Neutral Citation No. [2005] IEHC 95

THE HIGH COURT

[2000 No: 8724P]

BETWEEN

LYNN KINLON

PLAINTIFF

AND
CÓRAS IOMPAIR ÉIREANN

DEFENDANT

Judgment O'Neill J. delivered the 18th day of March, 2005.

1. In this Notice of Motion the relief sought by the plaintiff is as follows:

> 1. An order setting aside the Order of the Master of this Honourable Court made on 5th day of February, 2004 and perfected on the 10th day of March, 2004, which said order refused to substitute Bus Átha Cliath for Córas Iompair Eireann.
>
> 2. An Order substituting Bus Átha Cliath for Córas Iompair Eireann in the above entitled proceedings.
>
> 3. An order extending the Statute of Limitations period.
>
> 4. An order extending the time for an appeal of the Order of the Master of this Honourable Court made on 5th day of February, 2004 and perfected on 10th March, 2004.

2. When this matter came before me on 7th March, 2005, I initially heard the application for an extension of time for an appeal from the Order of the Master and having heard submissions from counsel for the plaintiff and Mr. O'Herlihy for the defendant and having considered the affidavits and exhibits I allowed an extension of time as sought. I then proceeded with the application for the other reliefs set out above.

Background

3. The plaintiff in this case, it is alleged was injured in a road traffic accident which took place on 1st August, 1997, at Arran Quay in the City of Dublin when it is alleged she was struck by a bus while riding her bicycle.

4. Arising out of this the plaintiff sought to make a claim for negligence in respect of personal injuries suffered in this accident. The plaintiff instructed a firm of Accident Claims Consultants known as Aaron and Carroll. This firm wrote a letter dated 2nd September, 1997 in the following terms:

> *"Córas Iompair Eireann,*
>
> *Dublin Bus Claims Dept.,*
>
> *Bridgewater House,*
>
> *Islandbridge,*
>
> *Dublin 8.*
>
> *2 September, 1997*
>
> *Your Ref:*
>
> *Our Ref: 1897LK*
>
> *RE: Our Client : Lynne Kinlon*
>
> *Accident : 1 August 1997 at 2.30 pm*
>
> *Bus Reg.No. : 96 D 313*
>
> *Dear Sirs,*
>
> *We act on behalf of Lynne Kinlon, who was involved in an accident on the above said date along the Liffey Quays travelling from Phoenix Park when she was a pedal cyclist.*
>
> *As a result of this accident, out client suffered severe personal injuries, loss and damage and it appears from our instructions that she is entitled to claim for damages against you arising out of the negligence/nuisance on the part of you, your servants or agents in or about the care, control and driving of Bus Registration Number 96 D 313.*
>
> *In those circumstances we hereby intimate a claim on behalf of our client.*
>
> *We await hearing from you.*
>
> *Yours faithfully,*
>
> _____
>
> *Aaran and Carroll & Co."*

5. A letter of the 16th September, 1997 replied to this letter and the entire text of this letter is as follows:

"Córas Iompair Éireann

Arran & Carroll, Group Investigations Dept.

564 South Circular Road, Bridgewater Business Centre,

Rialto, Islandbridge,

Dublin 8. Dublin 8.

Fax: 703 1554

WITHOUT PREJUDICE Tel: 703 1547

W 197/4383/001/LD Refer Enquiries to:

16th September 1997 ALICE CLARKE

Your Client: Lynne Kinlon

Accident: 1st August, 1997

Dear Sirs,

I acknowledge receipt of your letter of the 2nd September, 1997 and note that you act on behalf of the abovenamed in her/his claim for damages arising herein.

The full circumstances of this accident are being investigated and when I have completed my enquiries I shall reply to you conclusively.

To enable me to complete my investigations please advise:-

1) The time of the accident?

2) The direction and registration number of our bus?

3) The negligence alleged against Bus Atha Cliath/Dublin Bus?

4) Did your client report the accident to the Driver/Conductor, if so can your client give a physical description of the Bus Driver/Conductor?

