Neutral Citation Number: 2006 [IEHC] 55

THE HIGH COURT

[2003 No. 14921 P]

BETWEEN

ALENA HYNES

PLAINTIFF

AND
THE WESTERN HEALTH BOARD
AND
BY ORDER, KEVIN CRONIN

DEFENDANTS

Judgment of Mr. Justice Clarke delivered 8th March, 2006.

1. Introduction

1.1 In these proceedings the plaintiff ("Ms. Hynes") originally claimed damages for medical negligence against the first named defendant ("The Health Board"). On 9th May, 2005 a motion came before the court on behalf of the Health Board seeking to join the second named defendant ("Dr. Cronin") as a third party. The stated basis for seeking to join Dr. Cronin as a third party was that the operation carried out on Ms. Hynes, which gave rise to the allegations in the proceedings, was apparently carried out by Dr. Cronin. In those circumstances it was not surprising that, when the motion came on before me on 9th May, 2005, counsel on behalf of Ms. Hynes suggested that, in accordance with common practice, Dr. Cronin should be joined as a co-defendant rather than as a third party. On that basis an order joining Dr. Cronin as a co-defendant was made.

1.2 The application currently before me is on behalf of Dr. Cronin seeking to have that order joining him as a co-defendant set aside. The principal ground relied upon on behalf of Dr. Cronin is a contention that, as of the date when he was joined, the claim as against him was statute barred. It is undoubtedly the case that the relevant operation occurred more than three years before Dr. Cronin was joined. In the affidavit of Dr. Cronin's solicitor, grounding this application, the full grounds relied upon for seeking the order were set out as follows:-

> "4. I further say that it appears that, by joining the second named Defendant as co-defendant, the Plaintiff is seeking to avoid the consequences of the fact that, at the date of the joinder of the second named Defendant, the Plaintiff's action against the second named Defendant was statute barred. I further say that, as a party affected by the Order of Mr. Justice Clarke, the second named Defendant should have been a party to the application to join the second named Defendant outside the period provided for in the Statute of Limitations.
>
> 5. I further say that the Plaintiff took the liberty of amending its pleadings to include a claim for assault (in respect of which the limitation period is six years, as opposed to three years), but without the leave of the Court to make such an amendment. I further respectfully submit that the Plaintiff's case, if any, against the Defendants is a "negligence" rather than an "assault case", and that the Plaintiff should not be allowed to amend its pleadings as a device to avoid the consequences of the Statute of Limitations."

1.3 The application was opposed by Ms. Hynes and the Health Board.

2. The Law

2.1 Against that background it is necessary to turn to the legal authorities. There is authority in this jurisdiction which appears to lend support to two conflicting approaches to the question of the joinder of a defendant which may be outside the limitation period. Put simply the competing contentions are that either:-

> (a) the Statute of Limitations being a matter of defence, a defendant should be joined; should, if or she wishes, plead the statute, with the trial of the question as to whether the proceedings are statute barred being dealt with in the ordinary way whether by preliminary issue or otherwise; or
>
> (b) it being pointless to join a party who is clearly statute barred, no such order should be made.

2.2 I was referred, in the course of argument, to two decision of the Supreme Court and two decisions of this court.

2.3 So far as the Supreme Court authority is concerned the first case in time is *O'Reilly v. Granville* [1971] I.R. 90. In that case three separate judgments were delivered by the Supreme Court. At p. 94 Ó Dálaigh C.J. said the following:-

> "The answer to this objection, in my opinion, is twofold. First, the statute is not disregarded because the added party's rights are not affected and secondly, the statute is required to be specifically raised by pleading – the Rules say so. It is well-established law that a statute of limitations which merely bars the plaintiffs remedy must be disregarded unless pleaded in a defence; it is only a statute of limitations which extinguishes the plaintiff's right which can be relied upon without being pleaded".

Having noted that the defence provided by the statute to an action such as then under consideration (that is an action in negligence) simply barred the plaintiff's remedy rather than extinguishing any title which the plaintiff might have to property,

Ó Dálaigh C.J. went on, at p. 95, to state the following:-

> "Therefore I would allow the appeal and grant leave to add Mr. Desmond Granville as a defendant in each action. It is not to be assumed too readily that, in the circumstances of this case, Mr. Desmond Granville will be advised to rely upon the statute of limitations when a defence comes to be filed."

2.4 The reason for the last mentioned comment stemmed from the fact that there appeared to be evidence of correspondence which, in turn, might, on one view, give rise to an estoppel sufficient to prevent the defendant in that case from relying upon the statute.

