Neutral Citation No. [2004] NIQB 83 | *Ref:* **DEEC5091**

Judgment: approved by the Court for handing down | *Delivered:* **30.09.04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

DON MULLAN

Plaintiff;

V

RUTH DUDLEY EDWARDS

AND

First Defendant

THE DAILY MAIL/ASSOCIATED NEWSPAPERS LIMITED

Second Defendants

DEENY J

[1] Mr Don Mullan complains of an article in the Daily Mail Newspaper of 8 January 2002, which was published in Northern Ireland, and elsewhere. Mr Martin McCann appeared for him in this appeal from the refusal by Master McCorry of an Order sought by him. Mr Peter Cush appeared for Associated Newspapers Limited.

[2] Mr Cush helpfully provided a chronology of events which is of particular assistance as I consider this matter most easily understood by pursuing it in chronological order.

[3] On the 6 February 2002 the plaintiff's solicitors Messrs Madden and Finucane apparently wrote a letter of complaint to the editor of the Daily Mail complaining of the article. On 29 November 2002 they issued a writ on behalf of the plaintiff against Ruth Dudley Edwards, the author of the article

complained of and the Daily Mail. They purported to serve this on the Daily Mail by post on 12 December 2002. On 20 December 2002 Messrs Mills Selig, Solicitors, wrote to Messrs Madden and Finucane in the following terms.

> "Dear Sirs
>
> Don Mullan v Ruth Dudley Edwards and the Daily Mail
>
> Your letter of 12 December 2002 with enclosed Writ of Summons in the above matter has been referred to by us by our client Associated Newspapers Limited.
>
> Ruth Dudley Edwards does not work for our client and we have no authority or instructions to accept service or enter an appearance on her behalf. 'The Daily Mail' is not the correct title and is not in fact a legal entity. When the Writ has been amended appropriately and served we anticipate being instructed to enter an appearance on behalf of our client.
>
> Yours faithfully, Mills Selig."

It seems to me that this was a very constructive letter and indeed was rightly described by plaintiff's Counsel as extremely benign.

[4] Since the 4 September 1996 the time limit for actions for defamation and malicious falsehood in Northern Ireland, as in England and Wales, has been one year from the date on which the cause of action accrued. The plaintiff's solicitors should therefore have acted promptly in seeking to correct their error before the time limit expired in January 2003. Unfortunately, as averred by Mr Gerald Hyland, of Madden and Finucane, this letter was not brought to his attention immediately and a further reminder was issued to the Daily Mail on 9 January 2003 ignoring it. Subsequently however Mr Hyland appears to have learnt of this letter and proceeded to act upon it. He did so by swearing an affidavit on 16 May 2003 which was filed on 30 May 2003 applying, ex parte, to the Master for liberty to amend the Writ of Summons herein to refer to the second named defendant by its correct name and description, i.e. Associated Newspapers Limited.

[5] Two principal criticisms can clearly be made of the plaintiff's solicitors at this time. Firstly, it seems a rather languid response to a situation where their client's claim was prima facie out of time. It may be, although this is not

averred, that the time limit which came into effect in 1996 was not at the fore-front of their minds. However, if they choose to act in defamation matters it ought to be. Secondly, an application of this kind should have been brought by summons and not ex parte (see Supreme Court Practice 1999 volume 1 paragraph 20/8/4). One may also observe that it is a rather unattractive response to the open approach adopted by Messrs Mills Selig to make this application without notifying them of it.

[6] I was informed by Mr Cush, who had subsequently appeared before Master Wilson Q.C. in this matter, that the fact that the plaintiff was prima facie statute barred at the time of the application was not drawn to the attention of the Master. This is obviously in breach of the duty on a party making an ex parte application to disclose all relevant matters to the court.

[7] Unfortunately the conduct of the action did not improve. The Order of Master Wilson is dated 2 June 2003 and it provided that the plaintiff be at liberty to amend "within 28 days of the date hereof" i.e. by the 30 of June 2003. This was not done. The writ purported to be amended on 23 July 2003 and the plaintiff's solicitors purported to re-serve it on Associated Newspapers Limited on 14 August 2003. This was not valid service as the Masters Order had ceased to have effect (Order 20 r.9).