5) Can we have sight of bus ticket?

6) Where exactly did this accident occur?

7) Advise names and addresses of any witnesses to the accident?

8) Advise the name and address of your client's Doctor so that I can arrange a joint medical examination under the usual terms?

9) Please forward estimate for repairs to your client's vehicle?

I look forward to hearing from you.

Yours faithfully,

Denise Gibbons

For Liability Manager/DG."

6. Towards the end of July in the year 2000 the plaintiff was informed by this firm of accident consultants that they were unable to negotiate a settlement of her claim and as they were not solicitors they could not issue proceedings on her behalf and as the expiry of the statute of limitations period was approaching, that he was advised to go to a solicitor to initiate proceedings. She instructed Robert Walsh a solicitor to act on her behalf and a Plenary Summons was issued on 26th July, 2000. This Plenary Summons named Córas Iompair Éireann as the defendant. Prior to the issuance of this summons Mr. Walsh had been furnished with some papers which included the letter of 16th September, 1997, quoted above.

7. As a result of a reliance upon this letter Mr. Walsh deposes on affidavit that "a bona fide mistake in issuing proceedings against Córas Iompair Éireann, was made, not withstanding a reference to Bus Átha Cliath/Dublin Bus in one of the unticked paragraphs in that letter."

8. The Plenary Summons was served by way of a letter dated 5th October, 2000 which was addressed to the Secretary of Bus Átha Cliath at its office at O'Connell St. Dublin 1.

9. This letter is in the following terms:

"Re: Lynne Kinlon v. Bus Atha Cliath - Dublin Bus.

Dear Madam,

We enclose herewith by way of service Plenary Summons.

We would advise, you forward this immediately to your solicitor.

Yours faithfully,

_____

Robert Walsh & Company."

10. In paragraph 7 of his affidavit Gerard O'Herlihy the solicitor for the defendants deposes that this letter of the 5th October, 2000, was not received until the 17th October, 2000.

11. The first letter from the solicitors for the defendants dated 25th October, 2000, is in the following terms:

"Re: The High Court Lynne Kinlon v. Córas Iompair Éireann

Dear Sirs,

The above entitled proceedings have been passed to us for our attention in respect of this matter.

We note that proceedings are being issued against Córas Iompair Eireann. We would ask you to please note that these proceedings were issued as against the incorrect defendant. The appropriate defendant in this matter is Bus Átha Cliath/Dublin Bus having its registered office at 59 Upper O'Connell St. Dublin 1.

Indeed you will note from our client's letter of 16th September, 1997 addressed to Aaran and Carroll that there is, indeed, reference to Bus Átha Cliath/Dublin Bus.

Your letter of 5th October, 2000 is addressed to the secretary of Bus Átha Cliath/Dublin Bus. Notwithstanding this your proceedings appear to be served on Córas Iompair Eireann.

As you have clearly issued proceedings as against the incorrect defendant we would be very grateful if you would indicate how you wish to deal with the matter.

It would appear to us that the appropriate manner to proceed is to discontinue the proceedings already issued and issue fresh proceedings herein.

We look forward to hearing from you once you have had an opportunity to consider your position.

Yours faithfully.

_____

M. Roche & Co."

12. No reply was received to this letter and a reminder was sent by M. Roche and Co. dated 7th February, 2001.

13. The next letter in the correspondence was a letter of the 11th June, 2001 from Hughes Murphy Walsh and Co. Solicitors now acting for the plaintiff, enclosing the Statement of Claim. This was replied to by way of letter of 12th June, 2001 from M. Roche & Co. for the defendants which inter alia stated:

"For the record we enclose herewith a copy of our letter dated 25th October, 2000. We did not receive a reply to that letter and we sent a further reminder dated 7th February. That letter was not replied to either.

At the moment we have not entered an appearance on behalf of Córas Iompair Eireann as we have been waiting for you to respond to our letter of 25th October.

