Neutral Citation no. [2005] NIQB 86 | *Ref:* **HIGF5403**

Judgment: approved by the Court for handing down | *Delivered:* **28/10/05**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

_____

Between:

MARTHA BOND-BASSOM

Plaintiff/Respondent;

-and-

DR WILLIAM DAVID HUTCHINSON
DR JOHN EDWARD MOSS,
DR GARY NICHOLAS TURK

Defendants;

-and-

DR ETHNA MCGOURTY

Defendant/Appellant.

_____

HIGGINS J

[1] This is an appeal from the decision of Master Wilson whereby he refused the application of the Fourth Defendant/Appellant (the fourth defendant) for an order that a Writ of Summons (the writ), issued on 15 December 1995, be set aside insofar as it concerns the fourth defendant, alternatively setting aside the writ or alternatively declaring the writ not duly served on the fourth defendant. On 13 May 2005 the Master ordered –

i. pursuant to Order 2 Rule 1(2) of the Rules of the Supreme Court, that service of the writ of summons on the defendants herein at Antrim Health Centre on 18 December 1995 be deemed to be good and sufficient service on the fourth named defendant;

ii. that the conditional appearance entered on the said defendant's behalf on 7 October 2004 be deemed to be an unconditional appearance in the action;
iii. that the plaintiff do pay the said defendant her costs of this application (to be set off against any costs recovered by the plaintiff in the action).

[2] The four defendants carried on a medical practice at a Health Centre in Antrim. The plaintiff was a patient of the practice. She claims compensation for alleged personal injuries suffered as a result of alleged negligent treatment in March 1993, including late diagnosis and an alleged failure to attend at her home. In March 1995 the fourth defendant left the practice and in the following month married and moved to live in the United States of America, where she has lived ever since. Her sister's home at Ailesbury Avenue, Belfast was an occasional address for mail. The fourth defendant stayed at that address on a visit to Northern Ireland in the summer of 1996.

[3] On 6 December 1995 it was confirmed that the Medical Protection Society represented the interests of Dr Turk. On 7 December 1995 the plaintiff's previous solicitors wrote to the Medical Protection Society asking them to confirm that the other doctors in the practice were also represented by them.

[4] A writ of summons was issued out of the High Court on 15 December 1995. A letter dated 18 December 1995, addressed to the doctors separately and enclosing a separate writ of summons, was sent to each doctor at the medical practice in Antrim. On 20 December 1995 a Memorandum of Appearance was entered on behalf of three of the doctors, not including the fourth named defendant, by Carson & McDowell solicitors, acting on behalf of the Medical Protection Society.

[5] The fourth defendant was represented by the Medical Defence Union. She did not receive the writ sent to her at the address of the medical practice in Antrim. She was then living in the United States of America and had been for many months. No appearance was entered to the writ on behalf of the fourth named defendant. In February 2000 new solicitors took over conduct of the plaintiff's case. On 27 May 2004 the new solicitors wrote to Carson & McDowell requesting they provide an address for the fourth defendant, whom the new solicitors believed to be living in America. On 29 July 2004 Stewarts solicitors wrote to the plaintiff's solicitors informing them that they had no authority to disclose the fourth defendant's address. Stewarts represented another doctor who was not named in the original writ. They had been instructed by the Medical Defence Union to represent this doctor. An application to join this fifth doctor as a defendant was subsequently unsuccessful.

[6] Correspondence between Stewarts and Carson & McDowell established that Carson & McDowell had not entered an appearance on behalf of the fourth named defendant and that, so far as they were concerned, proceedings had never been served on the fourth defendant. On 5 October 2004 an application was made for leave to enter a Conditional Appearance on behalf the fourth defendant, for the purpose only of making an application to set aside the writ or the alleged service of the writ.

[7] At some time the plaintiff left Northern Ireland to live in England. In or about 2002 the plaintiff moved from Smethwick in the West Midlands, to Stow in Lincolnshire. Her medical notes and records were forwarded to her new GP in Saxelby, Lincoln. Among her medical notes and records in Lincoln were found various letters from the partners in Antrim to and from the Medical Protection Society, together with letters from the plaintiff's former solicitors. Included was a letter dated 23 July 1996 from the Medical Defence Union to the fourth named defendant, addressed to her at her sister's home at Ailesbury Road, Belfast, as well as a reply dated 29 August 1996. The reply is signed by Dr Hutchinson, though the fourth defendant's name is typed at the bottom of the letter. It is believed this letter was dictated by the fourth named defendant.

