Neutral Citation Number: [2010] IEHC 259

THE HIGH COURT

2009 6907 P

Between:

Sean Fitzgerald

Plaintiff

And

MGN Limited

Defendant

Judgment of Mr Justice Michael Peart delivered on the 28th day of June 2010:

On the 28th July 2009 the plaintiff issued a Plenary Summons in which he named Mirror Group Newspapers Limited as defendant. By so doing it was the plaintiff's intention to claim damages for libel against him arising from an article which appeared in The Irish Daily Mirror on the 30th July 2003. The plaintiff believed at that time of issue of these proceedings that the defendant company was the publisher of that particular newspaper, and had carried out a search which satisfied him that the registered office of the defendant company was Liberty Hall, Dublin 1.

The date of issue of these proceedings was just two days within the 6 year limitation period for such proceedings under the Statute of Limitations, 1957.

He was informed that the Mirror Group were at that time located at North Circular Road. He went to that address and met with a James McNamara who received the plenary summons from the plaintiff. Not having received any Entry of Appearance on behalf of the named defendant, the plaintiff wrote to the company on the 21st August 2009 calling upon it to enter an appearance, and enclosing a letter of consent to late appearance. The plaintiff has exhibited a letter dated 21st August 2009 from McCann Fitzgerald, solicitors, which makes no reference to the said letter from the plaintiff to the defendant company of the same date, so presumably these letters crossed in the post. That firm stated that they represent "MGN Limited" who had passed to them the proceedings issued against Mirror Group Newspapers Limited. It went on to point out that the Irish Daily Mirror Newspaper was published by MGN Limited and not the company named as defendant, and that the proceedings were therefore issued against the wrong company at an incorrect registered office, and called upon the plaintiff to discontinue the proceedings.

The plaintiff replied to that letter by letter dated 4th September 2009 stating that his proceedings had been accepted on behalf of "your client" by James McNamara, Deputy News Editor "of your client" on the 28th July 2009, and stated that in such circumstances the proceedings were validly issued and served and again called upon the firm to enter an appearance.

By 24th November 2009 the plaintiff had received no reply to his letter dated 4th September 2009, and wrote a reminder letter to which a reply was made by letter from the same firm dated 2nd December 2009. That letter again stated that the firm did not act for Mirror Group Newspapers Limited and again stated that this company was not the publisher of the newspaper which the plaintiff claims had defamed him. It explained again that the Irish Daily Mirror was published by MGN Limited with a registered office at One Canada Square, Canary Wharf, London E14-5AP, and that this information is printed on every copy of the newspaper in question, including that in which the article in question appeared on the 30th July 2003.

That letter went on to make the point that any proceedings which the plaintiff may thereafter issue against the correct defendant, MGN Limited, would be "out of time" not having been issued within 6 years of the date of publication of the article in question, and requested that in any application which the plaintiff might make to the High Court in relation to the matter this letter would be brought to the Court's attention.

On the 18th January 2010 the plaintiff in person made an *ex parte* application to the High Court in order to amend the name of the defendant to MGN Limited. That order was granted.

On the 8th February 2010 the plaintiff made a further *ex parte* application and obtained an order permitting further amendments to the plenary summons by inserting the registered office of MGN Limited, namely 1, Canary Square, Canary Wharf, London, and including also therein the indorsement in order to indicate that that the proceedings are such as come within Council Regulation (EC) No. 44/2001, thereby enabling the proceedings to be served outside the jurisdiction without the need to obtain any order for service outside the jurisdiction.

The plaintiff failed to carry out these amendments within the permitted time under the Rules of the Superior Courts, and on the 15th March 2010 he applied for and obtained an extension of time for doing so. The amendments were carried out in due course by the plaintiff.

By letter dated 16th April 2010 the plaintiff wrote to McCann Fitzgerald and enclosed a copy of the amended plenary summons, together with the orders made by the High court on the 18th January 2010 and 8th February 2010 respectively, and requesting entry of appearance.