If you do wish us to enter an appearance we confirm that we will so enter an appearance on the basis that the plaintiff is clearly aware of the fact that she has issued proceedings as against the incorrect defendant and that we will be defending the matter on those grounds.

We would again call upon you to clarify the plaintiff's position in respect of these proceedings.

Are we correct in understanding that the plaintiff does not intend to discontinue the present proceedings and to issue proceedings as against the correct defendant…".

14. Reminders were sent by M. Roche and Co. dated 12th July, 2001 and 10th September, 2001. A letter dated 25th October, 2001, from Hughes Murphy and Walsh Company stated the following:

"Further to ours of 6th October, 2000 enclosing Plenary Summons entitled as above, we note that to date we have not received your appearance.

We hereby put you on notice that should we fail to receive your appearance within a period of 21 days from the date hereof, a Notice of Motion and default will issue immediately thereafter."

15. This letter was addressed to C.I.E., Group Investigation Department, Bridgewater Business Centre, Islandbridge,. Dublin 8.

16. This letter was responded to by letter dated 5th November, 2001, from M. Roche and Co. in which the following was said:

"We are somewhat surprised that you would corresponded directly with C.I.E. when you are perfectly aware that we act on behalf of Dublin Bus. We have written to you on 12th June; 12th July, and 10th September, and you have ignored all

of those letters.

For the record we again enclose herewith a copy of our letter dated 25th October, 2000 addressed to Robert Walsh & Company. We also enclose herewith a copy of our letter dated 12th June, 2001 which you ignored.

Please correspond directly with us in future in relation to this case and please respond to our correspondence."

17. A further reminder dated 6th December, 2001, was sent by M. Roche and Co. to the solicitors for the plaintiffs.

18. The next letter in the correspondence is dated the 8th August, 2002 and is from the solicitors for the plaintiff to M. Roche and Co. and it is in the following terms:

"We now enclose our Statement of Claim for your attention".

19. This was replied to by way of a letter of 5th September, 2002, from Mr. Roche and Co. which *inter alia* says:

"We would be very grateful if you could indicate why you have served another Statement of Claim upon us in this case. It seems to be identical to the Statement of Claim delivered 11th June, 2001.

To date we have written the following letters both to you and to Robert Walsh & Company related to the incorrect defendant herein:-

1. *Letter to Robert Walsh and Co. dated 25th October, 2000.*
2. *Reminder letter to Robert Walsh and Co. dated 7th February, 2001.*
3. *Letter to Hughes Murphy Walsh and Co. dated 12th June, 2001.*
4. *Reminder letter to Hughes Murphy Walsh and Co. dated 12th July, 2001.*
5. *Reminder letter to Hughes Murphy Walsh and Co. dated 10th December, 2001.*
6. *Letter to Hughes Murphy Walsh and Co. dated 5th November, 2001.*
7. *Reminder letter to Hughes Murphy Walsh and Co. dated 6th December, 2001.*

We are entirely at a loss as to what more we can do in this case.

This letter is to once more confirm that you have issued proceedings as against the incorrect defendant. The correct defendant is, and has always been Bus Átha Cliath/Dublin Bus.

We have not as yet, entered an appearance on behalf of the defendant as we have been enquiring over all of the above mentioned letters as to what you intend to do about the fact that you have sued the incorrect defendant."

20. The next letter in the correspondence is one of the 26th December, 2002 from M. Roche & Company to solicitors for the plaintiffs in which the following is said:

"Further to my recent telephone conversation with your Mr. O'Neill, I now enclose herewith Notice of Entry of an appearance on behalf of Córas Iompair Eireann.

I note that it is agreed that this appearance has been entered on the strict understanding that it will be the defendants defence in this case and that the nominated defendant in these proceedings is incorrect.

Without prejudice to the foregoing, we enclose herewith Notice for Particulars for your attention."