[8] I was advised by Counsel for the defendant that it and its advisors then spent some time considering whether to await an application by the plaintiff's solicitors for judgment in default of appearance or to take the point pro-actively themselves. Ultimately the latter course found favour and on 17 May 2004 Master Wilson set aside the Order which he himself had made ex parte in the previous year. Apparently on the same day Mr Hyland then swore a further affidavit and applied to the court by way of summons for an Order deeming the plaintiff's service to be deemed good, or in the alternative, an Order under Order 20 r.5(3) to amend the title and an Order under Order 6 r.7 to extend the time for service. This was heard and refused by Master McCorry on 21 June 2004. The matter comes before me by way of appeal from that decision of the Master.

[9] Mr McCann points out, correctly, that an amendment to an already pleaded cause of action between existing parties can be made even though the limitation period has expired since the issue of the writ and relates back to the commencement of the action. See *Ketteman v Hansel Properties Ltd* [1987] A.C.189 and Article 73 of the Limitation (Northern Ireland) Order 1989. He cited Valentine, Civil Proceedings: the Supreme Court, paragraph 11.31:

> "An amendment which merely changes the name of a party without in any way changing the identity of that party can be made regardless of the limitation period. "

The authority quoted for that is *Davies v Elsby Brothers Limited* [1961] 1 WLR C.A. At the conclusion of his judgment in that case (at p. 177) Devlin LJ, as he then was, comments on the difficulty the plaintiff's solicitors had got in by issuing the writ close to the time limited:

> "This much at least is certain, that anybody who wants to sail so close to the wind ought to take the most extreme care to see that the names of the parties and the cause of action are properly described and defined on the writ."

[10] I pointed out that this situation appeared to be expressly addressed in the Rules of the Supreme Court at Order 20 r.5(2) and (3). The latter provides that 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 party intending to sue, or as the case may be, intended to be sued.

[11] Stopping there I am satisfied that this was a genuine mistake and it does not appear that Associated Newspapers Limited was misled by it. It knew that it owned the Daily Mail Newspaper and was being sued because of that article. However the Rule clearly leaves a discretion in the court whether to grant the amendment.

[12] Order 20 r.5(2) provides that an application for leave to make an amendment mentioned in paragraph (3) etc after any relevant period of limitation current at the date of the issue of the writ has expired may be granted if the court "thinks it just to do so." Mr Cush accepts that that provision is applicable.

[13] He, in addition, drew my attention to section 6 of the Defamation Act 1996, as amended, and set out at Gatley on Libel and Slander, 10th Edition, p.1176. This amends Article 51 of the Limitation (Northern Ireland) Order 1989. I set out the relevant passage:

> Article 51(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –
>
> *(a)* the provisions of Article 6(2) prejudice the plaintiff or any person whom he represents;

(b) any of the decisions of the court under this paragraph would prejudice the defendant or any person whom he represents,

the court may direct that those provisions are not to apply to the action, or are not to apply to any specified cause of action to which the action relates.

(2) In acting under this Article the court is to have regard to all the circumstances of the case and in particular to -

(a) the length of and the reasons for, the delay on the part of the plaintiff;

(b) in a case where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the expiration of the period mentioned in Article 6(2) –

(i) the date on which any such facts did become known to him and

(ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action and

(c) the extent to which having regard to the delay relevant evidence is likely –

(i) to be unavailable;

(ii) to be less cogent than if the action had been brought within the time allowed by Article 6(2).

[14] I bear these provisions in mind in addressing the issue. Obviously some aspects of the delay have already been set out above. My attention has been drawn to the case of *Gregson v Channel 4 Television Corporation* [2001] (Unreported) C.A. Mr McCann relies on it as authority for an extension of time outside the limitation period being granted. It was pointed out, however, that in that case although the plaintiff's solicitors had served the claim form (under CPR) on the 22 October 1999 the last day for service, with the defendant erroneously described, when the defendants' solicitors pointed out the mistake the plaintiff's solicitors applied by 5 November 1999 for permission to correct the mistake. This celerity must be contrasted with the facts of this appeal.