2.5 In the same case Walsh J. took a different view on the fundamental question of whether an added party's right to rely upon the statute is affected by late jointure. As will be seen from the passage from p. 94 referred to above, Ó Dálaigh C.J. was of the view, for reasons which he had specified earlier in the course of his judgment, that the rights of any party so joined were not affected. On that

basis a party joined is entitled to rely upon the statute and is only to be regarded as having been sued, for the purposes of the statute, as of the time when joined. Walsh J. took the contrary view and ultimately considered that, in an application to join outside the limitation period, the judge concerned should consider whether justice would be better served by adding or not adding the party concerned.

2.6 Budd J. at p. 105, agreed with Ó Dálaigh C.J. on the issue of when time ceased to run under the statute and in so doing commented as follows:-

> "However, I fail to see why the addition of the proposed defendant as a party to the proceedings should have any retrospective or any other effect which would have the result of depriving him of his legal right to rely on the statute, if he has such a right."

On the question of the appropriateness or otherwise of adding a defendant in such circumstances Budd J. commented, at p. 106, as follows:-

> "If it were apparent beyond doubt that the statute applied to this case, an application to add the proposed defendant as a party might very well be refused as being a futile operation; but that is not the position here".

There followed a consideration of the arguments for and against the proposition that an estoppel arose in that case.

Finally it should be noted that Budd J. does express himself to be in general agreement with the proposition, as stated by Ó Dálaigh C.J., to the effect that, as it is necessary to plead this statute in cases where the remedy only is taken away, the question of the applicability of the statute was taken prematurely in the High Court in that case.

2.7 The Supreme Court again had to consider a similar issue in *Allied Irish Coal Supplies Limited v. Powell Duffryn International Fuels Limited* [1998] 2 I.R. 519 where, speaking for the Supreme Court, at p. 533, Murphy J. noted 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 (see *Liff v. Peasley* (1980) 1 WLR 781 and *Ketteman v. Hansell Properties Limited* (1987) AC 189). Accordingly the application insofar as it seeks to join the plc for the purpose of maintaining an action against that company for breach of contract or fraudulent misrepresentation, must be rejected".

It is clear that no reference was made in the argument to the judgment of the court in *O'Reilly v. Granville*.

2.8 *O'Reilly v. Granville* requires some analysis. It is clear that the court, by a majority of 2:1, took the view that the statute only ceases to run against a defendant joined after the commencement of proceedings, as of the time when that defendant is joined. While it is also clear that both of the majority judges took the view that the statute was, primarily, a matter of defence, it must also be noted that Budd J. appears to have been of the view that a defendant should not be joined if it was manifestly clear that the case as against him was statute barred. It is undoubtedly the case that the majority was of the view that it was premature to deal with a disputed question in relation to the statute on a motion to dismiss.

While it is therefore clear that a defendant should be joined in any case where there is any question as to whether the statute might apply it does not seem to me that O'Reilly v. Granville is necessarily authority for the proposition that the court does not retain a discretion, in a clear case, to decline to join a defendant where to do so would, in the words of Budd J., be "futile".

2.9 While the Supreme Court in *Allied Irish Coal Suppliers* does not appear to have been referred to *O'Reilly v. Granville*, there is nothing in the judgment in that case which suggests that it was anything other than a clear case. In those circumstances it seems to me that the differences between the approach of the court in the two cases may be more apparent than real.

2.10 Against that background it is also necessary to have regard to two decisions of this court where the same issue arose.

2.11 In *Re Southern Mineral Oil Limited* [1999] 1 I.R. 237 Shanley J. noted the judgments of Ó Dálaigh C.J. and Budd J. in *O'Reilly v. Granville* and also the judgment of Murphy J. in *Allied Irish Coal Suppliers*. Shanley J. was of the view that the attitude of the Supreme Court would appear to have changed between the decision in *O'Reilly v. Granville* in 1971 and the decision in Allied Irish Coal Suppliers in 1998. On that basis, and on the facts of the case before him, he reached the view that the cause of action against the proposed added defendant was "clearly barred". In those circumstances Shanley J. came to the conclusion that, "in the absence of any suggestion that the action is not barred", he should refuse all the relief sought.

2.12 In *Kinlon v. Coras Iompair Eireann* [2006] 1 ILRM 22 O'Neill J. also had to consider the judgments in *Allied Irish Coal Suppliers* and *O'Reilly v. Granville*. O'Neill J. took a different view to that which had been taken by Shanley J. He reached the following conclusion:-

> "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 Suppliers Limited* 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*."

2.13 Faced with a contention that there is conflicting Supreme Court authority on this matter and, indeed, conflicting views expressed by this court as to how to deal with that conflicting Supreme Court authority, I have come to the following conclusions.

