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Judgment: approved by the Court for handing down | *Delivered:* **18/01/2011**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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BETWEEN:

THE OUTLET RECORDING COMPANY

Plaintiff;

-and-

1. **BRIAN THOMPSON and others**
   Practising as ELLIOTT, DUFFY, GARRETT,
   Solicitors

2. **HENRY TONER QC**

3. **RACHEL HUTTON**

Defendants.

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WEATHERUP J

[1] This is an appeal against the Order of the Master dated 11 March 2010 setting aside an earlier Order of the Master joining the second and third defendants in this action. Mr Hanna QC and Mr Coyle appeared for the plaintiff, Mr Horner QC and Mr Millar for the first defendants, Mr Simpson QC and Mr Good for the second defendant and Mr Lockhart QC and Mr McMahon for the third defendant.

[2] The Writ of Summons was issued against the first defendants on 6 February 2007 claiming damages for loss and damage alleged to have been sustained by reason of the negligence and breach of contract of the first

defendants in relation to legal services provided for the plaintiff in proceedings in the Chancery Division against the plaintiff by Margo O'Donnell ("the Margo action"), which action was settled on 2 December 2002. The first defendants had instructed Counsel in the proceedings, namely Henry Toner QC and Rachel Hutton ("Counsel"), but they were not joined as defendants when the present proceedings commenced in 2007.

[3] On 24 November 2008 the plaintiff issued a summons to join both Counsel as defendants in the action under Order 15. In the summons Counsel were described as third parties but that was a mistake as they were not third parties. The plaintiff obtained the consent of the first defendants to the relief sought and the plaintiff served the summons on the first defendants but did not serve the summons on Counsel. On 27 November 2008 the Master made an Order pursuant to Order 15 Rule 6 adding Counsel as defendants in the action. The Order referred to Counsel as third parties but that was a repetition of the mistake in the plaintiff's summons. The Order also gave directions in relation to the amendment of the pleadings. Thus Mr Toner became the second defendant and Ms Hutton became the third defendant.

[4] On 28 May 2009 the second defendant and the third defendant applied to set aside the Order of the Master joining them as defendants. The grounding affidavit made reference to other proceedings commenced by the plaintiff against the first defendants (Record No 2007/14748) which related to legal services provided to the plaintiff in respect of earlier proceedings against the plaintiff in the Chancery Division by John Sheahan and Others trading as the Dubliners ("the Dubliners action"). On 17 November 2008 an application by the plaintiff had been heard by the Master to join Mr Toner and Ms Hutton as second and third defendants in the proceedings relating to the Dubliners action. Mr Toner and Ms Hutton had been on notice of the application in the proceedings relating to the Dubliners action and had contested their being joined as defendants. They relied on the operation of the relater back principle that provided that the joinder of a defendant related back to the date of issue of the Writ of Summons, thus, it was claimed, depriving Counsel as the proposed additional defendants of a limitation defence that might otherwise be available. The Master accepted that argument and refused to join Counsel as defendants in the proceedings relating to the Dubliners action.

[5] The grounding affidavit on the application to set aside the Order made by the Master in the present action states that it is surprising that those representing the plaintiff, being fully aware of the matters raised before the Master in the application in the proceedings relating to the Dubliners action on 17 November 2008, chose to proceed by way of an ex parte application, in that notice of the application was not given to Counsel prior to moving the application on 27 November 2008. The affidavit states that it would have been evident that Counsel would have adopted the same arguments to resist

the application in the present action as they had adopted some days earlier in resisting the application in proceedings relating to the Dubliners action.

[6] The affidavit goes on to state that the events that are the subject of the plaintiff's complaint in the present proceedings occurred more than 6 years before the Order of 27 November 2007 and in the circumstances any claim against Counsel would have the benefit of a limitation defence. However if the Order of 27 November 2007 is not set aside then the relater back principle has the effect that Counsel would be deprived of the benefit of the limitation defence.

[7] On 11 March 2010 the Master made an Order setting aside the Order he had made on 27 November 2008. The plaintiff appealed against the Order of the Master of 11 March 2010 and it is that appeal which is before the Court.

