and not under Order 15, rule 2. It was also the expressed view of Geoghegan J. that the Supreme Court in *Allied Irish Coal Supplies Ltd*. had not intended to, and had not in fact, overruled the earlier Supreme Court judgment in *O'Reilly v. Granville* [1971] 1 I.R. 90.

Counsel submitted that Clarke J. in *Wicklow County Council v. O'Reilly* [2006] I.E.H.C. 265 correctly summarised the applicable test and considered the distinction between r. 2 and r. 13 of O.15 and concluded that O. 15, r. 2 is concerned with an amendment to the name of a party even if this would have the effect of substituting another party. Such an order could only be made where a *bona fide* mistake had occurred - where one party sets out to sue X but erroneously describes or names X as Y, with the attendant consequence of suing Y instead of X. The intentions of the person making the mistake are determined in the light of all the surrounding circumstances. Clarke J. concluded that in such circumstances the Statute of Limitations would not apply. The more general jurisdiction of O, 15, r. 13 does not require that a *bona fide* mistake is established, however the Statute of Limitations will apply in such instances and the date of joinder will be deemed as the date of commencement of the action as against the joint party.

It was submitted that there has been no undue delay on the part of the plaintiff in dealing with the issue of correcting the name of the plaintiff. Upon realising the error, the plaintiff filed a motion in July, 2005 seeking to correct the name of the plaintiff pursuant to Order 63, rule 1 (15). This order was granted by the High Court in November, 2005. In December 2005, the defendants filed a Notice of Appeal against that order. The appeal was heard in the Supreme Court some three and a half years later and the Supreme Court, in allowing the appeal, delivered its reserved judgment in November, 2009. This application was issued promptly thereafter pursuant to Order 15, rule 2. It was the plaintiff's contention that the facts of this case fall to be considered within O. 15, r. 2, such that the Statute of Limitations does not apply.

SUBMISSIONS OF THE DEFENDANTS

The defendants resisted the application on grounds as follows: first, there was no proper evidence of a mistake as provided for by O. 15, r. 2; second, the proposed new plaintiff's claim was statute barred under and by virtue of the Statute of Limitations 1957 (as amended), and third, the Court should in any event exercise its discretion not to permit the substitution.

Counsel on behalf of the defendants submitted that the factual circumstances of this case did not evidence any mistake of the type provided for in O. 15, r. 2 of the Rules of the Superior Courts. These proceedings were instituted in the name of the St. Lucia company, a separate legal entity to the Barbados Company which is the proposed plaintiff. It was argued that these are two separate and distinct corporate entities which were incorporated in different jurisdictions. Counsel contended that Mr. Brian O'Sullivan, former company secretary for the plaintiff, must have been aware of this fact and the explanation offered in his affidavit that the omission of the word "Co." was a simple error ignored the fact that the proceedings were initiated in the name of the St. Lucia company. It was submitted that the identity of the plaintiff was clear throughout and that following the publication of the article in the Sunday Times newspaper, letters of complaint were sent by Mr. O'Sullivan in the name of the plaintiff. Furthermore, the plenary summons identified the plaintiff as a St. Lucia company and the request for security for costs was based expressly on that fact which was not challenged or queried in any way.

Counsel on behalf of the defendants submitted that O. 15, r. 2, like O. 63, r. 1 (15), is inapplicable to the circumstances of this case as the rule cannot be used to correct a mistake as to the actual identity of the party which is sought to be sued. An order sought under O. 15, r. 13 would have been the appropriate order under which to make this application. Such an order would have been a less than satisfactory outcome for the plaintiff as the joinder of a plaintiff under such an order is subject to the relevant limitation period and the defendants relied in this regard on the decision in *Southern Mineral Oil Ltd. (in liquidation) v. Cooney (No. 2)* [1999] 1 I.R. 237.