That firm has entered an appearance in order to protect its client's position so that no judgment would be applied for in default of appearance, but maintains that the amendment of the title of the proceedings whereby MGN Limited is named cannot protect the plaintiff from a claim by that defendant that the claim is statute-barred given that the amendment was ordered outside the limitation period.

In due course, Counsel for the defendant mentioned the matter to this Court (the plaintiff being present also) in view of the defendant's concerns, and leave was given to issue a Notice of Motion to set aside the orders which the plaintiff had obtained on an

ex parte basis.

The grounding affidavit of Lesley Caplin, solicitor for the defendant and the replying affidavit filed by the plaintiff in response thereto add nothing to the sum of knowledge thus far, except, and quite importantly, the plaintiff has stated clearly in this affidavit that the application which he moved on the 18th January 2010 was an application pursuant to the provisions of Order 15 of the Rules of the Superior Courts, 1986 ("RSC").

Submissions:

The first matter to emphasise is that this is an application by the Defendant to set aside the *ex parte* orders which the plaintiff applied for and obtained on the dates referred to above. It is not an application to strike out the proceedings or otherwise dismiss them on the basis that no reasonable cause of action is disclosed, or that because of a Statute of Limitation issue which will be pleaded by MGN Limited, they have no prospect of success.

The defendant submits that being an application to substitute a party under Order 15, rule 13 RSC, and not one under the provisions of Order 63, rule 1 (15) RSC simply to correct a clerical error in the name of a defendant who was at all times the intended target, the application firstly ought to have been on notice; but secondly that in any event the Court ought not to have granted the order dated 18th January 2010 in circumstances where the effect of the order was to commence the proceedings from that date against MGN Limited, an entirely separate company, and at a time when the plaintiffs claim against that company was already clearly statute-barred, being well outside the six year limitation period.

The plaintiff, appearing personally in Court to argue his case before me, has stated that he honestly believed that Mirror Group Newspapers Limited was the correct defendant in order to make a claim in respect of an article appearing in the Irish Daily Star. He has also sought to derive solace from the fact that service in respect of that defendant was accepted by an employee of MGN Limited at the premises on North Circular Road, and he has exhibited a copy of a business card handed to him by that employee at that time, and which bears the name MGN Limited below the employee's name. He submits that there can be no prejudice given that it is clear from the Indorsement of Claim that it is clear that it is the Irish Daily Star which published the article complained of. As I have already stated he had made a company search and found details of Mirror Group Newspapers Limited and presumably he assumed that this was the correct defendant. He appears not to have inspected the newspaper in question to ascertain the identity of its publisher.

One can easily have some sympathy for someone in the position of the plaintiff, particularly where he appears personally and has not engaged lawyers to act on his behalf. Such a plaintiff cannot be in a position to be know how precisely a large publishing empire has organised its corporate structure. Such structures can be labyrinthine in nature, with many subsidiary and associated companies which operate individual enterprises within the overall group. Nevertheless, in the present case, it is a fact that the publisher of a newspaper is required to state its identity in its newspaper, and it would appear from the correspondence which has emanated from McCann Fitzgerald that it was done in the newspaper complained about herein.

I am satisfied first of all that the error which the plaintiff sought to correct cannot be characterised as a clerical error. It has not occurred through "the mechanical process of writing or transcribing" - a phrase used by Fullager J. in less technically advanced times than now to describe a clerical error in *R. v. Commissioner of Patents, ex parte Martin* [1953] 89 CLR 381, and which is adopted by Hardiman J. in *Sandy Lane Limited v. Times Newspapers Limited and Others*, (Unreported, Supreme Court, 16th November 2009). The learned judge distinguishes such a mistake from one arising from a lack of knowledge or wrong information as discussed in *Re Meres Application* [1962] RPC 182. In any event, the plaintiff has not sought to bring his application within Order 63, r. l (15) RSC. He accepts therefore that the amendment was not because of a clerical error as such, but is an application to substitute a different defendant for the defendant originally named in the proceedings.

