Neutral Citation No. [2015] NIMaster 6

Ref:

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **27/03/2015**

No. 12/142295

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEENS BENCH DIVISION

Between:

EMMETT SWEENEY

Plaintiff;

AND

NATIONAL ASSOCIATION OF ROUND TABLES – ENNISKILLEN BRANCH and WATERWAYS IRELAND

Defendants.

Master McCorry

[1] By writ of summons issued 27.12.12 the plaintiff claims damages for personal injuries, loss and damage, sustained as a result of the negligence, nuisance and breach of statutory duty of the defendants in and about the management of a jetty located near the rear of the Killyhevlin Hotel, Lough Erne, Enniskillen. This was the location of an accident in which the plaintiff slipped on the jetty and sustained serious injuries on 01.01.2010 whilst participating in a water skiing event organised by Enniskillen Round Table. The jetty is owned or managed and maintained by the second defendant. The plaintiff is a prominent member and a past chairman of Enniskillen Round Table. The writ of summons specifies in respect of the first defendant that the event was a sponsored water-ski run in respect of which the first defendant failed to ensure the safety of the plaintiff as a participant.

[2] By summons issued 23.09.14 the first defendant, sued as "The National Association of Round Tables – Enniskillen Branch" which it is agreed is an unincorporated body, issued a summons for an order pursuant to Order 12, rule 8 of the Rules of the Court of Judicature (Northern Ireland) 1980 setting aside the writ or alternatively setting aside service of the writ. This summons had been preceded by one issued by the plaintiff on 21.07.14 in which he sought a range of orders. The first was an order pursuant to Order 20, rule 5 or the inherent jurisdiction of the court amending the title of the first defendant to: "Mr James Hamill as nominated representative for the time being of the Committee and members of the Enniskillen Branch of the National Association of Round Tables". Secondly, as an alternative the same order was sought pursuant to Order 15, rule 6 but it was agreed at hearing that this rule was not appropriate in this application. Thirdly, in the alternative the plaintiff sought the very general relief: "Such order as the Court deems meet on such terms as the Court deems meet as may be necessary to regularise the title of the First Defendant", but I think that this would be more properly included under the fifth order sought: "An order declaring service of the writ sufficient, pursuant to Order 2, rules 1 and or 2 of the Rules …". The 4th relief sought was: "If necessary, pursuant to an amendment pursuant to Order 15, rule 6, an order pursuant to Article 50 of the Limitation (NI) Order 1989 extending the time for the taking of the action against Mr James Hamill as nominated representative …" Linked as it was to Order 15, rule 6, which it was agreed did not apply, this matter was not pursued in argument. At hearing the dispute crystallised into the questions: (a) should the writ be struck out as not having been served on a proper defendant within the period of validity; or (b) should the plaintiff be allowed to amend the writ to name what it considered to be a proper defendant, with such service as had been effected to be regularised by the court.

[3] So far as the relevant facts are concerned the starting point is the writ of summons and the letter which accompanied it at the time the plaintiff purported to serve it. The letter is dated 19.12. 2013 and it is addressed to "National Association of Round Tables 30 Paget Lane Enniskillen Co. Fermanagh BT74 7HT". It is not directed to a particular person, is headed: Re. Our Client: Mr Emmett Sweeney Accident at the Killyhevlin Hotel on the 01/1/2010" and says simply: "With reference to the above, please find enclosed copy Writ hereby served on you by First Class Post." It is not a letter of claim. In his affidavit dated 21.07.14 grounding the application for leave to amend, the plaintiff's solicitor Mr David Buchanan at paragraph 19 avers: "The writ named the "National Association of Round Tables Enniskillen Branch" being the sum of its members, as First Defendant. Proceedings were served on Mr Hamill, as representative of the Enniskillen Branch of the Association." The reason why service was purportedly effected upon Mr Hamill was because the plaintiff's solicitor understood that a Mr James Hamill had been the chairman of the Enniskillen Branch at the time of the accident on 01.01.2010, and had written to him initially in that capacity on 02.04.2012.In that letter Mr Hamill had been requested to provide information including the identity of the chairman, secretary and role-holders in the branch and this had apparently been forwarded to insurers because a response was received on 08.05.2012 from Alan J Preston

Associates Limited apparently identifying the insured as "The National Association of Round Tables Enniskillen Branch" but not answering the other questions about the identity of the officers other than to confirm that Mr Hamill was the chairman. Further correspondence followed in which the name of the insured is repeated but the officers are not named.