[8] The plaintiff's former solicitors received a first tranche of medical notes and records on 16 November 1995 and the present solicitors received a second tranche on 6 March 2002. Included in the second tranche were the letters dated 23 July 1996 and the reply dated 29 August 1996. In October 2003 a copy of the entire notes and records including the two letters was sent to Senior Counsel on behalf of the plaintiff and in May 2004 copies were sent to Stewarts. In August 2005 Stewarts who act for the fifth doctor claimed privilege in respect of the two letters. Senior Counsel (who did not appear in this appeal) advised the plaintiff's solicitor that it was too late to claim privilege, as the correspondence had been read by too many people. In November 2004 the fourth defendant's solicitors asserted privilege in respect of the two letters. How this correspondence came to be included in the plaintiff's notes and records is not entirely clear. It was probably as a result of a filing error by someone at the Antrim medical practice.

[9] It was submitted by counsel on behalf of the plaintiff that these letters are not communications between a lawyer and client and therefore do not come within the type of privilege known as legal advice privilege. If they were privileged at all it would be as a result of litigation privilege. This type of privilege arises only when litigation is in prospect or pending. From then on, any communications between a prospective litigant and his solicitor or other agent will be privileged if they come into existence for the sole or dominant purpose of either giving or receiving legal advice. Counsel on behalf of the plaintiff submitted that there is no evidence as to the purpose of the MDU letter. The letter itself does not state that it is written for the purpose

of defending a claim. It was submitted that it was not for the purpose of giving or receiving legal advice and is therefore not privileged.

[10] In my view the letter speaks for itself. The MDU provided financial protection for the fourth defendant. The MDU learnt by accident from the MPS that solicitors on behalf of the plaintiff had issued proceedings against four of the medical practitioners at the medical practice, including the fourth defendant. Clearly the MDU were anxious why they had not been notified about this by the fourth defendant. This is consistent with or supports the contention that the fourth defendant had no knowledge of the plaintiff's claim, as she had not been served with the writ (or a letter of claim alleged to have been sent in November 1995). In their letter date 23 July 1996 the MDU enclosed the clinical notes and requested the fourth defendant to review them and to let them know if there was anything in the notes which she thought should be brought to their attention. The fourth defendant responded from memory setting out her recollection of the period in question. It is clear that this correspondence was written when litigation was pending, if not commenced, and was for the purposes of legal advice on the question of liability. In the ordinary course of legal proceedings these two letters would be privileged.

[11] The alternative argument put forward on behalf of the plaintiff is that by reason of the circumstances relating to their disclosure, any privilege that attached to the letters had been lost. It was suggested that the privilege was lost as a result of the deposit of the letters in the plaintiff's medical file in the Antrim practice, before the file was transmitted to England on the plaintiff's move to that jurisdiction. The medical notes were then sent first to the West Midlands practice and then to Lincoln before they were sent to the plaintiff's solicitors and then to counsel and then to the fifth doctor's solicitors. It was contended that as a result the letters had lost their confidentiality. Counsel on behalf of the plaintiff relied on two passages in the text book Documentary Evidence (8 edit 2003) by C Hollander QC . The first, at 12 – 26, states –

> "There can be no privilege without confidentiality. If, therefore, an otherwise privileged document has lost its confidence there can be no claim for privilege".

The other, at 17 – 02, states –

> "It is a precondition of a claim to privilege that the documents in question are confidential. If particular documents are no longer confidential, then even if they would otherwise be privileged, privilege cannot be claimed".

[12] Counsel on behalf of the fourth defendant submitted that the letters had been disclosed to a limited and narrow circle, namely the plaintiff's solicitor and two general practitioners in England. This was quite unlike publication in a newspaper and that true confidentiality had not been lost. He relied on Wilson v Liquid Packaging Ltd 1979 NIR 165 in which the first defendant sought inspection by way of discovery, of a statement a copy of which had been sent to the plaintiff's Member of Parliament. Murray J (as he then was) held that production of a copy of an otherwise privileged statement and its transmission to a third party unconnected with the plaintiffs and their litigation, did not take the document outside the area of privilege and dismissed the application for inspection.