[8] In the Dubliners action the first defendants had acted as solicitors and had instructed Mr Toner and Ms Hutton as Counsel. The Dubliners action was settled on 14 November 2002. The plaintiff commenced proceedings against the first defendants in relation to the Dubliners action but did not include Counsel as defendants. The first defendants issued third party proceedings against Counsel. The plaintiff's application to join Counsel as defendants was rejected by the Master on 17 November 2008 after Counsel had been put on notice of the application and had contested joinder on the limitation point. However in relation to the issues arising in the Dubliners action the plaintiff had issued a protective Writ against Counsel so that in respect of the Dubliners action there are separate proceedings against the solicitors and against Counsel. There was no protective Writ issued against Counsel in relation to the issues arising from the settlement of the Margo action.

[9] First of all I look at the limitation point. The second and third defendants' position is that the complaints against them as Counsel predate the settlement of the action on 2 December 2002 and that the Order joining Counsel as defendants relates back to the Writ of Summons issued on 6 February 2007, thereby depriving the defendants of the six year limitation period they would otherwise be entitled to plead by way of defence to proceedings issued against them. On the other hand the plaintiff says that the cause of action against Counsel accrued when the loss was occasioned on the settlement of the action on 2 December 2002 so that the six year limitation period expired on 1 December 2008. Accordingly, the plaintiff contends, the Order joining Counsel as defendants, having been made on 27 November 2008, was made within six years of the cause of action accruing. Thus the relater back principle does not alter the position as Counsel were joined within the six year period commencing on the settlement of the Margo action on 2 December 2002.

[10] I accept the plaintiff's approach to the issue of the limitation period. The six year time limit had not expired at the date of the Order joining Counsel as defendants. The same argument of the plaintiff would have been to no avail in the proceedings relating to the Dubliners action as that action had settled on 14 November 2002 and when the plaintiff got the application to join Counsel before the Master on 17 November 2008 the six year limitation period had already expired.

[11] However the defendants contend for two irregularities in the making of the Order of 27 November 2008. The first matter is the absence of notice to Counsel. The plaintiff contends that Order 32 Rule 5 only requires that a summons be served "on every party" and that Counsel were not parties to the action. The defendants say that notice should have been given to them of the application to join them as parties in the action.

[12] Order 15 Rule 6 provides for the adding of a defendant who ought to have been joined or whose presence before the court is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon or between whom and a party there may exist a question or issue arising out of or related to or connected with a relief or remedy claimed which it would be just and convenient to determine. The old form of Order 15 Rule 6 did not provide that a defendant could not be joined after the expiry of a relevant limitation period, although there was a rule of practice to that effect. The present form of Order 15 Rule 6 includes paragraphs (5) and (6) to provide that no person should be added or substituted as a party after the expiry of any relevant period of limitation, subject to certain exceptions.

[13] In Liff and Peasley [1980] 1 All ER 623 the plaintiff made an ex parte application to join an additional defendant under the old form of Order 15 Rule 6. The added defendant applied to strike out the joinder because the application had been made outside the limitation period and therefore the defendant was said to have been improperly joined. The Court of Appeal ordered that the defendant should cease to be a party as he had been improperly joined as the claim was time barred. On the procedure for adding a defendant Brandon LJ stated -

> "It is an established rule of practice that the court will not allow a person to be added as a defendant to an existing action if the claim sought to be made against him is already statute-barred and he desires to rely on that circumstance as a defence to the claim. Alternatively, if the court has allowed such addition to be made ex parte in the first place, it will not, on objection then being taken by the person added, allow the addition to stand." (page 639a)

> "An application by a plaintiff for leave to add a person as defendant in an existing action is, or should ordinarily, be made ex parte under Order 15 Rule 6(2)(b). If the application is allowed, the writ must then be amended under Rule 8(1) and served on the person added under Rule 8(2) of the same Order. If the person added as defendant, having had the amended writ served on him, objects to being added on the ground that the claim against him was already statute barred before the writ was amended, the ordinary practice is for him to enter a conditional appearance under Order 12 Rule 7 and then to apply to set aside the amended writ and the service of it on him under Order 12 Rule 8. Then, if he establishes that the claim against him was statute barred before the writ was amended, he is entitled as of right, in accordance with the rule of practice, to the relief for which he has asked, unless the case is of a special kind under Order 20 Rule 5(3)." (page 639e)

[14] As authority for the proposition that the Order had been properly made ex parte, Stephenson LJ at page 630g referred to The Puerto Acevedo [1978] 1 Lloyds Rep 38 and Ashley v Taylor [1878] 10 Ch D 768. Each is an incidence of an application to add a defendant who was not already a party to the action. In Ashley v Taylor at page 773 Fry J stated -

> "I am of the opinion, therefore, on the principal point, that the order was quite regular. But I think that the order ought clearly to have been made ex parte as far as the administrator was concerned. He was an entire stranger to the action and it was irregular to serve him with the summons and to enter an affidavit of service on him in the order."