[4] In any event, it appears that the letter of 02.04.2012 was never received by Mr Hamill but by a Mr Joe Kelly who filed an affidavit on 16.09.2014 confirming that he had been the branch secretary at the time of the accident. However he states that he was not secretary on 19.12.2013 when the writ was purportedly served and also that at no time was the property at 30 Paget Lane a registered address for the Association. In fact it was a property owned by his parents' pension fund from which, as a sole tenant, he had operated a cookery school which had closed down as a separate entity in the course of a merger with Belle Isle Cookery School in April 2013. That entity traded from an address 8 miles away in Lisbellaw, Co. Fermanagh and on 19.12.2013 30 Paget Lane was unoccupied. He avers that from time to time he visited the building to check for mail, having done so in November 2013 and the next time he called was on 06.01.2014 when he found the letter and writ of summons. He contacted the plaintiff's solicitors to request that they email him a stamped copy of the writ, which they did, and he forwarded this to Mr Hamill. If this is correct then it would appear that the writ did not come to the attention of the appropriate association officer until 06.10.2014. The plaintiff has adduced no evidence to contradict what is stated by Mr Kelly or to show that the writ came to the attention of an appropriate officer before that date.

[5] The question then arises, why was the writ purportedly served so late in the day? The writ having been issued on 27.12.12 the period of validity expired on 26.12.13 and the cause of action having accrued on 01.01.2010 the primary limitation period expired on 01.01.13. In purporting to serve the writ by first class post on 19.01.2013 the plaintiff's solicitor was acting just 8 days before the validity period expired, with the result that he had no time to rectify any defect in service. Even before coming to the explanation for the delay, it is noted that the plaintiff's solicitor relies on the date of the letter accompanying the writ to assert that it was sent on 19.12.13, but in fact there is no affidavit evidence to indicate that it had actually been posted on that date. So far as the delay is concerned, the plaintiff's solicitor's explanation is that he was attempting to identify the association officer who was responsible for health and safety, and it was to this end that he had sent the repeated requests for information first to Mr Hamill and thereafter to the claims handler Alan Preston Associates. In his affidavit sworn 24.11.14, Mr Buchanan, the plaintiff's solicitor, stated that the plaintiff himself was not aware, and indeed remained unaware, as to who was responsible for health and safety, and this prompted the pre-action correspondence aimed at eliciting such information. This included first writing on 29.03.2012 to Joe Kelly at 30 Paget Lane, who contacted them to say that Mr Hamill was the chairman at the material time and his letter should be sent to him. He did not say that the 30 Paget Lane address was wrong, an issue to which I will return below. The subsequence correspondence continued until autumn 2012 by

which time the plaintiff's solicitor appreciated that time was becoming short and therefore acting on the information available at that time the writ was issued and service effected on the chairman of the association, named as confirmed by Alan Preston Associates, at what he believed was the correct address, just within the period of validity (though this of course is now in dispute).

[6] It is indisputable that the course of correspondence had taken place; it is exhibited by both parties, but whether or not this constitutes a good explanation for the delay is another matter, because the plaintiff's solicitor was aware of the identity of the chairman at the time in question, namely Mr Hamill, and given the basis upon which he was proceeding, he did not need to know more than that. In a sense therefore it appears to me that any explanation for delay based on ignorance as to the identity of the officer responsible for health and safety is something of a red herring, particularly where, in the plaintiff's own application to amend, he now wishes to specifically name the same person he was aware had been the chairman from the outset.

[7] The next question which arises is how the mistake about the name of the defendant came about? Once again the plaintiff lays the blame for that at the door of the claims handler, but aside from that the issue is somewhat clouded by the possibility (conceded at hearing) that the plaintiff's solicitor may not have been aware of the possible difficulties faced by a member of an un-incorporated association suing the association in tort, by service upon named members of the association in a representative capacity. In its letter of 08.05.2012 Alan Preston Associates referred to their insured as the "National Association of Round Tables – Enniskillen Branch", the nomenclature repeated by the plaintiff on the writ and also in the letter accompanying the writ. However, that letter does not specifically say that this was the correct title by which to sue the insured, and it may be that if the plaintiff's solicitor had been more aware that the plaintiff might face difficulties suing an unincorporated association of which he was a member then he might have been alert to the likelihood that the name referred to by Alan Preston Associates could not be correct. If that analysis is correct then the plaintiff had made a mistake of law not fact. That aside however, any suggestion that he proceeded as he did because of a misrepresentation by the defendant or insurer simply does not stand up to scrutiny.

