Neutral Citation No. [2010] NIQB 140 | *Ref:* **GIL8046**

Judgment: approved by the Court for handing down | *Delivered:* **17/12/10**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

DARREN BENSON

Plaintiff/Appellant

and

MORROW RETAIL LIMITED T/A MORROWS SUPERVALU

Defendant/Respondent

GILLEN J

[1] This is an appeal by the plaintiff from an Order made by Deputy Master Gilpin refusing to extend time for service of a Notice of Appeal ("the Notice") issued on 1 April 2010 against a decision by Deputy Judge Edgar on 19 March 2010 when he dismissed the plaintiff's Civil Bill. I am indebted to Deputy Master Gilpin for a commendably succinct and well reasoned judgment in this matter

[2] The respondent had issued a summons on 21 May 2010 for an order pursuant to Order 53 Rule 3 and Rule 11 of the Rules of the Court of Judicature (NI) 1980 ("the Rules") striking out the plaintiff's Notice. The appellant had issued a summons on 4 June 2010 pursuant to Order 55 Rule 3 and Order 3 Rule 5 to extend time for service of the Notice. The Deputy Master dismissed the plaintiff's application with costs and dismissed the respondent's summons with no order for costs.

Background

[3] The matter arose out of an accident which occurred on 7 September 2006 when the plaintiff alleged that he tripped on a shopping basket at the defendant's premises at Flush Place, Lurgan. The plaintiff alleged that the defendant was guilty of negligence and breach of statutory duty in and about the management, maintenance, supervision, care and control of the premises. The plaintiff had commenced proceedings against the defendant by way of Civil Bill issued on 3 March 2009.

[4] On 1 April 2010 the appellant's solicitor lodged the Notice pursuant to Order 55 of the Rules. Under the provisions of Order 55 Part 1 Rule 3 "the appellant must, within the period of 21 days mentioned in Rule 2(1), serve a copy of the Notice of Appeal on all parties to the proceedings in the court below who are directly affected by the appeal". Accordingly it was necessary to serve the Notice on the defendant on or before 8 April 2010. In the event the Notice was not served until 26 April 2010 i.e. 18 days outside the prescribed period.

[5] By Order 3 rule 5, the court may extend the period within which an appellant is required to serve a Notice of Appeal.

The Appellant's Case

[6] The appellant relied upon two affidavits filed in this matter by Patrick Vernon a solicitor in the firm of C R Ingram & Co, the solicitors on record for the plaintiff in this action.

[7] In the first affidavit which was before the Deputy Master dated 4 June 2010, Mr Vernon explained the reason for delay in the following terms at paragraph 5 :

> "The plaintiff instructed me that he wished to appeal the matter and two copies of the Notice of Appeal in Form 37 in Appendix A were lodged in the Central Office on 1 April 2010. This was within the 21 day period for lodging the Appeal. However, to enable the appeal to be lodged as quickly as possible we sent the Notice of Appeal by email to the Front of House office and arranged for a counsel known to us to be in Belfast to lodge the fee on the same date. Unfortunately despite a number of reminders counsel did not return the Notice of Appeal to us until after the 21 day period had elapsed. I lodged the Notice of Appeal with the defendant's solicitors immediately upon receipt of same. I accept and acknowledge that despite the Notice of Appeal being lodged in time with the court office; it was not served on the defendant's solicitors within 21 days as is required under the Supreme Court Rules."

[8] Before me Mr Vernon sought to introduce a further affidavit dated 13 October 2010 which had not been before the Deputy Master. In the course of this affidavit he asserted that a CCTV DVD existed which showed the incident in question and might have contradicted the defendant's case that

the basket over which the plaintiff tripped had been placed on the floor by another customer a matter of seconds before the plaintiff tripped. One of the witnesses relied on by the defendant was a till assistant who gave evidence to this effect. It was the plaintiff's case that the assistant who gave this evidence was not the assistant who was working at the checkout on the day of the accident.

[9] Mr Vernon averred that he had sought a copy of the CCTV footage from the defendant's solicitor but had been informed that the defendant's solicitors had given the footage to their insurer and that its whereabouts were now unknown. It was Mr Vernon's contention that before Deputy Judge Edgar, the store manager for the defendant informed the court that the footage did exist, that she had viewed it, and that she had given a copy of the footage to her son. It was his contention therefore that there were grounds to suggest that the DVD had been wrongly withheld from the plaintiff's advisers and that Deputy Judge Edgar had heard the case without the benefit of full and proper discovery.

[10] I observe at this stage that despite the opposition of counsel on behalf of the respondent, I decided to admit this affidavit notwithstanding the last minute nature of its arrival.

[11] In concluding that I should admit this affidavit, I was guided by the principles set out in Volume 1 of the Supreme Court Practice 1999 paragraph 14/4/45 which reads as follows:

> "The evidence on an appeal to the Judge in chambers should ordinarily be the same as it was before the Master or District Judge; but since such an appeal is dealt with by way of actual rehearing of the application which led to the order under appeal and the Judge treats the matter afresh as though it came before him for the first time, save that the party appealing has the right as well as the obligation to open the appeal, it would seem that the Judge in his discretion is free to admit fresh evidence and he frequently does so in the absence of special reasons (see Evans v Bartlim [1937] AC at p480)."

[12] My attention was drawn to an unreported judgment of McCollum J in Bailie v Cruickshanks. In that judgment this very experienced Queen's Bench Judge, refusing to exercise his discretion to admit a further affidavit on an appeal in a remittal application, said at follows at page 2:

> "In my view the onus is upon the persons seeking to advance such evidence

(i) To establish that the interests of justice will be better served by the admission of the additional evidence rather than by refusal to do; and

(ii) That he can advance a sound reason to the court for the failure to exhibit such evidence before the Master."