It was further submitted that it would be contrary to the provisions of the Statute of Limitations 1957 (as amended) to permit the substitution of a new plaintiff at this stage of the proceedings and the plaintiff should not be allowed to subvert the Statute of Limitations in this manner. Counsel on behalf of the defendants submitted that, at the upper limit, any cause of action vested in the proposed plaintiff became statute barred on the 1st March, 2004. The defendants relied upon an English line of authority concerning the old English rule which corresponds to O. 15, r. 2 including the decision of the House of Lords in *Ketteman v. Hansel Properties Ltd*. [1987] 1 A.C. 189 which was relied upon as providing authority for the general principle that when a party is joined to an action he is deemed to be joined as of the date of joinder, *i.e.* "relation back" does not occur in such an instance. Furthermore, the decision of O'Neill J. in *Kinlon v. Córas Iompair Eireann* [2005] 4 I.R. 480 was relied upon as authority that "relation back" does not arise in circumstances where an order joining or substituting a new party is made by the Court.

Counsel on behalf of the defendants argued that the Court should, in any event, exercise its discretion not to permit the substitution on the grounds of delay and drew the Court's attention to Hardiman J.'s judgment in the Supreme Court appeal in which he stated that:-

"Because of the delay (and there has been gross delay) the defendants might be able to object to the substitution of a new party on the grounds that the statute of limitations has run as against that party. Since this is a separate issue which may well come before the courts, I will say nothing about it. But I would not be prepared to deprive the defendants of the opportunity of raising it."

DISCUSSION AND DECISION

There are three distinct provisions contained in the Rules of the Superior Courts relating to the alteration of the names of parties to proceedings: Order 63, rule 1 (15), Order 15, rule 2 and Order 15, rule 13. Order 63, rule 1 (15) has already been unsuccessfully invoked by the plaintiff. Of relevance to this particular application are rr. 2 and 13 of Order 15.

Order 15, rule 2 provides that:-

"Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

Order 15, rule 13 provides that:-

"No cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added…."

A myriad of case law, concerning the application of both r. 2 and r. 13 of O. 15, was opened to this Court. To ensure clarity for the rationale grounding this decision, I propose to deal with this case law and reconcile the apparent divergence between certain seminal judgments relevant to this case. Any such examination of the operation of rr. 2 and 13 of O.15 must commence with an examination of the decision in *O'Reilly v. Granville* [1971] I.R. 90. That case arose out of the plaintiff's application to add a second defendant to those proceedings pursuant to Order 15, rule 13 of the Rules of the Superior Courts 1962. The Supreme Court allowed the plaintiff to add the second defendant even though the limitation period had expired as against that defendant.

The subsequent case of *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd*. [1998] 2 I.R. 519 concerned an application for the joinder of co-defendant pursuant to Order 15, rule 13. The High Court held that the co-defendant would not be joined to the action where the claim against it would be statute barred. The Supreme Court, dismissing the appeal, held that the Court could not permit a person to be named as a defendant in an existing action at a time when that person could rely on the Statute of Limitations 1957 (as amended) to bar the plaintiff from bringing a fresh action against him. The Court further held that it had jurisdiction to refuse to add parties for the purpose of introducing a new cause of action. Ultimately, the Supreme Court deemed that the Court had a discretion to order the addition of a new defendant. However, it appears that the decision of *O'Reilly v. Granville* [1971] I.R. 90 was not considered by either the High Court or the Supreme Court in that case.

In the case of *Southern Mineral Oil Ltd. (in liquidation) v. Cooney (No. 2)* [1999] 1 I.R. 237, Shanley J. considered an application to add or substitute parties pursuant to O. 15, rr. 2 and 13. The applicants were companies that had been wound up by order of the High Court. The liquidator had commenced the proceedings in the name of the companies in liquidation on the basis of his belief that this was the correct manner in which to proceed. The applicants applied to have the liquidator substituted as the applicant in the matter. Shanley J., applying *Re Probe Data Systems* [1989] B.C.L.C. 561, held that the applicant could not be substituted pursuant to O. 15, r. 2 on the basis that the two crucial requirements in order for rule 2 to apply were not evident, namely; (i) that a *bona fide* mistake had occurred and (ii) this mistake had not misled or caused any doubt as to the identity of the intended plaintiff. Shanley J. observed that, even though a genuine mistake had occurred on behalf of the applicant, this was not a case under r. 2 on the basis that at all material times the respondents understood that the applicants were companies in liquidation and not the liquidator. Shanley J stated at p. 247 that:-

"To now allow an amendment would be to suggest that the respondents at all material times were in no real doubt but that the intended applicant was in fact the liquidator. This is patently not the case and for these reasons liberty to substitute the liquidator for the companies in liquidation pursuant to O. 15, r. 2, will be refused."