[8] At hearing the question arose as to why the plaintiff believed that the address for service upon Mr Hamill was 30 Paget Lane. The plaintiff's explanation was that this address had been referred to by Mr McGahan of McKinty & Wright, solicitors for the first defendant in a letter dated 02.06.2014. (See affidavit of Mr Buchanan filed 24.11.14 at paragraph 28). Aside from the fact that this letter was 6 months after purported service of the writ, in a short supplementary affidavit filed on 08.12.2014 Mr McGahan stated that this address was given in the plaintiff's letter of claim dated 02.04.2012, assumed to be correct and Mr Hamill was written to at that address on 03.08.2014. When he did not respond Mr McGahan obtained a mobile telephone number for Mr Hamill, spoke to him and provided an email address through which

all subsequent contact was maintained. Unfortunately Mr McGahan's file was not up-dated to reflect the fact that 30 Paget Lane was not the correct address and it appeared on subsequent correspondence between Mr McGahan and the plaintiff's solicitors. On the basis of this explanation I am satisfied that Mr McGahan's use of that address, both before and after purported service of the writ in late December 2013/early January 2014, was not in any way intended to mislead the plaintiff's solicitor but was a genuine mistake in respect of an address which had in fact been initially provided by the plaintiff's solicitor himself, and a failure to update the file when the mistake was identified. Without, I hope, adopting too censorious a tone, I think that the fact that the mistake was perpetuated was as much the fault of the one as the other.

[9] The plaintiff's own connection with the Enniskillen Branch of the Round Table is relevant to the question whether or not he ought to have known who to sue. At paragraph 7 of his affidavit sworn 16.09.2014 Joe Kelly explains that as secretary he registered each member of the local association on the national database through its website. He was aware that the plaintiff had been a member from 1998 and had been chairman in 1999/2000. He had been an active member attending a vast number of events over the years, and many events were held in the plaintiff's own restaurant. Mr Kelly exhibited in a bundle of documents the Enniskillen Round Table directories for each year going back to the late1990s. These directories displayed a list of the officers for each year and a programme of events, and in addition a list of past chairmen. The programme of events shows that the plaintiff's restaurant was a regular venue for Round Table events, including meetings and the annual Christmas Dinner each year, although it is fair to note that the frequency of these events was reducing between 2000 and 2010, but the Christmas Dinner for 2009 was on 16 December of that year, at the plaintiff's premises, just a fortnight before the accident.

[10] Mr Kelly also exhibited a copy of an email from the plaintiff to Joe Kelly on 23.06.2009 with respect to various events. Another dated 23.06.2009 enclosed a copy of that years' directory. The minutes of a meeting on 05.10.2009 were sent to the plaintiff on 09.10.2009 although he had not been at the meeting himself. The minutes of a meeting on 05.05.2012 show that the plaintiff was in attendance. Likewise minutes record apologies in respect of a meeting on 01.02 2010 and 29.03 2010, when the plaintiff presumably would have been unfit to attend by reason of his injuries. What is clear is that in the years prior to his accident, and at the time of his accident and following, the plaintiff was a prominent and active member of Enniskillen Round Table, and must have been aware of the identity of the Association Officers at the time, or had at his disposal the means of ascertaining the identity of the officers.

[11] Order 20, rule 5 of the Rules of the Court of Judicature (Northern Ireland) 1980 provides:

> *"(1) Subject to Order 15, Rule 6, 7 and 8 and the following provisions of this rule, the court may at any stage of the proceedings allow the plaintiff to amend his writ, or*

any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the court for leave to make the amendment mentioned in paragraph (3) (4) (5) is made, after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks just to do so.

(3) 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 would 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".

[12] In The Sardinia Sulcis [2001] 1 Lloyd's Rep 201 at 205-206 Lloyd LJ explained the criteria which must be satisfied in order to satisfy the provisions of Order 20 Rule 5(2):

"The first point to notice is that there is power to amend under the Rule even though the limitation period has expired: see Order 20, Rule 5(2). The second point is that there is power to amend, even though it is alleged that the effect of the amendment is to add a new party after the expiration of the limitation period. But the court must be satisfied (1) that there was a genuine mistake, (2) that the mistake was not misleading, (3) that the mistake was not such as to cause reasonable doubt as to the identity of the person intending to sue, and (4) that it would be just to allow the amendment".