[13] The deposit of the letters in the medical file was not the act or the direct act of the fourth defendant. It appears to have been an inadvertent act by either a medical practitioner or a member of the clerical staff or both. The transmission of the medical file to England was an incidence of the plaintiff's removal to England to reside there, and not an act of the fourth defendant or her agents. The disclosure of the letters either in England or in Northern Ireland was to a very limited number of persons. They were part of a confidential medical file and the doctors were bound by that confidentiality. The transmission of the letters to the plaintiff's legal advisers was not the act of the fourth defendant, nor was it an act of her legal advisers. It was the act of a third party at a remove from these proceedings. No question of waiver of privilege, either by the fourth defendant or her advisers, arises. This was an inadvertent disclosure and a plainly obvious mistake. It did not occur during discovery by the legal adviser as sometime happens.

[14] I do not consider that the inclusion of the letters in the medical notes and records means that the privilege attaching to them was lost. Once the letters were found among the medical notes by the plaintiff's solicitor they should have been returned to the source from which they came or to the MDU. There was no requirement for the plaintiff's solicitor to transmit those letters to counsel, unless it was essential to obtain advice as to their status. However, it is not apparent that counsel's advice was necessary. Prior to receipt by the plaintiff's solicitors the letters had been part of a confidential medical file seen only by personnel bound by confidentiality. The confidentiality attached to them was not lost by their inclusion in the medical file. Thereafter they were seen by a very limited number of people. The confidentiality was obvious on the face of the letters and should have prompted the correct response when discovered on receipt by the plaintiff's solicitors. Therefore they remain privileged documents to which the general rule relating to discovery applies. The plaintiff's solicitor relies on Senior Counsel's observation that " the genie is out of the bottle and cannot be put back" . I regard that approach as an inadequate response to the situation in which the plaintiff's solicitor, to whom no impropriety can attach for her receipt of the letters, found herself. The position was simple. The medical

notes and records contained letters that were confidential and privileged. Their immediate return would have resolved the issue.

[15] I turn now to the Writ of Summons which was not physically served on the fourth defendant or seen or read by her. The Master ordered that service of the writ on the defendants at Antrim Health Centre on 18 December 1995 be deemed good and sufficient service on the fourth defendant. Each defendant was sent a letter enclosing the Writ. The first three defendants received the letter and enclosure and responded by entering an appearance. What happened to the letter addressed to the fourth defendant is unknown. The fourth defendant was in America. Was the posting of the letter containing a copy of the writ to the medical practice sufficient service on the fourth defendant? Was service on the other three members of the practice good and sufficient service on the fourth members when each was served individually? Order 2 Rules 1 of the Rules of the Supreme Court (NI) 1979 states –

> (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings or any document, judgment or order therein.

[16] Order 2 Rule 1 is wide in its terms. Its introduction removed the distinction drawn, under the previous rule, between non-compliance that rendered the proceedings a nullity and non-compliance which merely rendered the proceedings irregular. However it did not remove the possibility of failure to comply with requirements, or other improprieties, that were so serious that the proceedings would thereby be rendered a nullity, rather than merely irregular.

[17] Counsel on behalf of the plaintiff conceded that he could not rely on Order 6 Rule 7 (relating to the duration of a writ and its renewal). Nor, according Counsel on behalf of the defendant, was Order 3 Rule 5 (relating to the extension of time within which service could be effected) appropriate. It was submitted that the writ was 'dead' and that the only avenue open to the plaintiff was for service of the writ to be held or deemed good.

[18] It was submitted by counsel on behalf of the plaintiff that the court has a discretion under Order 2 Rule 1 to cure the irregularity relating to service and deem service good. He relied on Boocock v Hilton International Co 1993 4 AER 19. In that case the plaintiff failed to comply with Section 695 of the

Companies Act relating to service on an overseas company. It was held, in the interests of justice, that the court could exercise its discretion under Order 2, Rule 1 and treat the non-compliance with the Companies Act as an irregularity, and order that service of the writ, which was posted to the United Kingdom offices of the defendant, be deemed good service.