Relying on the decision of the Supreme Court in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd*. [1998] 2 I.R. 519, Shanley J. held that the application under r. 13 failed on the basis that the cause of action against the proposed added defendants was statute barred. Of importance was the observation of Shanley J. that the attitude of the Supreme Court in *O'Reilly v. Granville* [1971] I.R. 90, (*i.e*. that the Statute of Limitations 1957 (as amended) was a matter for defence and it did not arise until pleaded) had changed since the decision in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* [1998] 2 I.R. 519. Shanley J. stated at p. 246 that he felt "bound to follow" the later decision of the Supreme Court in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.*

In *Kennemerland v. Montgomery* [2000] 1 I.L.R.M. 370, an application was made pursuant to O. 15, rr. 2 and 13 to substitute the plaintiff in the proceedings. Geoghegan J. in the High Court permitted an amendment under O. 15, r. 2 in circumstances where it was perfectly clear that the defendants, at all material times, knew that the wrong company had been named as a plaintiff. Furthermore, Geoghegan J. noted that the justice of the circumstance required the substitution to be made. Crucially the judgment of Geoghegan J. confronted the apparent divergence between the Supreme Court judgments of *O'Reilly v. Granville* [1971] I.R. 90 and *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* [1998] 2 I.R. 519. In dealing with the decision of Shanley J. in *Southern Mineral Oil Ltd. (in liquidation) v. Cooney (No. 2)* [1999] 1 I.R. 237, Geoghegan J. stated that:-

"I think it highly unlikely that the Supreme Court in Allied Irish Coal would have been intending to overrule O'Reilly -v- Granville without actually saying so, particularly having regard to the detailed analytical judgments in that case. I think therefore that Allied Irish Coal Supplies -v- Powell Duffryn International Fuels Limited is simply a restatement of a long established principle that a Court will not add a defendant under Order 15 Rule 13 if the action is quite clearly statute

barred. I do not think that it can be taken as authority for the proposition that if there is doubt as to whether a plea of the statute would be successful or not, the Court making the decision as to whether to join the additional party or not has to there and then decide the statute bar issue and accede to or refuse the application accordingly. But at any rate I do not think that the principles which apply in relation to an application under Order 15 r. 13 necessarily apply equally to an application under Order 15 r. 2."

Therefore, it was the clear opinion of Geoghegan J. that the decision of the Supreme Court in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd*. [1998] 2 I.R. 519 did not overrule the decision in *O'Reilly v. Granville* [1971] I.R. 90. Furthermore, *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd*. was simply a restatement of a long established principle that a court will not add a defendant under O. 15, r. 13 if the action is quite clearly statute barred. It was held that the determination of a claim as being statute barred involved a consideration of numerous issues and it would be inappropriate to determine the issue at that stage of the proceedings. Whilst it was noted that the principles that govern applications under O.15, r. 13 do not necessarily apply to applications under O.15, r. 2, Geoghegan J. stated that where an application is made pursuant to r. 2, the court has a discretion to refuse the order sought in cases where the action is clearly statute barred beyond any doubt and it would be futile to do so. Geoghegan J. deemed that this was not such a case and accordingly deferred the limitation issue in that matter.

In *Kinlon v. Córas Iompair Eireann* [2005] 4 I.R. 480, O'Neill J. in the High Court also considered the judgment of Shanley J. in *Southern Mineral Oil Limited (in liquidation) v. Cooney (No. 2)* [1999] 1 I.R. 237 and the consequent apparent divergence in the Supreme Court judgments of *O'Reilly v. Granville* [1971] I.R. 90 and *Allied Irish Coals Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* [1998] 2 I.R. 519. As already noted, Shanley J. expressed the view that he was "bound to follow" the later decision of the Supreme Court in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* O'Neill J. disagreed with Shanley J. in relation to this point on the basis that in *Allied Irish Coal Supplies Ltd. v. Powell Duffryn International Fuels Ltd.* the case of *O'Reilly v. Granville* was not cited to either the High Court or the Supreme Court. O'Neill J. stated at p. 492 that:-

"It would appear to me that since O'Reilly v. Granville [1971] I.R. 90 does not appear to have been considered by the Supreme Court in Allied Irish Coal Supplies Ltd. v. Powell Duffryn Intl. Fuels Ltd. [1998] 2 I.R. 519 and expressly disapproved, it remains good law and insofar as I find myself with two conflicting Supreme Court authorities, I am inclined to prefer the reasoning of O'Reilly v. Granville."