[13] I do not believe that prescriptive rules can be laid down in a field such as this where a wide discretion is vested the Judge. The overriding principle is that the Judge should exercise his discretion in accordance with recognised principles and with an overall desire to achieve justice. However in circumstances such as this a Judge is entitled to take into account such factors as:

- The reason why the affidavit was not produced before the Master.
- The reason why it has now been adduced.
- Whether it relates to a matter in issue between the parties at the hearing before the Master.
- Has the defendant had an opportunity to deal with the contents of same.

[14] It seemed to me that notwithstanding the absence of any good reason why this affidavit had not been put before the Deputy Master, the matter of discovery had been raised in argument before him (see paragraph 10 (iii) of his judgment). To that extent it was not a fresh issue. Moreover the contents of this affidavit constituted an effort on the part of the plaintiff to ground her contention that there was a point of substance to be made on this appeal. I therefore admitted the affidavit.

Principles Governing this Application

[15] I commence by invoking the widely cited and applied formulation of the principles governing such cases outlined by Lord Lowry in Davis v Northern Ireland Carriers [1979] NI 19 ("Davis") at page 20:

> "Where a time limit is imposed by statute it cannot be extended unless that or another statute contains a dispensing power. Where the time is imposed by rules of court which embody a dispensing power, such as that found in Order 64 Rule 7 the court must exercise its discretion in each case, and for that purpose the relevant principles are:

(i) Whether the time is sped: a Court will, where the reason is a good one, look more favourably on an application made before the time is up;

(ii) When the time limit has expired, the extent to which the party applying is in default;

(iii) The effect on the opposite party of granting the application and, in particular, whether it can be compensated by costs;

(iv) Whether a hearing on the merits has taken place or would be denied by refusing an extension;

(v) Whether there is a point of substance (which in effect means a legal point of substance when dealing with cases stated) to be made which could not otherwise be put forward; and

(vi) Whether the point is of general, and not merely particular, significance.

To these I add the important principle:

(vii) That the rules of court are there to be observed."

[16] I pause to observe that Lowry LCJ in the Davis case added the following in the penultimate paragraph of his judgment:

> "We decided, however, that in order to do justice it would be better to find out the strength of the appellant's case, in so far as it was founded on points of law and therefore remained capable of being pursued by way of case stated. We therefore discussed the legal merits of the case in some detail". See also Magill v Ulster Independent Clinic and Others [2010] NICA 33 per Girvan LJ at paragraph 14.

[17] I am also conscious of the words of Lord Guest in Ratnam v Cumarasamy [1965] 1 WLR 8, 12 where he said:

> "The rules of court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules, which is to provide a timetable for the conduct of litigation …"

[18] I find a particular resonance in the words of Lord Guest in light of the overriding objective to deal with cases justly contained in Order 1 Rule 1A of the Rules which commends litigation to be carried out saving expense, expeditiously and fairly. It does lend weight to the requirement to provide a full, honest and plausible explanation as to why the timetable for the conduct of litigation has not been adhered to.

[19] I respectfully add one footnote to the principles set out in Davis. I do not consider that they should be approached artificially as a series of hurdles to be negotiated in succession by an appellant with loss of the right to obtain an extension if he cannot pass any one or more of them. To do so would be to focus too closely on appearance rather than substance. Courts must not fall into the trap of missing the wood for the trees. The central underlying question is always whether in the particular circumstances and in accordance with an overall desire to achieve justice, the discretion ought to be exercised in favour of the appellant. See also Graham, Corry and Cheevers v Quinn and Others (1997) NI 338 at 355A.

Conclusion

[20] Applying the principles in this case, I have come to the conclusion that I should affirm the decision of the Deputy Master for the following reasons.

[21] First, the delay in this instance is wholly inexcusable. For a solicitor to rely entirely on counsel to carry out tasks such as fee payment or return of documents from the Court Office constitutes an unacceptable professional practice. A solicitor cannot delegate his duty in this fashion and then attempt to escape censure by placing the blame on counsel. No good reason has therefore been offered for the failure to comply with the rules. No attempt was made to seek an extension of the time before the expiration of the period set out in the rules. The blame for this rests wholly on the plaintiff's solicitor and no blame attaches to the respondent.

[22] It is important to appreciate that the plaintiff in this case has had a full hearing on the merits. I am not satisfied that the issue of discovery raised by

Mr Vernon in his supplemental affidavit amounts to any point of substance. It is clear that the Deputy County Court Judge was aware of this matter. I can find no basis for challenging his refusal to be deflected by this matter of discovery from a dismissal of the case. There is no evidence that this footage would necessarily be of any material assistance and I find nothing in the assertions by Mr Vernon that would contradict the contention by the defendant insurers that the dvd had eventually made its way into their possession and had now been lost. There was a full opportunity to explore all attendant issues before Deputy Judge Edgar. During this hearing the legal merits of the appeal were canvassed and I find no reason to conclude that the outcome of this case would materially change if an appeal were granted.

[23] There was no legal point of substance in this case and in my view it was determined fully on the facts which had a complete airing before the Deputy County Court Judge. There is no point of general significance in this case on the facts as outlined before me.

[24] I have reminded myself, as did the Deputy Master that a court should not determine an appeal to extend time by a numerical account of the principles set out in Davis. Nonetheless other than the fact that the respondent would not have been prejudiced had an extension of time for appeal been granted, it is not without significance that there is no single factor deriving from the principles in Davis in favour of the appellant's case in this instance.

[25] In all the circumstances therefore I affirm the decision of the Deputy Master and award the costs of this application to the respondent.