Neutral Citation No. [2003] NIQB 25 | *Ref:* **NICF3896**

Judgment: approved by the Court for handing down | *Delivered:* **08/04/03**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

LEAH RACHEL PATERSON

Plaintiff/Appellant;

-and-

THE TRUSTEES FOR THE TIME BEING OF ST CATHERINE'S COLLEGE

Defendant/Respondent.

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NICHOLSON LJ

[1] This is an appeal by the plaintiff Leah Rachel Paterson against an Order made by Master McCorry on 14 January 2003 refusing her application for (a) an Order amending the Writ of Summons 2001 No. 3118 so as to substitute the words "The Reverend Father Richard Naughton as Chairman and Nominee of the Board of Governors of St Catherine's College, Armagh" as defendant to the action in place of the words "The Trustees for the time being of St Catherine's College", (b) an Order validating irregular service of the writ and/or deeming service good or, in the alternative, (c) an Order extending time for the service of the Writ (amended as above) and/or an Order extending the validity of the Writ (amended as above) for service; or (d) an Order having the effect of validating irregular service of the Writ and deeming service good or, in the alternative, of extending the validity of the Writ for service pursuant to Article 6 of the European Convention on Human Rights, sections 3 and/or 6 of the Human Rights Act 1998 and/or the inherent jurisdiction of the court.

[2] The application before the Master was based on the affidavits of Arlene Foster, solicitor on behalf of the plaintiff, sworn on 4 September 2002 and 18 November 2002. The appeal proceeded on the basis that the Master had rejected all the grounds of application. Affidavits were sworn by Patrick McGinley, solicitor for the defendant, on 30 January 2003, by Arlene Foster on 27 February 2003, and by the plaintiff and her mother on 26 February 2003 for the purposes of the appeal.

[3] The plaintiff was born on 28 June 1980. She attended St Catherine's College, Armagh between the ages of 13 and 16 and alleges that she was repeatedly bullied, that she complained to the school authorities as did her mother but that little or nothing was done to put a stop to the bullying. She claims to have been affected physically, mentally and academically. Medical reports have been furnished in support for her claim and her mother supports her claim by affidavit: see their affidavits of 26 February 2003 and the exhibits to the affidavit of Arlene Foster of 27 February 2003, marked AF3.

[4] A book of correspondence is exhibited to the affidavit of Mr McGinley partner in the firm of Joseph Donnelly & Company, solicitors for the defendants. The first letter was from a firm of solicitors, Messrs Blair and Hanna, who originally acted for the plaintiff. It is dated 3 February 1995 and is addressed to the Chairman of the Board of Governors of the College. It contains allegations of bullying and alleges that the bullying resulted from the negligence of staff of the College. It was stated that a claim for damages would be made against the College and it was suggested that the letter should be forwarded to the insurers of the College.

[5] It would appear from a letter dated 8 March 2001 that there was some correspondence between Messrs Blair and Hanna and Norwich Union, the insurers for the College. But the claim appears to have lain dormant until Miss Paterson changed her solicitors. On 8 March 2001 Richard Monteith, solicitor wrote to the Norwich Union asking them to advise as to the precise title of the insured for the purpose of proceedings and whether proceedings should be served directly upon the school authorities or whether they wished to nominate solicitors to accept service of same.

[6] Norwich Union replied "Without Prejudice" on 16 March 2001, stating that the title of their insured was "Trustees for the time being of St Catherine's College" and nominating Joseph Donnelly, solicitors, to accept service of proceedings. On 16 June 2001 Richard Monteith wrote again stating that in light of the letter of 16 March it was proposed to issue proceedings against the Trustees as opposed to the Board of Governors and Norwich Union were asked to state whether they proposed to make any point with regard to the title of the proposed defendant and, if so, advise by return of post.

[7] On 25 October 2001 Richard Monteith enclosed original and copy Writs "by way of service" on Messrs Joseph Donnelly & Company, solicitors stating that they had been advised to serve same by Norwich Union, giving insurers' reference number.

[8] On 30 October Mr McGinley on behalf of Joseph Donnelly & Company confirmed that they would be authorised to act on behalf of the defendants but that the title would have to be amended and that they were seeking to find out the name of the appropriate person and would consent to such intended amendment.

[9] On 1 November 2001 Richard Monteith requested the relevant information. Miss Paterson had attained the age of 18 on 28 June 1998; the time limit for issue of the Writ was the end of June 2001; the Writ was issued on 20 June 2001, the validity of the Writ, if not served, expired in June 2002. Mr Wilson a solicitor in the firm of Richard Monteith, assumed that service of the Writ had been accepted by Joseph Donnelly & Company. So did Arlene Foster who succeeded him in looking after the interests of Miss Paterson.

[10] On 8 January 2002 she wrote to Joseph Donnelly and Company asking them again for the name of the current chairperson of the Board of Governors. Mr McGinley replied on 11 January 2002 furnishing the name of the chairman. The last sentence of his letter read: "Please now proceed ex parte to apply for leave to amend the Title of the defendants and on completion forward to us original amended Writ which we will have authority to accept for service." The original Writ unfortunately remained in his file.

