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

Delivered: 17/10/00

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

Between

DAVID ROCK

Plaintiff;

And

BRIAN KEENAN-HALL TRADING AS HUNTLEY HAIR TRANSPLANTS

Defendant

NICHOLSON LJ

This is an Appeal from the Order of Master Wilson made on 22 May 2000 whereby he ordered that the plaintiff be at liberty to amend the civil bill and statement of claim to refer to the defendant by his proper name and description, that is to say, Brian Keenan-Hall t/a Huntley Hair Systems, and that all subsequent proceedings be amended accordingly and that the service on and appearance entered herein by the defendant do stand; and that the defendant pay to the plaintiff his costs of this application.

I gave leave to the plaintiff to put in an additional affidavit from Caroline Boston, the principal in the firm of John Boston & Company, solicitors for the plaintiff in which she sets out the sources of her information and belief. I shall return to this topic at a later stage. But it appears to me that it may be necessary to put in additional affidavits in order to comply with the relevant formalities. It is necessary to state the sources of information and belief. She refers in paragraph 1 to the fact that she makes her affidavit from a careful perusal of all documents in the case, along with her general understanding of the events that have taken place, following discussions with Mr Reilly who was on holiday when she swore her affidavit.

Mr Reilly is a solicitor in the firm who swore the grounding affidavit for the Summons brought before the Master seeking that the title of the action might be formally amended to identify the correct defendant, pursuant to Order 20, Rule 5 of the Rules of the Supreme Court (NI) 1980.

The somewhat complicated series of events which led to this appeal appear to be as follows:

David Rock who was born on 4 December 1960 suffered hair loss and just before his 25th birthday his hair had become very thin and was receding. He sought advice from a Mr Brian Keenan-Hall in late 1985 and received three treatments for the purposes of a hair-transplant. The first treatment occurred in May 1986. He was dissatisfied with the outcome of the hair transplant procedure and telephoned Mr Keenan-Hall to complain. His hair loss and recession continued and he had a second transplant around January

1989 and a further course of transplanting in March 1990. He was dissatisfied and tried to contact Mr Keenan-Hall on a number of occasions without success.

The three transplants took place at 230 Upper Lisburn Road, Finaghy, Belfast. At some stage after March 1990 he was told that Head Office at Belfast had closed down and that all further transplants would have to take place in Dublin. Having paid at least £1,800 for the first three treatments he could not afford any more. When he first attended the offices of his solicitors he informed them that as at 1990 he did not believe he had a cause of action against Mr Keenan-Hall.

The documents which emanated from Mr Keenan-Hall at this time and which were exhibited to the affidavit of Caroline Bolton bore the heading 'Huntley Hair Systems' and at times were signed 'Yours Sincerely, Brian Keenan-Hall' and on occasion, 'Yours sincerely, Brian Keenan-Hall Managing Director'. These documents were given by the plaintiff to his solicitors. Some documents also referred to Huntley Hair Transplant Clinic.

As time passed after 1990 the plaintiff's hair thinned and receded even further. At some stage scars carried out from the surgery which the plaintiff received became apparent. He consulted his general practitioner in October 1995 to seek advice about plastic surgery and was referred to a consultant plastic surgeon in April 1996. Following discussions with the plastic surgeon and his general practitioner he decided to take legal advice and as a result he went to his solicitors on 24 June 1996. Papers were sent to

junior counsel on 5 July 1996 who advised that the defendant ought to have registered offices in Northern Ireland. Counsel drafted a Civil Bill. The solicitor in the firm then dealing with the file, who is no longer in Northern Ireland, instructed Mr Reilly, the solicitor who swore the grounding affidavit, to attend at the companies office to ascertain the proper title of the defendant.

Mr Reilly did so and noted the name of Huntley Clinic (UK) Limited, Dunmurry Lane, Dunmurry, Belfast. The instructions to Mr Reilly are exhibited as CB2 to Caroline Boston's affidavit. A Civil Bill was issued claiming £15,000 damages against Huntley Clinic (UK) Limited for personal injuries, loss and damage sustained by the plaintiff by reason of the negligence, breach of contract and misrepresentation of the defendant its servants and agents in and about the performance of an operation to transplant the plaintiff's hair and in particular the pre-operative and post-operative treatment and care.