[13] Considering the meanings of the words "identity of the person intending to sue or be sued" Lloyd LJ page 207 observed:

"In one sense a plaintiff always intends to sue the person who is liable for the wrong which he has suffered. But the test cannot be as wide as that. Otherwise there could never be any doubt as to the person intended to be sued, and leave to amend would always be given. So there must be some narrower test. In Mitchell v Harris Engineering Company Limited [1967] 2 QB 703 the identity of the person intended to be sued was the plaintiff's employers. In Evans Construction Company Limited v Charrington & Company Limited [1983] QB 810 it was the current landlord. In Thistle Hotels Limited v Sir Robert McAlpine & Sons Limited, The Times, 11 April 1989 the Court of Appeal (Civil Division) Transcript No 328 of 1989, the identity of the person intending to sue was the proprietor of the hotel. In The Joanne Borchard [1998] 2 Lloyd's Rep 274 it was the cargo owner or consignee. In all these cases it was possible to identify the intending plaintiff or intended defendant by reference to a

description which was more or less specific to the particular case. Thus if, in the case of an intended defendant, the plaintiff gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued. But if he gets the wrong description, it was be otherwise. The point can be illustrated by the facts of Rodriguez v RJ Parker (Male) [1967] 1 QB 116. In that case the identity of the intended defendant was the driver of a particular car. It was held that it was a mistake as to name. But if the plaintiffs had sued the driver of a different car, there would have been a mistake as to identity. He would have got the wrong description".

[14] In International Bulk Shipping and Services Limited v Minerals and Metals Trading Corporation of India [1996] 1 All ER 1017 at 1027 Evans LJ explained the "rule" in The Sardinia Sulcis as follows:

> *"The rule envisages that the writ was issued with the intention that a specific person should be the plaintiff. That person can often, but not invariably, be identified by reference to a relevant description. The choice of identity is made by the persons who bring the proceedings. If having made that choice they use the wrong name, even though the name they use may be that of a different legal entity, then their mistake as to the name can be corrected. But they cannot reverse their original identification of the party who is to sue. This interpretation of the rule derives not only from the phrase "correct the name of a party" but also from the requirement that the mistake must not have been such as to cause any reasonable doubt as to the identity of the person intending to sue"*

[15] Order 10, rule 1(3) provides:

> *"Where a writ is served in accordance with paragraph 2"* (service by first class post to the last known address or by insertion in a sealed envelope through the letterbox
> *"(a) the date of service shall, unless the contrary is shown, be deemed to be the seventh day . . . after the date on which the copy was sent . . . or . . . inserted through the letterbox . . .*
> *(b) any affidavit proving due service of the writ must contain a statement to the effect that –*
> *(i) in the opinion of the deponent the copy of the writ . . . will have come to the attention of the defendant within 7 days thereafter; and*
> *(ii) in the case of service by post, the copy of the writ has not been returned to the plaintiff through the post undelivered . . ."*

The plaintiff relies upon this provision to establish that the writ having been issued of 27.12.2012 so that validity expired on 26.12.13 (the plaintiff wrongly suggested 27.12.13) service was effected on 26.12.13 seven days after the writ was sent on

19.12.13. Though as noted, there is no affidavit evidence to say that the writ was actually sent on that date rather that was the date on the letter accompanying the writ. The plaintiff also seems to miss the point that in determining when service actually occurred (if it did occur) it is the date on which the writ comes to the attention of the defendant, not the date 7 days after posting or insertion through the letter box. This is clear from Order 10, rule 1(3)(b)(i) which requires the deponent to the affidavit of service to state his opinion as to when the writ would have come to the attention of the defendant.

[16] The White Book at 10/1/29 observes: ". . . it is open to the defendant to show, contrary to the deeming provision of paragraph 3(a) that he did not in fact receive the copy writ at all or that he actually received a copy of the writ later than 7 days after the date on which it was sent to him . . .; and goes on . . ."it is open to the plaintiff to show, contrary to the deeming provision at paragraph 3(a), that the defendant did in fact receive the copy writ within the period of 7 days . . . and in such case, service will have been duly effected on the date of actual receipt . . .". That the crucial date is the date on which the writ came to the attention of the defendant was confirmed by the Court of Appeal in Hodgson v Hart District Council [1986] 1 All ER 400 at pp402/3. Applying these principles to the affidavit evidence, in particular that of Mr Kelly as the plaintiff's affidavit evidence does not satisfactorily deal with the point, the court must conclude that service did not take place until the writ came to the attention of Mr Kelly on 06.01.2014, by which date its period of validity had expired. Therefore, in addition to leave to amend pursuant to Order 20, rule 5(2) the plaintiff will require relief pursuant to either Order 6, rule 7 to extend the validity of the writ, or pursuant to Order 2, rule 1 to regularise a nullity.