21. Thereafter on 18th December, 2002, a defence was delivered on behalf of Córas Iompair Eireann the first paragraph with which is as follows:

"1. The defendant is not the owner of nor did this defendant manage or control the motor bus, the subject matter of these proceedings and in the premises this defendant has no liability to the plaintiff in respect of the care, driving management or control of the said motor bus."

22. The next letter in the correspondence is one of the 14th May, 2003 from the solicitors for the plaintiff to the solicitor for the defendants and it is in the following terms:-

"We note from your defence delivered on 18th December, 2002 that paragraph 1 alleges that Córas Iompair Eireann is not the correct defendant.

At the commencement of the hearing of the action an application will be made on behalf of the plaintiff to substitute Bus Átha Cliath/Dublin Bus for Córas Iompair Eireann as the defendant. We note from pervious correspondence that from an early stage the Group Investigations Department carried out investigations in relation to this claim and in the premises no prejudice can be suffered as a result of the said Substitution Application.

Please confirm within 21 days from the date hereof that you will consent to the said Application. If no such consent is received within 21 days a Motion for the said Substitution will be brought and this letter will be replied upon for the costs of the said Motion."

23. This letter was replied to by a letter of 30th June, 2003 from the solicitors for the defendant to the solicitor for the plaintiff in the following terms:

"We are most surprised at the contents of your letter of 14th May.

We took the liberty of writing to you in relation to this matter on 7th February, 2001; the 12th June, 2001; 12th July, 2001; 10th September, 2001; 5th November, 2001; 6th December, 2001; and 5th December, 2002.

You specifically chose to ignore each and every one of those letters.

In the light of the foregoing please note that we are instructed not to consent the proceedings being amended and we intend to use this and copies of all of the correspondence which you previously ignored in evidence should you issue a Notice of Motion in respect of this matter."

24. Therafter a notice of motion dated 12th December, 2003 was issued, in which the primary relief claimed was:-

"An order substituting Bus Átha Cliath/Dublin Bus, having its registered office at 59 Upper O'Connell St. Dublin 1 as defendant for Córas Iompair Eireann."

25. This application came on for hearing before the Master of the High Court on 5th February, 2004, when the Master refused the relief claimed.

26. For the appellant in this appeal it was submitted that the true identity of the defendant was always apparent and that what occurred was a bona fide mistake as to the description of the defendant not as to its identity. It was submitted, that, at all times, this was well known to the plaintiff and the defendant and the mistake was contributed to by the defendants in its letter of 16th September, 1997.

27. It was submitted that in these circumstances in order to do justice between the parties it was appropriate that Bus Átha Cliath be substituted for Córas Iompair Éireann and in this regard counsel for the appellant relied upon the judgment of Shanley J. in *Southern Mineral Oil Limited (In liquidation) v. Cooney (No. 2)* [1999] 1 I.R. 237 and in particular the following passage from the judgment of Shanley J. at *page 246 of the report as follows*:

"As to O. 15, r. 2, of the Rules of the Superior Courts there is a similar, but not identical, rule in the English Rules of the Supreme Court; O. 20, r. 5(1), (2) and (3) provide as follows:-

'(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the court for leave to make an amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

(3) An amendment to correct the name of a party may be allowed under paragraph (2), notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued."

The effect of these rules was considered in the English case of Evans Ltd. v. Charrington & Co. Ltd. [1983] Q.B. 810, where Donaldson L.J., in the Court of Appeal said at p. 821:-

'In applying O. 20, r. 5(3), it is in my judgment important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of, and seeking to sue B, but mistakenly describing or naming him as A and thereby ending up suing A instead of B.

The rule is designed to correct the latter and not the former category of mistake. Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding circumstances.'

In the more recent case of Re: Probe Data Systems [1989] B.C.L.C. 561, the Secretary of State for Trade and Industry in England and Wales applied to the court under the Rules of the Superior Courts, O. 20, r. 5(3) for leave to amend an originating summons to substitute himself as applicant instead of the official receiver. Millet J., refusing the application, said at p. 563:-

'At first sight it may appear that in order to substitute a new plaintiff there are only two requirements which must be satisfied. First, that the mistake sought to be corrected was a genuine mistake; and second, that it was not misleading or such as to cause any reasonable doubt as to the identity of the intended plaintiff. That is not the case, for not every mistake can be corrected by amendment under O. 20, r. 5(3). The mistake must have been a mistake as to the name or identity of the intended party'."