Caroline Boston avers in paragraph 17 of her affidavit that proceedings were issued against Huntley Clinic (UK) Limited in the belief that this was the proper title of Mr Brian Keenan-Hall's Practice/Clinic and that the company had been in existence during the 1980s. It transpired that the company was formed in or about 1994.

Mr Rock's solicitors commenced correspondence with Messrs Shean Dickson Merrick, solicitors who acted for the company and much of the correspondence is exhibited to Miss Boston's affidavit as exhibit CB3.

It is apparent from the documents that Mr Keenan-Hall was personally aware of and may have treated the plaintiff. He referred to him in documents by his Christian name and received at least one cheque made out personally to himself.

I infer that he was aware that the plaintiff had been treated by his "firm" in the 1980s and in 1990 and that he was aware that the company of which he was a director was incorporated in or about 1994. Some of the delay in bringing proceeding lay in the difficulty which Mr Keenan-Hall's solicitors had in obtaining information or instructions from him. The rest of the delay is explained at paragraphs 20 and 21 of Ms Boston's affidavit. This related to legal aid.

Messrs Shean Dickson Merrick had entered Notice of Intention to defend the County Court proceedings by Notice dated 12 September 1996. On 22 September 1998 they advised John Boston & Co that they had been unable to obtain any instructions from their client since December 1987 and were seeking to come off record. On 11 November 1998 they informed John Boston & Co that they were remaining on record and that the correct defendant was Brian Keenan-Hall t/a Huntley Hair Systems. In reply John Boston & Co stated that they would apply on the morning of the hearing (which was fixed peremptorily for 18 December 1998) to amend the title of the defendant and asked for their written consent to the amendment.

The legal aid authorities limited legal aid to obtaining an expert's report which was obtained from Mr James Small FRCS on 17 November 1998.

Counsel advised an application to remove the proceedings to the High Court. The medical report is exhibited to the affidavit of Ms Lee Smeaton sworn for the purposes of the application for removal. This application was successful. Whilst there appears to have been no evidence on affidavit, the Order for Removal pursuant to Order 78 Rule 2 provided that, upon application of counsel for the plaintiff that the action be removed to the Queen's Bench Division from the County Court, and on counsel for the defendant consenting, it was ordered that the action be removed. The title was now *David Rock v Brian Keenan-Hall t/a Huntley Hair Systems.*

I am informed by Mr John Thompson QC, acting on behalf of the defendant/appellant that, although he was not acting for the defendant at the time, the defendant's counsel did not consent.

An appearance was entered by Shean Dickson Merrick on behalf of Brian Keenan-Hall t/a Huntley Hair Systems on 23 February 1999 and the statement of claim was served. A defence pleading that the claim was statute-barred and reply including a plea that, if statute-barred, the plaintiff would seek the exercise of the court's jurisdiction to extend the time-limits were served.

The plaintiff then sought to regularise the civil bill proceedings as already stated. The grounding affidavit of Ms Reilly is set out with exhibits in the booklet described as 'plaintiff's application to substitute defendant'. The replying affidavit with exhibits is to be found in the same booklet. Paragraph 4 of that affidavit states that Messrs Shean Dickson Merrick were advised by

counsel to withhold consent to the application to amend the title of the proceedings when the application to remove was made. Paragraph 6 states that Huntley Clinic (UK) Limited was incorporated in April 1994 and never having traded was dissolved on 11 July 1997.

It was argued before the Master on behalf of the defendant that the appropriate order under which the application should have been made was Order 15, not Order 20. The Master rejected this argument. Hence this appeal.

Whilst Mr Reilly's affidavit addressed many of the issues in the case I did not consider it full enough and I indicated that I would give leave to file a further affidavit. Mr Thompson QC for the defendant/appellant very properly adopted a neutral position, referring me to the decision in *Bailie v Cruiskshank* [1999] NIJB 47 but accepting that other judges had not followed the practice of McCollum LJ in that case.