[17] In arguing that the plaintiff ought to be permitted, pursuant to Order 20, rule 5(2), to amend the writ of summons so as to name the correct defendant, the plaintiff cites Murray v Hibernian Dance Club (1996) The Times. In that case the plaintiff, who had fallen and broken her ankle whilst visiting the Dance Club, had sued the Defendant as "The Hibernian Dance Club" which was an unincorporated association devoid of personality at law. Outside the limitation period she sought to amend so as to sue individually named defendants on their own behalf and representing the members of the association. The Court of Appeal held that in naming the defendant using a common collective title was not such as to cause any reasonable doubt that the claim was asserted against the membership as a whole and allowed the amendment. Hutchison L.J. noted:

> *"It is plain that the provisions of Ord 20 r 5 are apt to cover the case where the action is hitherto a nullity because the plaintiff has sued an entity which does not exist in law."*

The plaintiff argues that the present case is similar to the Murray v Hibernian Dance Club. It was clear that the plaintiff's intention was to sue the members of the Round Table using the generic term adopted by its insurer. This was due to a genuine mistake and was not misleading or such as to cause reasonable doubt as to the

identity of the party intended to be sued. The pre-proceedings correspondence clearly showed that the defendant was aware of the action and had notified its insurers and solicitors had been instructed, so that the defendant suffered no prejudice as a result of the amendment.

[18] However, the facts as found would not support the contention that the plaintiff's mistake in this instance was due to anything done by the defendant. The plaintiff as an active member of the Association was aware of the identity of the Association Officers at the time, and the defendant therefore argues with some force that if there was a mistake, it was arguably a mistake of law not fact, namely that the solicitor was unaware that it might not be possible to sue an unincorporated association with no legal personality, rather than any reasonable doubt as to who should be sued. However, it seems to me that the one fed into the other and at the end of the day it may not matter if the mistake was a genuine one..

[19] The plaintiff also relies upon Patterson v Trustees for the time being of St Catherine's College [2003] NIQB 25, where Nicholson L.J. on appeal from myself allowed the plaintiff to amend to substitute: "The Reverend Father Richard Naughton as Chairman and Nominee of the Board of Governors of St Catherine's College, Armagh" in place of "The Trustees for the time being of St Catherine's College". The writ had been served upon the defendant's solicitors who did not have instructions to accept service and subsequently notified the plaintiff's solicitors of this but did not return the original writ unendorsed in accordance with Order 10, rule 1(4). However, prior to this the insurer had written to the plaintiff's solicitor indicating in clear terms that the title of their insured was "The Trustees for the time being of St Catherine's College" and nominating a solicitor (the one subsequently served) to accept service. At [17] Nicholson L.J. held:

> *"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."*

[20] Citing Tavara v Macfarlane [1996] PIQR 292 Nicholson L.J. went on to apply Order 2, rule 1 to validate irregular service of the writ and deeming service of the writ upon the solicitors for the defendant as good service. However, this is a decision based very much on its own facts, where the cause of the plaintiff's mistake was something done by the defendant's insurer and solicitor, where there is no evidence in this case, on the facts as found, that either the insurer or the defendant's solicitor acted in such a way as to mislead or cause the plaintiff's solicitor's error. The first defendant therefore seeks to distinguish Tavara v Macfarlane on its facts. In that case the plaintiff had served an unsealed county court summons within the validity period. Once the summons was issued it fell on the County Court to effect service and it transpired that the County Court had lost the file. Concerned that the summons had not been served the solicitors therefore decided to serve it themselves

at the defendant's last known address. Learning subsequently of a more up to date address they served again by placing through the letterbox of the second address, but unfortunately that copy was unsealed. This was not drawn to their attention by the defendant's solicitors until a week after the validity period had expired. At first instance the judge held that the service of an unsealed summons was an irregularity and should be taken as good. In applying the principles with respect to the court's exercise of its discretion under Order 2, rule 1, Nicholson L.J. followed Tavara, but he did so against a very different factual context than in the present case, and indeed Tavara was decided on very different facts.