28. It is quite clear that the appellant's reliance on this part of the judgment of Shanley J. and in particular the reliance placed upon O. 20 r. 5(3) of the English Rules of the Supreme Court is misplaced.

29. Firstly, O. 15 r. 2 of the Rules of the Superior Courts deals only with the substitution of plaintiffs. The addition or deletion of a defendant falls to be dealt with under O. 15 r. 13.

30. Secondly the rules of the Superior Courts do not contain a provision similar to O.20 r. 5(2) and (3). The effect of these two sub-rules taken together is that where a mistake occurs such as can be catered for under O. 20 r. 5(3), an amendment can be permitted notwithstanding that the relevant period of limitation from the date of issue of the writ has expired. There is nothing in the Rules of the Superior Court that would permit that to be done.

31. In the absence of a provision in the Rules of the Superior Courts, similar to O. 20 Rs. 5(2)(3) of the English rules, there is no jurisdiction, to cater for a mistake of the kind that is catered for in the English rules, and which the appellant contends is the kind of mistake that has occurred in this case. Hence, the fact that the mistake was a *bona fide* mistake, or that there was no mistake as to the identity of the correct defendant, and that the mistake only concerned, the correct description of the correct defendant, and that C.I.E. or Bus Átha Cliath, are not prejudiced, are all irrelevant considerations. The rules, simply do not create a jurisdiction to correct the mistake by the substitution sought.

32. The problem that arises in this case is that the Statute of Limitation period of three years expired on the 1st August, 1997. The Plenary Summons issued in this case names only Córas Iompair Éireann as defendant. Apart from this named defendant, the Statute of Limitation expired on the first day of August, in the year 2000 insofar as any other potential defendant is concerned.

33. The issue which then necessarily arises on this appeal is whether or not this court should permit the joining of Bus Átha Cliath to the proceeding in circumstances where it would appear, that Bus Átha Cliath can avail of a defence, which would bar the action under the Statute of Limitations Act 1957 as amended.

34. In this regard Mr. Herlihy for the defendant relies upon the following passage from the judgment of Shanley J. in the case of *Southern Mineral Oil Limited (In Liquidation) v. Cooney (No. 2)* where the learned judge said as follows at page 245 to 246:-

> *"The attitude of the Supreme Court, as expressed in 1971, by Ó Dálaigh C.J. and Budd J. in O'Reilly v. Granville [1971] I.R. 90 (that the statute was a matter of defence and does not arise until pleaded), to applications to join parties to proceedings has changed somewhat as can be seen from the decision of the present Supreme Court in Allied Irish Coal Supplies Ltd. v. Powell Duffryn Intl. Fuels Ltd. [1998] 2 I.R. 519. In that case, Murphy J. delivered a judgment (with which Lynch and Barron JJ. concurred). One of the matters in issue was an application by the plaintiff to add a party as a defendant. The trial judge had refused to add the party as a defendant and the Supreme Court affirmed that decision. Murphy J. said at p. 533 of his judgment:-*
>
> > *'It is a well established rule of practice that a court will not permit a person to be made a defendant in an existing action at a time when he could rely on the Statute of Limitations as barring the plaintiff from bringing a fresh action against him.'*
>
> *It appears to me that I am bound to follow the later decision of the Supreme Court in Allied Irish Coal Supplies Ltd."*

35. Mr. O'Herlihy submitted that relying upon the foregoing that it was the established practice not to permit party to be added once the statute of limitation had expired and he indicated that if joined Bus Átha Cliath would seek to avail of the defence provided by the Statute of Limitations.

36. I find myself in considerable difficulty in relation to the question posed above because of what would appear to me to be a conflict of authority on the topic.