[11] He wrote again on 11 April 2003 asking: "What is the position in relation to your intended application for leave to amend the said Title by consent? If the plaintiff indeed intends to proceed with her action we would require that she does so without further delay.

[12] On 20 August 2002 he wrote an even fuller letter setting out the facts as he saw them and stating that the Writ should have been amended and served by 27 June 2002, reserving his clients' position in relation to an application to regularise the legal situation.

[13] In an affidavit sworn for the purposes of the appeal on 30 January 2003 he stated that the omission to return the original Writ was an oversight on his part and he would have returned it if so required. The plaintiff was not a personal litigant and he did not accept that he had contributed in any way to the omissions of the solicitor for the plaintiff. At paragraph (xi) he set out five grounds which, he stated, gravely prejudiced the defendants owing to the delay in the case.

[14] Arlene Foster's first affidavit which was before the Master stated at paragraph 2 that the Writ was served on 25 October 2001. In her second affidavit she stated that counsel had been informed that the Writ was served on that date and that she believed that the Writ had been served until after the issue of the summons on 9 September 2002. She contended that the letter of 30 October 2001 from Mr McGinley did not give a clear indication on the face of it that the Writ was not endorsed to perfect service. When reviewing the file after taking it over from Mr Wilson, she understood that service had been perfected and advised counsel of same in the context of his drafting the summons to amend the defendants title in the Writ. She argued at paragraph 5 that service had only failed to be perfected by reason of the defendants' solicitors declining to indorse the original Writ with a statement that they had accepted service.

[15] The appeal raises the four issues set out at (a) to (d) in paragraph [1].

[16] I received considerable assistance from counsel on both sides by reason of their written submissions and skilful oral argument.

[17] I have no difficulty in allowing the amendment of the title of the proceedings under Order 20, rule 5. The error was caused by the insurers of the college and the solicitors for the college have always made it clear that they would consent to such amendment. There is no prejudice to the college notwithstanding that the relevant period of limitation current at the date of issue of the Writ has expired.

[18] The difficulty which the plaintiff faces is that the Writ has not been served and the validity of the Writ has expired.

[19] Did the solicitors for the college contribute in any way to misleading the plaintiff's legal advisers? They received the original writ and copies thereof and they were stated on the face of the Writ to be nominated to accept service of the Writ. They were informed by the plaintiff's solicitors that the Writ was being served on them on 25 October 2001. Order 10 rule 1(4) provides:

> "Where a defendant's solicitor endorses on the Writ a statement that he accepts service on the Writ on behalf of the defendant, the Writ shall be deemed to have been duly served on that defendant and to have been so served on the date on which the endorsement was made."

Thereafter an obligation arises to enter an Appearance. On 30 October 2001 Mr McGinley wrote, stating:

> "… We confirm that we will (my underlining) be authorised to act on behalf of the defendants in this matter. However, we advise etc …"

On 11 January 2002 he wrote:

> "…. Please now proceed ex parte to apply for leave to amend the Title of the defendants and on completion forward to us original amended Writ which we will have authority to accept for service." (my underlining)

Neither firm of solicitors appears to have realised that the original Writ was on the file of Joseph Donnelly & Company. But the plaintiff's solicitors required the original Writ in order to make the application and it was necessary to get back the original Writ from Joseph Donnelly & Company in order to make the application to amend the title. That firm must have been under the impression that they had returned the original Writ unendorsed by them. The correspondence between the plaintiff's solicitors and the defendants' solicitors was not misleading, if one ignores the correspondence with the insurers. But I do consider that the failure to return the original writ in order to have the title rectified did contribute to the confusion on the part of the plaintiff's solicitors.

[20] Have the defendants been prejudiced by the delay in bringing proceedings? They certainly have been and, arguably, the blame rests largely with Messrs Blair and Hanna, insofar as the facts have been disclosed to this court. But they have not been heard and they may have some explanation. The relevant Limitation Order entitles a minor plaintiff to bring proceedings for a cause of action accruing during minority within three years of obtaining his or her majority. In these circumstances and having regard to the affidavits on the merits which have been supplied to the court I do not consider that the grounds of prejudice set out by Mr McGinley are significantly greater in March 2003 than they were in June 2001. It may be that the legal system is too generous to minor plaintiffs whose interests may be adequately protected by a next friend. But that is not a matter which the court can or should take into account.

[21] What the defendants will lose if an extension of time for leave to serve the Writ is granted is their right to the protection of the Limitation Order.

[22] Is there a basis for validating irregular service of the Writ or for deeming service good? I consider that there is. It arises from the correspondence between the insurers of the college and the solicitors for the plaintiff who offered to serve directly the Board of Governors of the school. The insurers selected the title "Trustees for the time being of St Catherine's

College" although it was suggested to them that the Board of Governors were appropriate persons to sue. The insurers nominated Joseph Donnelly and Company to accept service of proceedings on behalf of "the Trustees". It was reasonable to expect them to instruct Joseph Donnelly and Company to accept service, whether or not the title was wrong and would have to be rectified later. I assume that the solicitors were instructed not to accept service until the title was corrected. The insurers should have informed the plaintiff's solicitors that they had misled them. I accept, of course, that they misled them unintentionally and in good faith.