McCollum LJ accepted that the judge in his discretion is free to admit fresh evidence and frequently does so in the absence of special reasons. He stated that he did have an absolute discretion as to whether or not to admit fresh evidence and that he was not bound by any requirement to find special reasons or special circumstances before he admitted an affidavit that was not before the Master. He helpfully indicated at p49 matters that the court would find "of considerable importance" – whether the evidence was in the possession of the party seeking to put it in evidence when the application was

before the Master and whether it was clearly in issue between the parties at the hearing before the Master.

I accept that all relevant evidence was in the possession of the plaintiff's solicitor before the Master. But it seems to me that other factors should be taken into account. In remittal proceedings if the fresh evidence indicates clearly that the High Court is the appropriate forum, the plaintiff is not likely to do as well if his case is remitted – either by way of settlement or otherwise. But the County Court can award more than £15,000. If an application for removal fails the jurisdiction is limited. If a party is added under Order 15 when the action is statute-barred against that party, the adding of the party is pointless. The failure to put in additional evidence is usually the fault of legal advisers and that failure can be punished by a costs order. In circumstances such as the present, the plaintiff might sue his legal advisers – a step to be discouraged when costs can penalise them adequately. At the same time McCollum LJ's judgment is a salutary lesson to incompetent solicitors. However, I would be slow to refuse the fresh affidavit even in remittal proceedings and that has been my practice because costs are an effective sanction. Appeals from Master where remittal has been ordered are comparatively infrequent.

Where the facts and the legal position are complicated I would be even slower to penalise the legal advisers. Without the additional affidavit (or additional affidavits) the case is bound to be statute-barred. It may be so in any event but the only choice of saving it is to argue that Order 20 applies.

The merits are with the plaintiff in so far as the defendant misled the plaintiff's solicitors by referring to himself as `managing director'. I realise that they were careless but on balance I consider that justice will be done by admitting the affidavit or affidavits. The defendant through his counsel has not sought to advance the argument that he will be prejudiced by allowing the affidavits.

Accordingly, I propose to address the substantive legal issue between the parties. Order 20 of the Rules of the Supreme Court provides by Rule 5:-

> "(1) Subject to Order 15, Rules 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 pleadings, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
>
> (2) …
>
> (3) An amendment to correct the name of the 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 … intended to be sued."

The application in this case is to amend the title of the Civil Bill, not a Writ. Arguably, I should have been referred to the County Court Rules (Northern Ireland) 1981. Order 9 Rule 1 empowers the judge to add or substitute any person as … defendant. When an application for an amendment is made after any relevant period of limitation has expired since

the issue of the originating papers, the judge may nevertheless allow the amendment if it is such as the High Court would have power to allow in a like case.

Accordingly a County Court Judge has the same power to add a defendant as the Master, or a High Court Judge has (where proceedings are instituted in the High Court) under Order 20: see Valentine on Civil Proceedings – The County Court at 11.48 and Valentine's Civil Proceedings – The High Court at 11.34. It is stated at 11.34(5):

> "A party can be substituted if just to do so and it arises from a genuine mistake in naming the person which was not misleading as to substantive identity …"

This applies where the mistake arises by naming the wrong party, not where it arises from thinking that the wrong person should be the party or where the mistake is a mistake of law.

Three cases are cited by Valentine: *Evans Construction v Charrington* [1983] QB 810; *Bridge Shipping v Grand Shipping* [1992] LRC (Com) 730; 173 CLR 231 and *Murray v Hibernian Dance Club* (The Times, 12 August 1996). Mr Thompson QC for the defendant also drew my attention to *Ramsey v Leonard Curtis (a firm)*.

In so far as it is helpful to refer to the burden of proof, it rests with the plaintiff: see *Hancock Shipping Co v Kawasaki Ltd* [1992] 1 WLR 1025 at 1031. Staughton LJ said (of an amendment to pleadings under the Order):

> "In my judgment it is not helpful to speak of the burden of proof, but rather of the burden of persuasion. If the court concludes that it cannot

> decide whether or not it is just to allow the amendment, the party applying for leave must fail. … But the party making the application cannot be expected to adduce evidence on all points which might conceivably affect the justice of the case …"