[19] The facts of Boocock are very different from the circumstances of this appeal. A writ that did not comply with the Companies Act had been served and solicitors had indicated that they had instructions to enter an appearance. Then the difficulties with compliance with the Companies Act arose. The judge at first instance refused, in exercise of his discretion, to extend time. That decision was upheld on appeal. However the Court of Appeal were impressed by the usual facts and the defendant's intimate knowledge of the proceedings and all that had transpired relating to service. Liability was not in dispute, the defendant was anxious to settle the case and interim payments had been made. The Court decided that an irregularity had occurred in relation to the failure to name the appropriate Company representative and that this irregularity could be cured by the exercise of the court's discretion under Order 2 Rule 1. In the course of giving judgment Neill LJ said at page 27:

> "One therefore turns to consider whether there is any room for the exercise of a separate discretion under Ord 2, r 1, in relation to the irregular service of the amended writ in August 1991.
>
> There is clear authority for the proposition that the court should not exercise its discretion under Ord 2, r 1 more favourably to a plaintiff than it would do under Ord 6, r 8. As Slade LJ put the matter in Leal v Dunlop Bio-Processes International Ltd [1984] 2 All ER 207 at 215, [1984] 1 WLR 874 at 885:
>
> > 'If he [the plaintiff] cannot properly enter through the front door of Ord 6 r 8, he should not be allowed to enter through the back door of Ord 2, r 1.'
>
> …..
>
> In the present case the judge was not invited to consider the case on the basis that the court had power under Ord 2, r 1 to allow the service of the amended writ in August 1991 to stand despite the fact that the mode of service did not comply with s 695 of the 1985 Act. This court can therefore view the matter afresh. The facts are very striking. Hilton

> International Co and their insurers knew of the claim from shortly after the accident in 1987. Detailed discussions followed. The chairman of Hilton International Co was clearly anxious that the claim should be settled. Liability has not been in dispute. There have been some interim payments of Mrs Boocock's expenses. Mr Chester knew about the claim and was aware almost immediately of the service of the amended writ at his office. It is true that Hilton International Co have what Lord Brandon in the Kleinwort Benson case called 'an accrued right of limitation', but the surest guideline for the exercise of any general discretion is to consider what the justice of the case demands.
>
> In the present case I am satisfied, despite the cogent arguments put forward by counsel for Hilton International Co, that in the interests of justice the court's power under Ord 2, r 1 to cure an irregularity should be exercised. In the light of the particular facts of this case I would allow the appeal and order that the service of the writ in August 1991 was good service."

[20] Counsel on behalf of the plaintiff relied on this case as authority that where there had been an irregularity, and the defendants were aware of proceedings, the court could exercise its discretion under Order 2 Rule 1. Similarly reliance was placed on the decision of Nicholson LJ in Patterson (a minor) v The Trustees For The Time Being Of St Catherine's College 2003 NIQB 25. In that case a writ was sent to solicitors with authority to accept service. Unfortunately the title in the writ was incorrect. The plaintiff's solicitor was advised to amend it. This was not done in time and the validity of the writ expired. Nicholson LJ had no hesitation in exercising his discretion under Order 2 Rule 1 and ordered that the service of the original writ (albeit incorrectly entitled) be deemed good service.

[21] Counsel on behalf of the defendant submitted that Boocock was a case of irregularity and the difficulty in Patterson was a mere technicality, and that neither provided assistance in the instant appeal. Furthermore he submitted that these were cases of irregularity whereas the instant case was one of non-service or failure to serve. He referred to Golden Ocean Assurance Ltd and World Mariner Shipping SA v Martin and Other (the 'Golden Mariner') 1990 2 Lloyd's Law Reports 215. In that case there was a multiplicity of defendants, forty six in all. The writ, which was a concurrent writ, was in the prescribed form and all 46 defendants appeared in the title. Beneath the title appeared the individual name and address of each of the defendants to be served. There