[21] Order 2, rule 1 provides:

> *"(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 anything 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.*
>
> *(2) ……..the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit."*

In relation to Order 2, rule 1 generally, The Supreme Court Practice 1999 Edition ("The White Book") at paragraph 2/1/3/ states: "The authorities show that O.2,r.1 should be applied liberally, in order, so far as is reasonable and proper, to prevent injustice being caused to one party by mindless adherence to technicalities in the rules of procedure."

[22] Against that, it is well established that a court should be reluctant to exercise its discretion under Order 2, rule 1 where the validity of the writ of summons has expired and an application under Order 6, rule 7 to extend the validity of the writ would not be successful. As stated by Slade L.J. in Leal v Dunlop Bio Processes International Ltd [1984] 1 WLR 874:

> "Likewise, in my opinion, it would have been an improper exercise of the registrar's discretion under Ord. 2, r.1 to make good the irregular service of the writ retroactively in this case, where he could not properly have renewed the writ under Ord. 6, r.8 When seeking the indulgence of the court under Ord.2,r.1, in circumstances such as the present, a plaintiff cannot, in my opinion, expect the court to exercise its discretion more favourably than it would have been prepared to exercise it on an application under Order 6, r 8.

If he cannot properly enter through the front door of Orde.6, r.8 he should not be allowed to enter through the back door of Ord. 2, r.1."

[23] Also in that case Sir Roger Ormrod L.J. emphasised "the importance to ensure compliance with the Rules of Court and that only in exceptional circumstances should irregularities be cured or deemed good by the exercise of the courts discretion." This gives rise to some debate in the present case as to whether the appropriate test to be applied by the court in deciding whether or not to exercise the Order 2, rule 1 discretion is "exceptional circumstances" or the Order 6 rule 7 test of "good reason". I have to say that I do not understand that what Sir Roger Ormrod was doing was setting a test or standard but merely pointing out that it would only be in exceptional cases that the court would use Order 2, rule 1 to cure an irregularity. In any event, in Kuwait Oil Tanker Co. SAK v Al Bader [1997] 2 All E.R. 855 the Court of Appeal exercised the Order 2, rule 1 discretion to cure irregularity in obtaining leave to service outside the jurisdiction and in so doing held that the applicable test was not "exceptional circumstances" but "good reason", where there had been a bona fide mistake and no prejudice caused to the defendant.

[24] Order 6, rule 7 is the equivalent of the Order 6, rule 8 at the material time applicable in England, and it provides (1) that for the purpose of service a writ is valid in the first instance for 12 months beginning with the date of its issue; and (2) where a writ has not been served on a defendant the court may extend the validity of the writ from time to time for such period not exceeding 12 months at any one time, beginning with the day next following next following that on which it would otherwise expire, as may be specified in the order or if the application is made before expiry to such later day if any as the court may allow. The most helpful summary of the relevant principles remains that set out at 6/8/6, 6/8/7 and 6/8/12 of The Supreme Court Practice ("The White Book") 1999 edition. I do not propose to rehearse in detail what is so clearly set out therein, suffice to say that the essential principles are:

(1) It is the duty of a plaintiff to serve the writ promptly accordingly there must always be a good reason for the grant of an extension of validity. The later the application is made the better the good reason must be. Kleinwort Benson Ltd v Barbrak Ltd, The Myrto (No.3)[1987] A.C. 597 HL and Waddon v Whitecroft-Scoville Ltd [1988] 1 All ER 996 HL.
(2) Whether a reason is good or bad depends on the circumstances of the case and normally the showing of good reason for failing to serve the writ during its original period of validity will be a necessary step to establishing good reason for the grant of an extension (Waddon v Whitecroft-Scoville Ltd).
(3) Good reasons include difficulty or impossibility in finding or serving a defendant particularly where he is evading service, or agreement with the defendant to defer service. Bad reasons include: negotiations in the absence of agreement to defer service; difficulties tracing witnesses or obtaining evidence; or carelessness. However, it is important to note that there is a dearth of recent authority in this jurisdiction and of course in England and