[15] Furthermore one sees from paragraph 4 of the judgment of Lord Justice May that the defendant was initially sued under the name of Channel 4 Television Company Limited. It transpired that this was a real company but dormant and a subsidiary of Channel 4 Television Corporation, the correct defendant. It seems to me that this is a pure misnomer and rather different from the instant situation. "The Daily Mail" simply is not a legal entity. While it is right to say that Associated Newspapers Limited clearly understood the intention of the plaintiff the facts do not seem to be on all fours with the *Gregson* case.

[16] Mr Cush relied on *Steedman and others v British Broadcasting Corporation* [2001] EWCA CIV 1534. At paragraph 15 of his judgment, with which Hale LJ, as she then was, and Brooke LJ appear to agree, David Steel J arrived at the following conclusion in the light of the equivalent English statutory provision to our Article 51:

> "The discretion afforded by this section is largely unfettered. It requires the court to balance any prejudice to the claimant on the one hand and the defendant on the other in allowing the action to proceed or otherwise. All the circumstances of the case must be had regard to in assessing the justice of the matter with particular reference to the length of, and reasons for, the delay and the extent to which the passage of time since the exploration of the limitation period has had an impact on the availability or cogency of relevant evidence."

At paragraph 29 he rightly says that to grant relief to the claims under the section would be highly prejudicial to the defendants given the clear time bar.

[17] He considers that the prejudice is counter-balanced to some extent by the prejudice to the claimants but that is ameliorated by the ability to claim against the solicitors. I say nothing about that as I am not privy to the nature or extent of the instructions given to the solicitors in this case. But I do note that it was said from the Bar and not disputed that the Daily Mail would have been published in other jurisdictions in these islands on the date in question with this article. It would appear therefore that the plaintiff, who is not, I was informed by plaintiff's Counsel, resident in this jurisdiction, would have an opportunity for a vindication of his reputation, and for compensation, elsewhere.

[18] The dominant theme of the judgments is the need to adhere to the rules laid down and to apply the limitation period which has been fixed by

Parliament since 1996. Mr Cush relied on Gatley on Libel and Slander, 10th Edition, paragraph 18.18 as drawing attention to a series of cases in which it said that claims regarding reputation should be pursued with vigour. Clearly that was the intention of Parliament in reducing the time limit from 3 years to 1 year. Although no Northern Ireland decision was cited to me I am mindful of the repeated statements of our Court of Appeal that the Rules are there to be complied with.

[19] Counsel for Associated Newspapers Limited put the article in question before the court. He pointed out that the plaintiff was not named in the article. There was strong criticisms by Ruth Dudley Edwards of a film about "Bloody Sunday", January 30 1972. The plaintiff was the co-producer of that film. Counsel says there will be an issue as to whether persons in Northern Ireland would have identified the plaintiff with the criticisms made by the author of the article. There would also be an issue of fair comment.

[20] Counsel were agreed that even if the application was successful this would not prejudice Ruth Dudley Edwards, who was not represented before the Court. But Counsel for the defendant was concerned that as she was not a party to the action and not resident in the jurisdiction and not an employee of the second defendant they might have difficulty in obtaining full and effective assistance from her in defence of the action. I note these arguments without ascribing great weight to them.

[21] It seems to be that a key issue here is the length and reasons for delay. I set out briefly the conduct of the action to this date which, I think, speaks for itself:

1. The plaintiff, through his solicitors, failed to identify the second defendant correctly in the original writ.
2. He sued the Daily Mail which was not a legal person.
3. He failed to act on the letter of 20 December 2002 from Mills Selig on behalf of the second defendant.
4. He failed to amend his writ, as effectively invited to do, before the expiry of the 12 month limit.
5. He did not apply to amend his writ promptly but waited until the 30 May 2003 more than 4 months after the expiry of the time limit.
6. He applied ex parte when he ought to have put Messrs Mills Selig on notice.
7. He failed to inform Master Wilson of the limitation issue when applying ex parte.
8. He failed to act on the Master's Order amending within the 28 days provided.

[22] In all of the circumstances of this case, as set out above, I consider it would be unjust under Order 20 r.5 and inequitable under Article 51 of the

Limitation Order as amended, to deprive the defendant of its limitation defence, on the facts of this case. I confirm the Order of the Master with costs above and below.