[15] In The Puerto Acevedo at page 41 Lord Denning stated -

> "It would be most unjust that, after the year had expired, [for the purposes of the Hague Convention rules on limitation] the P&I Club (who covered both shipowners and demise charterers) should escape. It is plain to me that leave should be given to add the demise charterers as defendants. If they have any objection to being joined, they can raise the matter at a later stage after the pleadings have been served on them. I am quite clear at this stage that we should grant the application to join them."

Bridge LJ agreed –

> "…. I think it is beyond argument that we have jurisdiction to make an order. It may be a jurisdiction which will be rarely exercised, but the position confronting us, unlike the position before Donaldson J is that this is now being heard as an unopposed ex parte application. Of course the second defendants, as they now become, will have an opportunity, if so minded, to apply to have the order set aside. But it seems to me on the material before us that the plaintiffs make out a clear prima facie case for the exercise of the Court's discretion in their favour. As the matter is ex parte and may later have to be considered inter party I make no further comment than that."

[16] Thus, under the old form of Order 15 Rule 6, a rule of practice existed that a defendant should not be added out of time. However that did not prevent a defendant being added on an ex parte application. The Order adding the defendant would be set aside if the defendant had been added after a relevant limitation period had expired. The present form of Order 15 Rule 6 provides in paragraphs (5) and (6) that a defendant should not be added after a relevant period of limitation has expired. Does that invalidate an Order made ex parte to add a defendant or does the Order stand pending the defendant's application to set aside the ex parte Order on the basis that the defendant has the benefit of a limitation defence? In Marshall v Gradon Construction Services Ltd [1997] 4 All ER 880, under the English equivalent of the present form of Order 15 Rule 6, an ex parte application was made for a defendant to be added. The Order was made and the added defendant applied to set aside the Order on the limitation ground. At page 885j Mummery LJ referred to Liff v Peasley at page 639a quoted above where Brandon LJ had stated that where the claim was statute barred the Order should not be made or alternatively should not be allowed to stand. Marshall v Grandon fell under the alternative position where the Order should be set aside. Similarly in the present the Court allowed the addition to be made ex parte in the first place and on objection being taken, if the objection is well taken, this Court will not allow the addition to stand. The issue is whether the objection is well taken.

[17] In contrast to the above authorities Mr McMahon for the third defendant relied on Hall v Colvick [1888] WR 259 where it was stated that notice should be given on an application to join a defendant. However it is not clear from the report whether this was a reference to notice being given to the existing defendant. The report was not stating in terms that notice be given to the proposed defendant. If however it was intended to mean that notice must be

given to the proposed defendant any such approach has been overtaken by the cases referred to above setting out the process in relation to ex parte applications, an approach endorsed by the Court of Appeal of England and Wales.

[18] As to the first objection on the ground of irregularity, namely that the application was made without notice to Counsel as proposed defendants, I am satisfied that this was not an irregularity for the reasons appearing above.

[19] The second irregularity that the second and third defendants contend for is the failure to disclose the steps that were taken by the plaintiff to notify Counsel in the proceedings relating to the Dubliners action and that had the plaintiff done so Counsel would have objected to being joined as defendants on the limitation ground. Mr McMahon for the third defendant stated that this lack of full and fair disclosure was the basis on which the Master set aside the earlier Order. I assume that the Master proceeded on the basis that the limitation defence that succeeded in the proceedings relating to the Dubliners action would also have succeeded in these proceedings relating to the Margo action. However I have concluded above that Counsel cannot rely on a limitation defence to defeat their being joined as defendants in this action and I have also concluded that there was no irregularity in the making of the Order without notice to Counsel. While I consider that it would have been appropriate for the plaintiff to disclose the position in relation to the other proceedings I find that the omission does not bear on the outcome in these proceedings as the defendants cannot avail of a limitation defence.

[20] I am satisfied that the Order of 27 November 2008 should not be set aside. The Order should be amended to delete the reference to third parties. The plaintiff's appeal against the Order of 11 March 2010 setting aside the Order of 27 November joining the second and third defendants is allowed.