[23] When one reads the correspondence between the insurers and the plaintiff's solicitors followed by the correspondence between the two firms of solicitors, one understands how the mistake by the plaintiff's solicitors occurred.

[24] If the insurers had instructed Joseph Donnelly and Company to accept service on behalf of the Trustees, regardless of the fact that they were not the appropriate parties to sue, no doubt Joseph Donnelly and Company would have done so, but when returning the original Writ with acceptance of service endorsed thereon, they would have advised the plaintiff's solicitors to apply ex parte to amend the title.

[25] Their letter of 30 October was not ambiguous, as they would have been unaware of the correspondence between the insurers and the plaintiff's solicitors. But set in the context of the insurers' letter of 16 March it led the plaintiff's solicitors to assume that they had accepted service of the Writ. The solicitors for the plaintiff wrote to them twice thereafter in order to ascertain the correct title of the defendants.

[26] It is true that Mr McGinley's letter of 11 January 2002 should have alerted the plaintiff's solicitors to the fact that his firm had not accepted service. But in my view the failure to detect this was excusable by reason of the letter written on behalf of the insurers. Initially, as I have stated they misled the plaintiff's solicitors who had offered to serve the Writ on the Board of Governors. The defendants' solicitors sought to protect their clients' interests throughout. The plaintiff's solicitors cannot escape criticism for their delays and carelessness but the circumstances are exceptional. If the original Writ had been returned unendorsed I would have held that the conduct of the plaintiff's solicitors was inexcusable.

[27] I commend Mr Montague for sending me a copy of Tavera v Macfarlane a case which had not been cited in argument and which he had come across when he was researching another case. It supported one of Mr Scofield's arguments. Mr Montague's conduct was an example of professional ethics at its highest and should serve as a model for other members of the profession.

[28] I am satisfied that I do have power under Order 2 rule 1 to validate irregular service of the Writ and/or to deem service of the Writ good on the defendants. I exercise my discretion in favour of the plaintiff based on paragraphs [19] and [22] to [26] of this judgment and my ruling at paragraph [20] that no significant prejudice has occurred to the defendants since 20 June 2001 when the Writ was validly issued and in the interests of justice, balancing what would otherwise be the loss to the plaintiff of the right to sue, against the hardship to the defendants. I have taken into account that the plaintiff would have had a cause of action against her solicitors.

[29] I order that the title of the Writ be amended so as to substitute "The Reverend Father Richard McNaughton as Chairman and Nominee of the Board of Governors of St Catherine's College, Armagh" as defendant in place of "The Trustees for the time being of St Catherine's College" under the power conferred by Order 20, rule 5.

[30] I further order that the "serving" of the original Writ on Joseph Donnelly and Company be deemed good service as from 30 October 2001. I give leave to the defendants' solicitors to enter an Appearance as soon as practicable and I direct that the Statement of Claim be served within a week from entry of Notice of Appearance. The plaintiff's solicitors must be vigilant in proceeding to trial.

[31] The issues as to whether the plaintiff can show good reason for extending the validity of the Writ and as to whether Article 6 of the European Convention can be called in aid do not arise in view of my decision under Order 2 Rule 1.

[32] Tavera v MacFarlane [1996] PLQR 292 supported Mr Scofield's argument that I was entitled to exercise my discretion under Order 2 Rule 1, whether or not the court was willing to exercise its powers under Order 6 Rule 7. I have borne in mind the various authorities referred to in the judgment of Hutchinson LJ. The facts of that case differed significantly from the present case. But in this case the plaintiff's solicitors offered to serve the Writ on the Board of Governors of the school and only refrained from doing so as a result of the letter which they received from the insurers and which led them to send the original Writ to Joseph Donnelly for acknowledgement of service. It was the insurers who misled them in the first place as to the title of the proceedings. The plaintiff's solicitors deserve criticism for their tardiness, for their failure to act on the information contained in Joseph Donnelly's correspondence. But the fact remains that if they had effected valid service of the Writ, the same prejudice would have been suffered by the defendants. I have, of course, taken into account the loss of the right to rely on the Limitation Order.

[33] The first report of bullying was made on 15 April 1994. The plaintiff's mother re-attended on 19 April 1994. Ms Laverty a teacher, died before the issue of the Writ. Mrs Daly retired before the issue of the Writ. The school girls would have been in their 20s in any event and tracing of them may not be easy. The prejudice is caused by the fact that a claim can be brought within three years of adulthood.

[34] In view of the insignificant prejudice to the defendants on the merits arising from a departure from the requirements of the rules I am exercising my discretion liberally in what I believe to be in accordance with justice.

[35] The costs of the application should be borne by the plaintiff's solicitors.