37. In his judgment in *Southern Mineral Oil Limited* Shanley J. expressed the view that he was bound to follow the later decision of the Supreme Court in *Allied Irish Coal Supplies Limited*, in preference to the judgments of the Supreme Court in *O'Reilly v. Granville*. I find myself with great regret unable to agree with Shanley J. on this point.

38. In Allied Irish Coal Supplies Limited, the case of *O'Reilly v. Granville*, does not appear to have been cited either to the High Court or to the Supreme Court. As the leading authority on this point up to that time, the Supreme Court could not have reached a different conclusion without express disapproval of *O'Reilly v. Granville* and in any event it is difficult to see how either the High Court or the Supreme Court could have concluded that, "*It is a well established rule of practice that a court will not permit a person to be made a defendant in an existing action at a time when he could rely on the Statue of Limitations as barring the plaintiff and bringing a fresh action against him*" when in fact the leading judgments of the Supreme Court then, were diametrically opposed to that view, that view having been canvassed in *O'Reilly v. Granville* and rejected by the majority of the court, unless *O'Reilly v. Granville* was not cited to either Court.

39. It would appear to me that since *O'Reilly v. Granville* does not appear to have been considered by the Supreme Court in *Allied Irish Coal Supplies Ltd.* and expressly disapproved, that 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*.

40. In that case O'Dálaigh C.J. concluded that this court should not refuse to add a defendant to proceedings simply because the defence of the Statute of Limitations would have been available to that defendant on the grounds that, firstly, the court should not assume that a defendant would avail of that defence, secondly that the defence could only be raised by pleading and thirdly in an application to join a defendant the court could not determine in advance whether or not that defence would be successful. Budd J. agreed with O'Dálaigh C.J. but added that if it was apparent beyond doubt that the defence of the Statute was available to the proposed defendant the adding of the defendant would be futile and might very well be refused.

41. Walsh J. disagreed with the majority on one essential point. O'Dálaigh C.J. and Budd J. concluded that both as a matter of substantial law and also by virtue of the concluding sentence of O. 15 r. 13, an added party could not be considered to be a party to the proceedings earlier than the order giving leave to add. Walsh J. was of the opinion that the addition of the party as a defendant had the effect of deeming that party to have been a party to the proceedings from the time the writ was initially issued, thereby having the effect of eliminating a defence under the Statute of Limitations that might have been available to that added defendant, and hence, to avoid that injustice a proposed defendant who could avail of the statute should not be added. Whilst accepting this proposition, which had been urged on the court by counsel for the defendant relying upon the established English line of authority going back to the case of *Mabrob v. Eagle Star and British Dominion Insurance Company* [1932] 1 K.B. 485, Walsh J. nonetheless concluded that if the judge were to take the view that justice would be served by the addition of the party that he should be added even though this effectively deprived him of the benefit of the Statute of Limitations. He arrived at that conclusion on the basis that the Statute of Limitations did not exist for the purpose of aiding unconscionable and dishonest conduct.

42. The source for the proposition to which expression was given by Murphy J. in *Allied Irish Coals Limited* to the effect that "*It is a well established rule of practice that a court will not permit a person to be made a defendant in an existing action, at a time when he could rely on the Statute of Limitations as barring the plaintiff from bringing a fresh action against him*", is the English line of authority which appears to derive from the *Mabro* case and was considered in the two cases referred to by Murphy J. in *Allied Irish Coal Supplies Limited namely Liff v. Peasley* [1980] 1 W.L.R. 781 and *Ketteman v. Hansel Properties Ltd. Limited* [1987] A.C. 189. In both of these cases the Court of Appeal and subsequently, in the latter case, the House of Lords had to consider the origin of the

established rule of practice as aforesaid. Two theoretical base were considered; namely what was described as the "*relation back*" theory and the "*no useful purpose*" theory.