3. Conclusions on Law

3.1 While it true to state that Budd J. in *O'Reilly v. Granville* appears to agree with the general proposition that the statute is a matter of defence and that, in those circumstances, a defendant should be joined, it should be noted that the passage from his judgment, which I have quoted above and which refers to the possibility of a defendant not being joined where it would be futile to join him, comes earlier in the course of the judgment and can, in my view, on a fair reading, be taken to express his primary view on the matter. Insofar as Budd J. was a necessary member of the majority I do not believe that the ratio of the case can be determined without regard to that aspect of his judgment.

3.2 In those circumstances I have come to the view that the general proposition, to the effect that a defendant can be joined in proceedings notwithstanding there being issues as to the applicability of the statute to his case, is subject to an exception that the court retains a discretion not to join a defendant where the statute would clearly apply and where, in the words of Budd J., the joining of such a defendant, would be "futile".

3.3 It would, it seems to me, be inappropriate for a court to impose upon parties (and indeed the court itself) the burden of dealing, in a wholly unnecessary way, with a number of applications and hearings where the end result of all such applications would necessarily mean that the case against the individual concerned would be dismissed as being manifestly statute barred. A contrary view would, it seems to me, be inconsistent with the policy inherent in the jurisdiction of the court to dismiss a manifestly ill-founded cause of action as identified in *Barry v. Buckley* [1981] I.R. 306.

3.4 I am, therefore, satisfied that the court should not, in a clear case, join a defendant where it is manifest that the case as against that defendant is statute barred and where it is also clear that that defendant concerned intends to rely upon the statute.

3.5 However I am also of the view that *O'Reilly v. Granville* is authority for the proposition that the court should not enter into an inquiry as to whether a claim may or may not be statute barred on the hearing of a procedural motion seeking to join a defendant (or, as here, where a defendant having being joined seeks by a similar procedural motion to have the earlier order set aside). On that aspect of the matter the only question which the court should ask itself on such an application is as to whether the claim as against the defendant concerned is clearly statute barred. If there is any doubt whatsoever about that fact, then the defendant should be joined, if it is otherwise appropriate so to do, and the issue of the claim being or not being statute barred should be dealt with in the ordinary way as appropriate to the circumstances of the case including, if so appropriate, by means of a preliminary issue.

3.6 I should finally note that it does not appear to me that there is any material difference between the considerations that apply in a case such as this, where the defendant was joined without notice being given to him, and brings an application to set aside that order, on the one hand, and a case where the defendant is, for whatever reason, heard on the original motion to join. There is no reason in principle why a defendant should be a notice party to an application to join him. A plaintiff is entitled to issue proceedings against a defendant without giving him notice. There seems no reason in principle, therefore, why a plaintiff should not be entitled to bring an application to join an additional defendant without putting that additional defendant on notice. The only parties who have a legitimate interest in such an application are the persons who are already parties to the proceedings and who may have their proceedings interfered with by the addition of a new party. Similarly there is no reason in principle why a person should not be added as a co-defendant on a motion to join such person as third party notwithstanding such party not being on notice. However it seems to me that, as a matter of principle, a defendant who is so joined without notice must be entitled to bring an application to have the order joining him set aside.

4. Application to the Facts of this Case

4.1 Insofar as there is a contention contained in the grounding affidavit filed on behalf of Dr. Cronin in support of this application to the effect that Dr. Cronin should have been put on notice of the application to join him, I must disagree.

4.2 What happened in this case occurs in a great number of cases. A defendant seeks to join a third party. In accordance with normal practice the defendant is required to place the plaintiff on notice. The defendant's grounding affidavit for that application discloses the relevant circumstances relied on in seeking to join the third party. On such circumstances being brought to a plaintiff's attention, the plaintiff may well consider that it is necessary to join the proposed third party as a co-defendant. This will arise not least in a case where there may be grounds, from the plaintiff's perspective, to fear that, at a trial, the entire responsibility for whatever cause of action might be established would be placed at the door of the proposed third party. In those circumstances the defendant would escape liability entirely. On that basis, in turn, the plaintiff would have no direct claim against the only party found liable. The plaintiff's claim would therefore fail. Indeed the likelihood of a plaintiff wishing to attend the hearing of a motion seeking to join a third party for the purposes of seeking to have the party concerned joined as a co-defendant is recognised by the Rules of the Superior Courts, which indicate that such a course of action is a material factor to be taken into account in the assessment of the award of the costs of a plaintiff attending a motion to join a third party.

4.3 There was nothing, therefore, wrong with Ms. Hynes seeking an order joining Dr. Cronin as a co-defendant as an alternative to the order sought by the Health Board joining Dr. Cronin as a third party, notwithstanding the fact that Dr. Cronin was, quite properly, not a party to the application. Equally, however, it follows that it is open to Dr. Cronin to bring the application which I am presently considering, which seeks to have that order set aside. For the reasons indicated above it does not seem to me that the principles applicable to the exercise of the courts discretion as to whether or not to set aside the order joining Dr. Cronin are different to those that would properly have been applied by the court in deciding whether to join Dr. Cronin on an application of which he had, for whatever reason, notice and which he opposed.

