

**Neutral Citation No: [2013] NIQB 83**

*Ref:* **GIL8920**

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

*Delivered:* **28/06/2013**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

**BETWEEN:**

**KEVIN BURKE  
and  
PHYLLIS BURKE**

**Plaintiffs/Appellants;**

**-and-**

**O'KANE AND DEVINE CONSTRUCTION LIMITED**

**Defendant/Respondent.**

**GILLEN J**

**Introduction**

[1] This is an appeal by the plaintiffs from the interlocutory order made by the Recorder of Londonderry on 17 April 2003 whereby it was adjudged that the time should be extended/enlarged pursuant to Order 43 Rule 10 of the County Court Rules (Northern Ireland) 1981 ("the 1981 Rules") so as to permit the defendant/respondent to make a late payment into court ("the lodgement") pursuant to Order 21 Rule 2(2) of the 1981 Rules.

**Background**

[2] It is common case that the proceedings in this matter arise out of a claim by the plaintiffs against the defendant for loss and damage sustained as a result of the alleged negligence, breach of contract and breach of statutory duty of the defendant in and about the construction and sale by it of a dwelling house on and after May 2006.

[3] There was before me an agreed chronology which can be set out as follows:

- Building agreement dated 18 May 2006 between the parties.
- Thereafter complaints were made by the plaintiffs to the defendant regarding alleged problems with the property.
- There was correspondence between the plaintiffs and the NHBC concerning the complaints.
- A letter of claim dated 15 February 2011 was sent from the plaintiffs' solicitors to the defendant.
- A civil bill was issued on 16 November 2011.
- A notice of intention to defend was served on 7 December 2011.
- The defendant served a notice for further and better particulars on 28 August 2012.
- The plaintiffs' replied to the notice for particulars on 15 November 2012.
- On 26 November 2012 the Recorder of Londonderry gave court directions in this matter.
- Following the directions, there was a meeting of the respective parties, their legal advisors and the joint experts on 29 January 2013.
- Following the meeting of the joint experts a Scott Schedule was agreed on 11 March 2013.
- The case was listed for hearing on 20 March 2013 but was not reached.
- Thereafter on 5 April 2013 the defendant lodged an application before the court to extend time to make their lodgement.

### Relevant Rules and Orders

[4] Order 21 Rule 2 of the County Court Rules (NI) 1981 ("the 1981 Rules") provides that a lodgement can be made up to 28 days after a notice of intention to defend is served. In this case that would have been on or before 4 January 2012.

[5] Order 21 Rule 2 also permits a lodgement to be made within 14 days of the service of replies to particulars, if the leave of the court is sought. In this case no such leave was sought by the defendant.

[6] Order 21 Rule 3A provides as follows:

"Without prejudice to Order 43, Rule 10, the judge may, on the application of any party, make an order permitting the defendant to make a payment into court or increase a payment made into court under Rule 2 or permitting a plaintiff to accept a payment or increase payment made into court notwithstanding the fact that the period for making a payment into court under Rule 2(2) or accepting a payment into court under Rule 3(1) has expired."

[7] Order 43 Rule 10 of the 1981 Rules provides as follows:

“The judge may, upon such terms, if any, as he may think reasonable, enlarge or abridge any of the times fixed by these rules for taking any step or filing or sending any document, or giving any notice in any proceedings; and where any person has failed to take any step, or to file or serve any document, or to give any notice within the time or in the manner prescribed by these Rules, the Judge may, upon the application of such person, and if he thinks sufficient excuse exists for such failure, and upon such terms as, to costs or otherwise as he thinks fit, declare the taking of such step, or the filing or serving of such document, or the giving of such notice so done or effected, to be sufficient.”

[8] I pause to observe that the application in this case was made pursuant to Order 43 Rule 10 to extend time for making a lodgement.

[9] Mr Foster, who appeared on behalf of the respondent, recognised the application should have been made under Order 21 Rule 3A which purports to be without prejudice to Order 43 Rule 10. No point was taken on this matter by Mr McKenna who appeared on behalf of the plaintiffs/appellants and so I did not pursue the matter further. Suffice to say that applications such as these should be brought under the appropriate Rule.

#### The appellants' case

[10] In the course of a well-structured skeleton argument augmented by concise oral submissions, Mr McKenna made the following points:

- There has been a clear failure to comply with the Rules in this instance. The lodgement application has been made 15 months after the time limit set down in the Rules to make a lodgement.
- In any event it was made on 5 April 2013 some two weeks after the case had been first listed for hearing.
- The defendant served a notice of further and better particulars on 28 August 2012 and the plaintiffs' reply to this on 15 November 2012. The defendant had ample information to assess the potential of all aspects of the plaintiffs' case.
- An extension of this time in this instance would defeat the purpose of the Rules which is to provide a timetable for the conduct of litigation.