43. The former of these theories, was to the effect that when a party was added as a defendant, his joining to the proceedings was related back to the time of the issue of the writ with the consequence of perhaps eliminating a defence under the Statute of Limitations. The latter theory was based on the view that if the time of involvement in the proceeding started with the joining of the additional defendant then the party joined could avail of his defence under the Statute of Limitations and hence no useful purpose would be served in joining him.

44. The House of Lords emphatically, in *Ketteman v. Hansel Properties Ltd*. rejected the "*relation back*" theory as the basis of the rule holding that a person added as a defendant did not become a party until the writ had been served on him and that in computing the period of limitation, the date of joinder was not to be related back to the date when the original writ was issued and thus time only ceased to run from the actual date of joinder. It was further held by a majority of 3 to 2 that a plea of limitation was a procedural defence and had to be pleaded.

45. In the light of the judgments of the House of Lords in the *Ketteman* case it is hard to see how the practice could be described thereafter as an established practice.

46. In my view the only basis upon which a practice of this kind could be said to be an established practice would on the basis of the so-called "*relation back*" theory. If it was the law that when a party was joined as an additional defendant his joinder was deemed to take effect from the date of the original writ, then in circumstances where a defence under the Statute of Limitations might have been available to him it would be right, in order to avoid injustice, for there to be an established practice not to join an additional defendant in these circumstances.

47. In many cases at the time of the application to join an additional defendant, even though it might be apparent that the limitation period had expired, it would not be known whether the proposed defendant wished to avail of the statutory defence or whether there were circumstances which might estop him from availing of that defence. That being so in a great many cases it could not be said on an application to join an additional defendant that "*no useful purpose*" would be served by joining that defendant. Hence in my view the concept of "*no useful purpose*" could not be the basis of established or invariable rule of practice.

48. Having carefully considered the judgments of the House of Lords in the *Ketteman* case it would seem to me that there is a considerable convergence between the opinions expressed there and the opinions expressed by O'Dálaigh C.J. and Budd J. in *O'Reilly v. Granville*. It is of course the case that the judgments in the House of Lords don't go so far as a complete departure from the "*established rule of practice*", but the inevitable consequence of these judgments is that this rule of practice could not continue to operate in an application to join an additional defendant unless at the time that that application is made it is proved that the proposed defendant will avail of a defence under the Statute, and that that defence will in all probability be successful.

49. I therefore, as said earlier, prefer the reasoning in the judgments of O'Dálaigh J. and Budd J. in *O'Reilly v. Granville* and indeed it could be said that having regard to the fact that *O'Reilly v. Granville* does not appear to have been cited to either the High Court or Supreme Court in *Allied Irish Coal Supplies Ltd.*, that it remains good law which I am bound to follow.

50. In summary therefore I take the law on this topic to be to the following effect:-

> 1. There is no established rule of practice to the effect, that where a defence under the Statute of Limitations may be available to a proposed defendant that such proposed defendant should not be joined as a defendant in proceedings under O. 15 (13) of the Rules of the Superior Court.
>
> 2. The joinder of an additional defendant does not have the effect of deeming that defendant to have been a party to the action form the date of issue of the original writ. An added party cannot be considered to have been a party to the proceedings earlier than the order giving leave to add. Therefore there is nothing in the Rules of the Superior Courts or in substantive law which would restrict an added defendants right to rely on a defence under the Statute of Limitations, i.e., an added defendants right to plead the Statute cannot be adversely affected, by his being joined to the action.
>
> 3. A defence under the Statute of Limitations must in every case be pleaded. [See O. 19 r. 15].
>
> 4. A court should not assume that a proposed defendant sought to be joined under the O. 15 (13) would avail of a defence under the Statute of Limitations.
>
> 5. The court in an application under O. 15 (13) to join an additional defendant should not attempt to determine in advance that a potential defence under the Statute of Limitations Act will be successful.

51. In light of the above conclusions, it follows that I must make the order sought, joining Bus Átha Cliath as a defendant to this action.

52. It would be inappropriate for me to express any view on any potential defence; that might be raised by pleading by Bus Átha Cliath.