4.4 For the reasons indicated above it seems to me that it would only have been appropriate not to join Dr. Cronin if the case as against him was clearly statute barred. Therefore his application to have the order joining him set aside should only be allowed on the same basis. It is in that context that counsel on behalf of Ms. Hynes drew my attention to the provisions of the Statute of Limitations (Amendment) Act 1991 ("the 1991 Act") which, in the case of actions involving personal injury, extends the time within which an action may be brought by reference to the time when the person concerned had, or ought to have had, knowledge of a variety of facts including the existence of a significant injury attributable to the actions or omissions of an identifiable person. It is clear that, as against that legislative background, the question of the applicability of the statute of limitations, in at least certain cases, is more complex than was the case prior to the coming into force of the 1991 Act.

4.5 While accepting that fact, counsel for Dr. Cronin makes the point that there is currently no evidence before the court which might suggest that questions under the 1991 Act might arise. On that basis it is argued that a proper construction of the relevant law should not lead to a conclusion that no claims involving personal injuries could be said to be clearly statute barred simply by virtue of the existence of the 1991 Act. In this latter proposition I am satisfied that counsel for Dr. Cronin is correct. There might well be cases (for example a serious motor accident) where it would be difficult to see that the plaintiff would not have been aware of all the factors that are properly to be taken into account under the 1991 Act at, or immediately after, the time of the accident itself. On the other hand it seems to me, for the reasons which I have set out above, that it is premature to consider any potentially contestable issues under the statute in an application such as this.

4.6 In those circumstances it seems to me that the proper course of action should be to permit Ms. Hynes an opportunity to file a brief affidavit sufficient to put facts before the court which would, if it be possible so to do, raise a question as to the applicability of the statute on the facts of this case. Certain facts were referred to by counsel for Ms. Hynes in the course of argument but were not the subject of evidence. I do not feel that I could conclude that the case as against Dr. Cronin was not clearly statute barred without some evidential basis for suggesting that the provisions of the 1991 Act came to Ms. Hynes' aid. For the reasons indicated above it does not seem to me that I should enter into any inquiry as to the merits or otherwise of the argument addressed on behalf of Ms. Hynes in respect of the statute other than for the purposes of concluding whether or not the claim is clearly statute barred. On the assumption that facts such as those identified by counsel for Ms. Hynes in the course of argument can be put on affidavit, then it seems to me highly likely that it would be necessary to conclude that the case is not one which is so clearly statute barred as to render the joining of Dr. Cronin futile.

5. The Assault Claim

5.1 It seems to me that solicitors for Dr. Cronin are clearly correct when they make the point that the order of the 9th May, 2005 did not give a licence to amend the statement of claim by including an entirely new cause of action i.e. one of assault. Irrespective of whether the facts of the case might be such as could arguably bring it within "assault" as opposed to "negligence" (with obvious consequences for the position under the statute) it seems to me that an order giving a plaintiff liberty to amend a statement of claim consequent upon the addition of a new defendant should, in the absence of any additional terms to the contrary, be ordinarily interpreted as enabling only such amendments to be included in the statement of claim as are reasonably necessary for pleading the case against the new defendant. The order giving leave to amend the statement of claim should not be interpreted as permitting other, extraneous, amendments.

5.2 However, be that as it may, it is clear that the time limit provided for in the statute of limitations in respect of a claim for assault in this case has not yet run. There would be nothing to debar the plaintiff from issuing a separate summons claiming damages for assault. In those circumstances it would clearly be appropriate that the action for assault should be consolidated with or linked to the negligence action arising out of the same circumstances. Therefore, provided I am ultimately satisfied that the plaintiff's claim as against Dr. Cronin is not clearly statute barred, it would not seem to me to be appropriate to strike out the amendments which provided for the assault claim, notwithstanding the fact that they were not authorised by my original order. If either or both of the defendants feel that the plaintiff does not have a sustainable claim in assault then it will, of course, be open to them to bring an application to have that aspect of Ms. Hynes' claim dismissed in the exercise of the court's inherent jurisdiction, on the basis that that aspect of the claim must necessarily fail.

5.3 In all those circumstances I would propose permitting Ms. Hynes an opportunity to place such facts as she may wish on affidavit to enable an argument to be addressed to the effect that the case as against Dr. Cronin is not clearly statute barred. Provided that I am satisfied, on the basis of such evidence, that the claim is not clearly statute barred, I would propose confirming the order joining Dr. Cronin and would propose further ordering that the amendment involving the addition of a claim for assault (and any consequentional amendments) should be allowed to stand.