Wales a somewhat different regime has been introduced with the establishment of their Civil Procedure Rules since 2000 and of course the Human Rights Act 1998.
(4) Where application for renewal is made after the writ has expired and after expiry of the relevant period of limitation the applicant must not only show good reason for the renewal but must also give a satisfactory explanation for failure to apply for renewal before the validity expired.
(5) Whether or not to extend validity is a matter for the discretion of the court and in exercising that discretion the court is entitled to have regard to the balance of hardship Jones v Jones [1970] 2 QB 576.
(6) The application to extend involves a 2 stage inquiry. At the first stage the court must be satisfied that the plaintiff has demonstrated good reason for the extension and a satisfactory explanation for failure to serve before validity expired. Only if it is so satisfied will the court proceed to the second stage by considering all the circumstances of the case including the balance of hardship.
(7) The application to renew the writ should be made within the appropriate period of validity but the court has power to allow extension after expiry as long as the application is received during the "first period of expiry" (i.e. the year following.) Chappell v Cooper 1980 1 WLR 958.This is arguably subject to a wider power to allow later extension according to a number of propositions in Singh (Jogrinder) v Duport Harper Foundries Ltd [1994] 1 WLR 769.

[25] In the present case, the reason for delay in serving the writ provided by the plaintiff's solicitor is that the plaintiff's solicitors was attempting to identify the identity of the officers responsible for health and safety at the water skiing event on 01.01.2010. However, as already noted the plaintiff had the identity of the current chairman Mr Hamill from the outset and the real problem was not the identity of the health and safety officers, which given his close involvement with the round table ought to have been apparent to him if they existed, or he had at his disposal the means of identifying them. Consequently good reason for delay in serving the writ is not demonstrated and the court cannot therefore go on to consider the balance of hardship.

[26] That leaves the plaintiff with Order 2, rule 1 where arguably he starts at a disadvantage in that had the date of service been 27.1.2013 then the court could consider exercising its discretion pursuant to Order 2.rule 1 to cure an irregularity, but if the date of service was 06.01.2114, as appears to be the case, then the writ is invalid at the time of service, Order 6, rule 7 relief would be refused because of a failure to provide good reason, and the court is therefore being asked to exercise Order 2, rule 1 where an application under Order 6, rule 7 would fail. In other words, as the defendant argues, this in a classic Leal situation where the plaintiff is attempting to get in the back door of O.2, rule 1 where he cannot get in by the front door of Order 6, rule7, or to put it another way, this is a case of extending validity

pursuant to Order 2, rule 1 where Order 6, rule 7 is not available, as opposed to an application pursuant to Order 2, rule 1 to cure an irregularity.

[27] An important consideration in any application under Order 6 rule 7, and also important in deciding whether or not to exercise the Order 2, rule 1 discretion to cure an irregularity is whether or not by so doing the defendant may be denied a limitation defence, because that is where the issue of whether or not there is prejudice to the defendant most often arises. Articles 73(1) and (2) of the Limitation (Northern Ireland) Order 1989 provides that:

> *(1) For the purposes of this Order, any new claim made in the course of any action is to be treated as a separate action and as having been commenced - … (b) in relation to any other new claim, on the same date as the original action.*
> *"(2) Except as provided by Article 50, by rules of court, or by county court rules, neither the High Court nor any county court may allow a new claim within paragraph (1)(b), other than an original set-off or counterclaim, to be made in the course of any action after the expiry of any time limit under this Order which would affect a new action to enforce that claim".*

A "new claim" includes any claim involving the addition or substitution of a party (Article 73(8)). In the context of this case, therefore, the court cannot allow a new claim to be made in the course of the action after the expiry of any limitation period except as provided by the rules of court. Article 73(3), (4) and (5) of the 1989 Order provides, where relevant:

> *"(3) Rules of court …may provide for allowing a new claim to which paragraph (2) applies to be made as there mentioned, but only if the conditions specified in paragraph (4) are satisfied, and subject to any further restrictions the rules may impose.*
> *(4) The conditions referred to in paragraph (3) are the following:*
> *(b) As respects a claim involving a new party, if the addition or substitution of the new party is necessary for the determination of the original action.*
> *(5) The addition or substitution of a new party is not to be treated for the purposes of paragraph (4)(b) as necessary for the determination of the original action unless either:*
> *(a) The new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name …".*

In the present case the effect of allowing the plaintiff to amend the writ is a new claim and therefore comes within the ambit of Article 73. That means that amendment cannot be allowed unless the conditions set out at paragraph (4) are met. Those conditions are that the substitution of a new party is necessary for the determination of the original action, which in turn requires that the name originally given was given in mistake for the new party's name. That appears to be the case in the present instance, although as already noted, that mistake may not be based solely on a mistake of fact as to the identity of the proper defendant but on the plaintiff's solicitor's misconception as to the applicable law. The first defendant

argues that Order 2, rule 1 is subordinate to Article 73 so that the court has no power to use Order 2, rule 1 to correct an irregularity unless the criteria in Article 73(5) are satisfied (Bank of America National trust and Savings Association v Christmas "the Kyriaki" [1994] 1 All ER 401). However, it seems to me that if that criterion is met then there is no bar on the Court exercising the Order 2, rule 1 discretion, on that ground at least.