## The respondent's case

[11] In an equally well-structured skeleton argument augmented with fulsome oral submissions, Mr Foster made the following points:

- In the absence of expert reports being exchanged, a meeting of experts or a Scott Schedule being drawn up, none of the issues in this case had crystallised until shortly before the application to extend time under Order 43 Rule 10. The Scott Schedule was only received a few days before the matter was listed for hearing. This revealed a significant level of agreement between the experts with six defined areas of dispute.
- The replies to particulars did not permit an informed opinion to be taken as to the appropriate value of this case or to allow for any proper approach to resolution.
- Order 43 Rule 10 is couched in wide and general terms giving a broad discretion to the trial judge.
- Order 1 Rule 1(A) of the Rules of the Court of Judicature (Northern Ireland) 1980 invokes the need to embrace the overriding principle to deal with matters justly, expeditiously and proportionately. In this instance, the defendant simply wishes to limit the scope of the potential additional cost to be incurred in respect of legal costs and witnesses in the context of a County Court case where the costs automatically follow the event. If an extension of time is granted, the plaintiffs may be forced to consider whether the amount on offer represents a reasonable offer or one which they can readily dismiss. This is a situation unlike in the High Court where under Order 62 Rule 3(2) the High Court is vested with discretion as to costs.
- There is no injustice to the plaintiffs in allowing an extension of time.
- By way of a letter of 5 April 2013 the defendant's solicitor had set out in open correspondence a letter offering a sum by way of settlement on the basis that the agreed Scotch Schedule had only recently been signed on 15 March 2013, that the defendant could not avail of this facility any earlier since the experts had not met and settled the extent of the repairs by the time the ordinary time limits had expired and that the sum offered made provision for general damages in respect of the plaintiffs' allegation of distress and inconvenience.

## Conclusion

[12] This court considered the concept of extension of time for making a lodgement in a personal injury claim in the High Court in McCleave v Cloughfern Arms [2008] NIQB 149.

[13] At [16] et seq I said:

“[16] That the court has a discretion to grant leave for later payment must not ignore the primary wording of Order 22 Rule 1(1)(a) and (b). The

discretion must be exercised rationally. It cannot be construed in my view to mean that consent can be given for late lodgement without reference to the spirit and terms of those primary time limits. Hence prima facie it is only where good reason can be given why those primary time limits could not have been complied with that the discretion should be exercised. It seems to me that the legislative intention was clear. Courts must be careful in pursuing a purposive path to avoid being a policymaker in direct contradiction to the intention of the legislature. There must be limits to the concept of judicial creativity no matter how inviting the prospect may be. The paramount objective must always be to ascertain the true intent of the legislature.

[17] There may well be force in the proposition that Rules of Court ought to make provision for later lodgements along the lines of the Civil Procedures Rules adopted in England or the use of Calderbank letters which operates so efficiently for example in the Family Division. That is a matter for the Supreme Court Rules Committee. It is not a matter for a Practice Direction or an unlicensed approach to the exercise of discretion.”

[14] Davis v Northern Ireland Carriers [1979] NI 19 is a widely cited authority from the pen of Lord Lowry in which he made clear that a court will look more favourably on an application to extend time for compliance with the statutory rules which is made before the time is up and in any event parties must understand that the rules of the court are there to be observed. The rules are there to provide a timetable for the conduct of litigation and, as in the wording of Order 43 Rule 10, cannot be set aside unless “sufficient excuse exists for such failure”.

[15] Lord Carnwath recently remarked in Cusack (Respondent) v London Borough of Harrow (Appellant) [2013] UKSC 40 at [59]:

“Particularly in a system which accords as much importance to precedence as the common law, considerable help can often be gained from considering the approach and techniques devised or adopted by other judges when considering questions of interpretation. Even though such approaches and techniques cannot amount to rules, they not only assist lawyers and judges who are subsequently faced

with interpretation issues, but they also ensure a degree of consistency of approach to such issues.”

[16] I consider there is much to be said for the Civil Procedures Rules approach to lodgements being made at any stage but that is not the law in Northern Ireland. The law requires reassuring clarity. Accordingly whilst each case must depend upon its own facts and judicial discretion will remain unfettered, there must be a consistent approach to the interpretation of the Rules so as to ensure that they are observed and that a proper timetable for the conduct of litigation is maintained in accordance with them. They are not mere dust jacket endorsements. In the instant case no application was made by the defendant to extend time for a lodgement prior to the expiration of the time limits set out under Order 21 Rule 2 of the 1981 Rules either in relation to the notice of intention to defend or the notice for particulars that were served in this instance. Fifteen months elapsed until an application was made to extend time and this only after the case had been listed for hearing but not reached on that day. If the defendant had considered that the reply to particulars by the plaintiff was inadequate for the purposes of ascertaining the case being made or that it frustrated its desire to make a lodgement in compliance with the Rules then further particulars should have been sought or an interlocutory application could have been made to extend time for the lodgement at a much earlier stage in the proceedings.

[17] I consider that there was insufficient excuse for failing to comply with the Rules. This was not the locus classicus of successful late lodgement applications where for example the plaintiff belatedly introduced new heads of damage or fresh medical evidence. Whatever the difficulty that the defendant may have encountered in assessing the appropriate figure to lodge in this case, avenues were open to him to have remedied this either by way of application to the court for an early extension of time to lodge (which might well have been granted) or by way of a further notice for particulars. It is unacceptable for the defendant to ignore the rules, set its own timetable and to determine that the appropriate moment to consider lodgement is only after the Scott Schedule has been served. To permit that would create a dangerous precedent for all building cases of this ilk and in terms would drive a coach and horses through the 1981 Rules. There is no doubt that, as directed by the learned judge in this case, a meeting of experts however late in the day and the drawing up of a Scott Schedule is an invaluable aid to resolution. However I cannot ignore the danger of this case creating a precedent whereby in future similar building cases the Rules will be ignored almost invariably and may be accompanied by an unexamined assumption that parties nowadays can postpone lodgements until the experts have met and drawn up a Scott Schedule without reference to the court until the time limits under the rules have long sped. Practitioners must recognise that absent a change in the 1981 Rules, they are there to be observed in their current form.

[18] In all the circumstances I have come to the conclusion that I must reverse the decision of the County Court and refuse permission for the lodgement to be made in this instance. Costs will follow the event.