In *Evans Construction Co Ltd v Charrington & Co Ltd & Another* [1983] QB 810 the plaintiff company became a tenant of land under the terms of a 7 year lease between them and the first defendant. During the currency of the lease the first defendant assigned the reversion to Bass Holdings Ltd, a member of the same group of companies and the first defendant acted as managing agent for Bass. Towards the end of the term of the lease the plaintiff entered into a 3 year lease with Bass that was stated to be supplemented to the original lease. After the expiry of the supplemental lease the first defendant wrote to the plaintiff enclosing a notice terminating the lease. The notice stated that the first defendant was acting as agent for Bass. On receipt of the notice the plaintiff wrote to the first defendant stating that it would apply to the court for a new tenancy. The plaintiff's solicitor did so but erroneously named the first defendant as landlord. Leave was granted to join Bass as an additional defendant under Order 20 Rule 5.

On appeal, Waller LJ dissenting, it was held that the issue was whether to substitute Bass for the first defendant, that Order 20 Rule 5 could not be applied to correct a mistake as to the actual identity of a party sought to be sued but it could be applied to correct a mistake made in describing or naming a party providing the identity of the party was known to the person making the mistake and the mistake was not misleading: that the nature of a

mistake depended on the intention of the party making it and as it had been clearly established that the plaintiff had intended to serve the notice on its landlord but had made a genuine mistake in naming it, Order 20 Rule 5 could apply to amend the name.

Waller LJ took the view that there was not a mistake as to the name but as to identity. The absence of provisions for re-service was because mistake in the ordinary case was not misleading, for example "R S Parker" for "R J Parker" or "Harris Engineering Ltd" for "Harris Engineering (Leeds) Ltd".

Donaldson LJ said at 821F:

> "In applying Order 20 Rule 5(3) it is, in my judgment, important to bear in mind that there is a real distinction between suing A in the mistaken belief that A is the party who is responsible for the matters complained of and seeking to sue B but mistakenly describing or naming him as A and thereby ending up suing A instead of B. The rule is designed to correct the latter and not the former category of mistake. Which category is involved in any particular case depends upon the intentions of the person making the mistake and they have to be determined on the evidence in the light of all the surrounding circumstances …"

Griffiths LJ said at 825D:

> "Is the rule to be limited to mere mis-spelling or some other slip such as leaving out one word in the long title of a company so that looking at the name on the proceedings the nature of the mistake can readily be seen: or is it to be more liberally construed so that it will cover the case when entirely the wrong name has been used? I see no reason why it should not include a case where entirely the wrong name has been used, provided it was not misleading, or such as to cause any reasonable doubt as to the identity of the person

> intended to be sued. The identity of the person intended to be sued is of course vital …"

In *Murray v Hibernian Dance Club* the plaintiff sued the club, an unincorporated entity. The issue raised on the appeal was the question of who was the intended defendant. It was held that the mistake made, namely to sue the members and/or proprietors of the club under a collective title apt to describe them but devoid of personality at English law, as opposed to suing individually named defendants, was not such as to cause any reasonable doubt that the claim was being asserted against the membership as a whole.

In *Bridge Shipping Party Ltd v Grand Shipping SA & Another* the Rules of the Supreme Court of Victoria provided for substitution of one party for another in circumstances similar to Order 20. It was held that in issuing a third party notice against the owner of a vessel the plaintiff had not made a mistake "in the name of a party" because it had intended to sue the owner, believing that its right of action lay against the owner, not the charterer of the vessel.

Reference was made in that case to *Whittam v W J Daniel & Co Ltd* [1962] 1 QB 271 where the Court of Appeal upheld amendment of the name of the defendant from "W J Daniels & Co (a firm)" to "W J Daniels & Co Ltd". It was held that the relevant rule covered not only cases of misnomer, clerical error and misdescription but also those where the plaintiff intending to sue a person identified by a particular description was mistaken as to the name of the person who answered that description.