was no misdescription or error of any kind. The American process servers served each of the writs for service in America, on the wrong defendant. The writ addressed to the 9th defendant was served on the 16th defendant, and the writ addressed to the 16th defendant was served on the 18th defendant and so on. At first instance it was held that those writs, so served, had not been validly served and the proceedings were set aside. On appeal it was held that this was an irregularity which could be cured by the exercise of the discretion under Order 2 Rule 1. On appeal it was held that while the service had been defective, there was service, or purported service, nonetheless. The defendants in that case could have been in no doubt that they were litigants in the proceedings. It was held that the insertion of the incorrect name and address must have been understood as a misdescription. By an oversight no writ was served on the 10th defendant, who received a form of acknowledgement of service only. This document gave the title of the proceedings and listed the 10th defendant among those sued. It was contended that the 10th defendant must also have understood that he was intended to be sued and the fact that he never received a writ at all, could be treated as an irregularity. This argument in relation to the 10th defendant was rejected by the judge at first instance. On appeal Lloyd LJ held that the judge was unquestionably right and declared that the 10th defendant should play no part in the proceedings. McCowan LJ and Sir John Megaw were of the opinion that the service of the acknowledgement of service document left the 10th defendant in no doubt that the plaintiff intended to sue him and that he was aware of the nature of the proceedings. The majority regarded the acknowledgement of service as a step in the proceedings to which Order 2 Rule 1 applied and, as such, they could exercise their discretion against setting the service aside. This was service outside the jurisdiction in respect of which the other requirements were satisfied.

[22] It is important to consider the facts of the present appeal. By December 1995 the fourth defendant was no longer associated with the medical practice in Antrim. She had married and moved to America, where she was residing in December 1995. She was thus outside the jurisdiction. The appropriate method for service outside the jurisdiction should have been observed, had the plaintiff's then solicitors been aware of her new residence. However the solicitors chose the procedure for service within the jurisdiction under Order 10. In Barclays Bank Ltd v Hahn 1989 2 AER 398 the House of Lords considered 'letter box service' under Order 10 Rule 1 (2)(b). Giving the opinion of the House Lord Brightman, with whom Lord Lowry and the other members of the House agreed, said at page 402c –

> "My Lords, I accept the appellant's proposition that the defendant must be within the jurisdiction at the time when the writ is served, and I do not find it possible to agree the Court of Appeal's approach. This approach would mean that a writ could validly

> be served under Ord 10 on a defendant who had once had an address in England but had permanently left this country and settled elsewhere by inserting the copy writ through the letter box of his last address, provided that the plaintiff was able within seven days to communicate to the defendant the existence of the copy writ; for in such circumstances the plaintiff could properly depose that the copy writ would have come to the knowledge of the defendant within seven days after it was left in the letter box of his last known address. This appears to me to outflank Ord 11 (relating to service of process outside the jurisdiction) in every case where the defendant was formerly resident in this country and is capable of being contacted abroad within seven days. I feel no doubt that the words 'within the jurisdiction' apply to the defendant, and not to the writ for service."

[23] The requirement that the defendant must be within the jurisdiction applies equally to service under Order 10 Rule 1 (2)(a). The fourth defendant was without the jurisdiction. She was never served with the writ nor is there any evidence that she read it or ever saw it or heard about it. There was nothing absent from the procedure other than the non-service of the writ or failure to serve the writ. There was no irregularity relating to the procedure. In the absence of an irregularity there is nothing on which the court can exercise its discretion under Order 2 Rule 1. There had been no proper service. Where a medical practitioner leaves a medical practice and moves to live in another country, service on the practitioner's former partners or associates of a writ is insufficient, in my opinion, to include or serve the practitioner who is no longer within the jurisdiction.

[24] The Plaintiff relied on the correspondence from the medical file to prove that the plaintiff had knowledge sufficient to show that she was aware of a writ addressed to her, having been issued and sent to her. The correspondence, if admissible, shows no more than that solicitors acting on behalf of the plaintiff had issued proceedings against her, along with the other partners of the medical practice. If, contrary to what I have held, that correspondence was no longer privileged I do not see how it would advance the plaintiff's claim that service be deemed good, in circumstances in which she was not physically handed the writ or had sight of it or had read it and when she was residing outside the jurisdiction.

[25] I conclude that Order 2 Rule 1 cannot be used to permit service of the writ to be deemed good. I do not consider service of the writ to have been effected. The writ so far as it relates to the fourth defendant will be set aside. Therefore the fourth defendant is no longer a party to these proceedings. The

writ is no longer valid and no other application was made relating to it. Therefore the appeal will be allowed and the order of the Master reversed. The conditional appearance may be discharged. The fourth defendant is entitled to her costs against the plaintiff, both of this appeal and of the application before the Master, but I direct that the order for costs is not to be enforced until the trial of the action has been concluded.