I am not too concerned as to whether or not the plaintiff's application ought more properly have been brought by way of Notice of Motion. It probably should, given that the plaintiff had received correspondence from McCann Fitzgerald. On the other hand that firm had not entered any appearance and were not on record, and furthermore, in their letter dated 2nd December 2009, they had requested the plaintiff to bring their letters to the attention of the Court in any application which he may wish to make.

Given the opportunity which any party affected by an order obtained *ex parte* has to seek to have it set aside, nothing much turns on this issue in the present case, and indeed, the defendant does not make the submission as its primary one.

The central issue for determination really is a simple one, namely whether the Court ought not to add or substitute a party as a defendant to proceedings under Order 15 RSC in circumstances where it is known that as of the date of such order the limitation period has already expired and that the statute will be pleaded in any Defence which may be delivered by that party. This question was considered comprehensively by O'Neill J. in *Kinlon v. Córas Iompair Éireann*, (Unreported, High Court, 18th March 2005). That was a case where the plaintiff had issued proceedings arising out of injuries sustained by the plaintiff when she was hit by a bus in Dublin. The proceedings which were issued named Córas Iompair Éireann as defendant, whereas the correct defendant was Bus Átha Cliath. The plaintiff delayed in making an application to substitute the latter company, but eventually did so by way of an application to the Master of the High Court who refused to make the order sought. The plaintiff appealed.

During the course of a careful and comprehensive judgment, the learned O'Neill J. examined an apparent conflict between two judgments of the Supreme Court relating to this type of issue, namely those in ***O'Reilly v. Granville*** [1971] I.R. 90 and *Allied Irish Coal Supplies Limited v. Powell Duffryn International Fuels Limited* [1998] 2 I.R. 519. In that regard, and as noted by O'Neill J. the late Shanley J. had in *Southern Mineral Oil Limited (in liquidation) v. Cooney (No. 2)* preferred the conclusion in the latter case on the basis that he was bound to follow the later decision. However, O'Neill J. identified that in *Allied Irish Coal Supplies Limited v. Powell Duffryn International Fuels Limited* there is no indication therein that *O'Reilly v. Granville* was referred to in argument, and that it could not be the case in such circumstances that *O'Reilly v. Granville* should remain good law which he was bound to follow. Left with two decisions which diverge, O'Neill J. for the reasons stated by him preferred to rely still upon the long-standing authority of *O'Reilly v. Granville.*

Having carried out an extensive examination of the relevant case-law, he concluded that the law in this country in relation to this topic is to the following effect:

> *"In summary therefore I take the law on this topic to be to the following effect:*
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> > *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 from 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 defendant's right to rely on a defence under the Statute of Limitations, i.e., an added defendant's 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."

I respectfully agree with these conclusions, and propose to decide the present application by reference to them.

It follows that it was open to the Court, albeit on foot of an *ex parte* application, to permit the plaintiff to substitute MGN Limited as the defendant in these proceedings in place of Mirror Group Newspapers Limited. However, it is clear that by so permitting, the entitlement of MGN Limited to plead the Statute of Limitations in any Defence it may choose to deliver is in no way diminished, since the joining of that company as a defendant operates only from the 18th January 2010 and in no way results in a situation whereby the proceedings are deemed to have been commenced against MGN Limited as of the date of issue of the plenary summons.

Clearly, it is highly probable that the defendant will plead the statute, but it is not a matter for this Court to prejudge the likely outcome of that plea at this point in time, when it has not as yet been pleaded. But the plaintiff should be aware that in the event that he fails to overcome that defence, should it be made in due course, he will be exposed to the possibility at least of an order for the costs of the proceedings should they be dismissed.

For the moment, however, it is appropriate that I refuse the application of the defendant to set aside the orders of the 18th January 2010 and that of the 8th February 2010.