In *Ramsey & Another v Leonard Curtis (a firm)* (Unreported: 28 July 1999) two partners of the firm of Leonard Curtis were appointed joint administrative receivers of a company of which the plaintiffs were directors, employees and shareholders. They issued a writ against the firm of which there were nine partners. The writ was misconceived because an administrative receiver must be an individual, not a firm or body of persons corporate or unincorporated. Henry LJ stated at p7 of the transcript:

> "The authorities accept that the word `mistake' should not be limited to mistakes without fault (see Russell LJ in *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703. But the authorities do not accept the widest definition of mistake …"

He cited with approval passages from various judgments. The proposition of law was stated to be:

> "Where there is no mistake either as to the name of the plaintiff [defendant] or as to the identity of the party intending to sue [be sued] but only an error as to the rights of the correctly identified party, the rule does not apply."

In *International Bulk Shipping and Services v Minerals and Metals Trading Corporation of India* [1996] 1 All ER 1017 at 10276 Evans LJ said:

> "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 …"

See also the *Al Tawab* [1991] 1 Lloyd's Rep 201.

In my view the rule covers the mistake made. The intention was to sue the firm of Huntley Hair Systems. By a genuine mistake which may well have been induced by Brian Keenan-Hall, it was believed that the firm was incorporated. He signed at least one letter as managing director. A search of the Companies Register revealed that there was a company called Huntley Clinic (UK) Ltd of which he was a director. It was assumed that this was the correct defendant. The solicitor who made the search failed to notice that the company was incorporated in 1994. When the Civil Bill was issued Messrs Shean, Dickson Merrick entered Notice of Intention to Defend. As soon as they became aware that the defendant was wrongly named, they informed the solicitors for the plaintiff. The county court judge in ordering a removal to the High Court corrected the error in the title and an appearance was entered on behalf of Brian Keenan-Hall t/as Huntley Hair Systems. He was not misled. He knew that the company was not incorporated until 1994. I infer that he told his solicitors the correct title of the defendant as at the time when the claim arose. He must have instructed them to enter an appearance in the High Court.

No argument was advanced on his behalf that he was prejudiced by the amendment. Accordingly I consider that if the proceedings had been commenced in the High Court I should exercise my discretion in favour of the plaintiff. I express no view as to whether the Limitation Order applies in favour of the defendant. I do not have the materials so to do. But I am

satisfied that I should make the order so as to validate the proceedings against Keenan-Hall from the date of issue of the Civil Bill.

I take the view, as did the parties implicitly, that I have jurisdiction to amend the Civil Bill. Once the proceedings have been removed to the High Court the County Court Judge ceases to have any jurisdiction and I do not have to remit the matter to him so that he may order the amendment of the Civil Bill. Order 22 Rule 11 of the County Court Rules deals with Removal. This is the view of Valentine at 3.54:

> "Once proceedings are removed to the High Court the jurisdiction of the County Court is gone and any order made by it as to costs is not binding."

He cites *Hares v Lea* (1870) LR 10 Eq 683.

As I indicated I am not satisfied that Caroline Boston has set out the sources of her information properly. It is not enough that she has perused documents or has a general understanding of events. If necessary she must make personal contact with the plaintiff and the solicitors in her firm so as to give her source for every statement not made from her own personal knowledge. I give her leave so to do.

Finally, I must deal with the question of service of the Civil Bill, as raised by Mr Thompson QC. He contends that it must be served on Mr Keenan-Hall. The latter instructed his solicitors to enter an appearance in the High Court when the proceedings were removed thereto. I expect them to obtain authority from him to enable these long drawn out proceedings to be put in order. If they put in an affidavit that they have express instructions

from him not to accept service of the Civil Bill on his behalf or state that they cannot contact him, I will then consider what steps (if any) I ought to take. My present view is that I have power to deem service good on him as he must have known that a mistake had been made as to the name of the defendant. The costs of the hearing before the Master and this Court are reserved to the trial judge.

I commend counsel for the plaintiff and the defendant for their assistance to me.

I now complete the judgment as I have received the additional affidavit of Caroline Boston and a letter from Messrs Shean Dickson Merrick confirming that they are authorised to accept service of the Civil Bill on behalf of Mr Keenan-Hall. I consider that I do have power to deem service good as did the Master. If I am wrong in that, I am grateful to Mr Keenan-Hall's legal advisers for obtaining authority to accept service and the plaintiff's legal advisers should out of caution take up their invitation without prejudice to my ruling.

I give leave to the defendant to appeal against this decision and time will run when the order is perfected and the defendant's solicitors have been duly notified.

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