[28] It is clear from the outset that this plaintiff's intention was to sue the Enniskillen Branch of the Round Table as the organiser of the event at which he was injured. He named the defendant wrongly because there is no legal personality in the defendant named. There is the arguable complication that he cannot sue an unincorporated association of which he himself is a member. He always knew the identity of the chairman for the relevant period, namely Mr Hamill who he now seeks to sue in a representative capacity on behalf of the committee and members. The issue whether or not he can sue Mr Hamill as a nominated representative of the members among whom the plaintiff himself was numbered was not debated at hearing, but suing him as the nominated representative of the committee might be a different matter. In any event the once hard fast rule that a member of an unincorporated association such as a club could not sue solely on grounds of their joint membership is now much more circumscribed and there is authority for the proposition that an officer of a club, or even a member performing a task on behalf of other members, where there is a risk of injury, could become liable to them or at least be obliged to warn them of the danger. In the Hibernian Dance Club case for example, the claimant was able to sue the committee contending that they were agents of the members in relation to the occupation of the premises, employment of staff and exercise of reasonable care to visitors (and as in the present case had to amend the title of the defendant in order to do so). In Grice v Stourport Tennis, Hockey and Squash Club [1997] 9 C.L. 592, the Court of Appeal held that in determining potential liability of club officers, membership of the club, though not itself giving rise to a duty of care, did not provide immunity where a duty otherwise arose. In any event, in his very thorough and comprehensive submissions and skeleton argument the first defendant's counsel did not argue that the plaintiff as a member of the round table could not sue it.

[29] Turning again to Order 20 rule 5(2), the proper approach to be adopted by the court has been clarified in The Sardinia Sulcis [2001] 1 Lloyd's Rep 201 which confirms that there is power to amend under the Rule even though the limitation period has expired and even though it is alleged that the effect of the amendment is to add a new party after the expiration of the limitation period. However, this is subject to the plaintiff satisfying Lloyd LJ's four criteria, namely: (1) that there was a genuine mistake, (2) that the mistake was not misleading, (3) that the mistake was not such as to cause reasonable doubt as to the identity of the person intending to sue, and (4) that it would be just to allow the amendment". At hearing the first defendant concentrated on criteria 4 only, although it would generally be considered unusual for a court to find that the fourth criteria had not been satisfied where the

other 3 criteria were. Essentially the first defendant argued that in the circumstances of this case it would be unjust to allow the amendment.

[30] Therefore, whatever way the court approaches the plaintiff's application, whether from the perspectives of Order 2, rule 1 or Order 20, rule 5(2), the outcome as is so often the case, and properly so, depends upon what is fair and just. The Rules of Court are there not to place obstacles in the paths of parties to litigation, but to regulate the manner in which those proceedings are conducted and to ensure fairness. In the plaintiff's favour are the facts that the extent to which the service took place outside the validity period was by just 10 days and the case being put forward by the plaintiff was apparent to the proposed first defendant's insurers as far back as 02.04.2012. The first defendant has not therefore been taken aback by the proposed amendment or placed in the position of not being able to defend the action because of inability to investigate or lapse of time or any of the usual basis upon which to allege prejudice. Having said that, the first defendant cannot be said to suffer no prejudice because if the amendment, leave for which is sought is permitted, and the irregularity arising from the fact that writ was invalid on the date of service is regularised pursuant to Order 2, rule 1, then the first defendant loses the benefit of an accrued limitation defence. That however is the only prejudice to the first defendant and it must be balanced against the prejudice suffered by the plaintiff as a result of the action not being able to proceed. In this case the balance of hardship clearly favours the plaintiff.

[31] Returning to the relief sought in his application, the plaintiff should have leave to amend the title of the defendant on the writ of summons, and further, irregular service of the writ of summons is validated and service on 06.01.2014 deemed good, pursuant to Order 2, rule 1. It follows that the first defendant's application pursuant to Order 12, rule 8 must be dismissed. I will hear counsel on the issue of costs at their convenience.