The decision of Clarke J. in *Hynes v. The Western Health Board* [2006] I.E.H.C. 55 and *Wicklow County Council v. O'Reilly & Others* [2006] I.E.H.C. 265 followed this line of authority and concluded that the authoritative decision on this issue was that of *O'Reilly v. Granville* [1971] I.R. 90.

Order 15, rule 2 makes provision for instances where an action has been commenced in the name of the wrong person as a plaintiff; it can be accurately summarised as being the rule governing the substitution of parties. I am mindful that r. 2 of O. 15 is imbued with its own limitations. The Court must be satisfied that the mistake was *bona fide* and that the order for substitution pursuant to r. 2 is necessary for the determination of the real matter in dispute. Also, an order pursuant to O. 15, r. 2 will not be made where to do so would constitute a new action (see *Southern Mineral Oil Ltd.(in liquidation) v. Cooney (No. 2)* [1999] 1 I.R. 237) .

Order 15, rule 13 concerns the procedure for adding, substituting or striking out a party. The names of any parties may be added, whether plaintiffs or defendants, who ought to have been joined, or "*whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter*".

There are, however, two important distinctions between Order 15, rule 2 and Order 15, rule 13. First, in relation to r. 13, it is not necessary for the applicant to establish that a *bona fide* mistake occurred. Secondly, where a court makes an order pursuant to O. 15, r. 13 the proceedings against the new party are deemed to have commenced only on the date of the making of the order adding that party. This may, therefore, have significant implications concerning the computation of the relevant limitation period in accordance with the Statute of Limitations 1957 (as amended). Order 15, rule 2 does not contain such a provision, however, it nonetheless contains the requirement that the mistake be one of a *bona fide* nature.

These proceedings have been commenced in the name of the wrong person as plaintiff. This Court is satisfied that the mistake which occurred in the naming of the plaintiff was indeed a *bona fide* mistake. In this respect the plaintiff has crossed the first hurdle in relation to the application of Order 15, rule 2. The second hurdle which has been identified, and is set out in r.2, is that it must be shown that an order mandating the addition or substitution of a plaintiff is "necessary for the determination of the real matter in dispute". This Court is fully satisfied that this criterion also has been fulfilled in this instance. The third hurdle, which has been identified by the case law cited above, is to inquire whether the underlying cause of action remains the same. This is the case in this instance. The final hurdle which the plaintiff must satisfy is that should the Court grant the order sought pursuant to O. 15, r. 2, no prejudice or injustice will fall upon the defendant. It is this Court's view that the defendants were properly served with proceedings and put on full notice of the case being made against them. The defendants will suffer no prejudice or injustice in this instance by this Court granting such an order. On the basis of the clarification of precedent case law, I am satisfied that the judgment in *O'Reilly v. Granville* [1971] I.R. 90 represents the authoritative case law on this point. (See also the decisions in *Kennemerland v. Montgomery* [2000] 1 I.L.R.M. 370, *Kinlon v. Córas Iompair Eireann* [2005] 4 I.R. 480, *Wicklow County Council v. O'Reilly* [2006] I.E.H.C. 265 and *Hynes v. The Western Health Board & Anor*. [2006] I.E.H.C. 55.)

I am satisfied that there is ample authority for concluding that relief should be granted on facts such as have arisen in this case. As to the Statute of Limitations issue, this Court declines to exercise its discretion to refuse to make the order pursuant to r.2 on the basis that the claim is statute barred and futile in practice. This is not such a case. I will therefore grant that the amendment sought be allowed pursuant to Order 15, rule 2 of the Rules of the Superior Courts.