

Neutral Citation no. [2007] NICA 40

Ref: KERF5963

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

Delivered: 26/10/07

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

CIARNAN CONVERY

Plaintiff/Respondent

and

THE IRISH NEWS LIMITED

Defendant/Appellant

Before Kerr LCJ and Higgins LJ

KERR LCJ

Introduction

[1] On 8 February 2007, after a trial lasting several days before Coghlin J and a jury, the jury found in favour of the plaintiff, Ciarnan Convery, in his claim for damages for libel against the newspaper, the Irish News, in relation to an article in the form of a restaurant review which had been published in the newspaper on 26 August 2000. The plaintiff is the owner of the restaurant that was the subject of the article.

[2] The jury assessed damages at £25000 and the judge gave judgment to the plaintiff for that amount together with costs. The defendant applied to the judge for a stay on the payment of the damages and costs for a period of six weeks and the judge granted that application. A Notice of Appeal against the verdict of the jury and the judgment was lodged on 21 March 2007. Various dates have been set for the hearing of the appeal but these have had to be vacated, principally for the reason that they did not suit counsel who has now been retained on behalf of the appellant. The appeal is now listed for hearing on 23 and 24 January 2008.

[3] No application to extend the stay has been made until now. The plaintiff's solicitors sought payment of the damages but on 16 May 2007 the defendant's solicitors replied in the following terms: -

"It is not appropriate to pay damages herein because not only is there an appeal pending but there is an ongoing police investigation into the conduct of members of the jury post verdict and possible relationships with the plaintiff/respondent.

In the circumstances our client is prepared to pay the damages into court pending the outcome of the appeal."

[4] Plainly, this offer did not find favour with the plaintiff for on 5 July 2007 his solicitor applied to the Enforcement of Judgments Office for enforcement of the judgment. On 12 July 2007 the defendant gave notice of an application to be made to the Master on 6 November 2007 to stay the enforcement of the judgment on the ground that an appeal was pending.

[5] The matter came before this court on Monday of this week when the appellants applied for an adjournment of the appeal from its scheduled date in November. On that application, Mr Michael Lavery QC, who appears with Mr Aiken for the respondent, objected to the further adjournment of the appeal. Alternatively, he submitted that the appeal should be re-listed on condition that the damages be paid. This submission finally prompted an application by the appellant to amend its Notice of Appeal to include a paragraph seeking a stay on the execution of the judge's order of 8 February until the appeal has been determined. We heard that application yesterday.

The application for a stay

[6] Two principal grounds were advanced by Mr Fitzpatrick in support of the application. He suggested that the imminence of the appeal strongly favoured the grant of a stay of execution of the order, pointing out that the plaintiff's claim had been pursued at an extremely leisurely pace. Ultimately, he said, it was necessary for the defendant to set the case down for trial. Mr Fitzpatrick's second ground was that there was an ongoing police investigation into the possibility that jury tampering had taken place. While that was extant it would not be appropriate, he claimed, to order that the damages be paid.

[7] For the respondent Mr Lavery argued that the grant of a stay should only be made exceptionally and that nothing had been put forward by the

appellant to support the notion that this was in any way an exceptional case. On the question of jury tampering he said that the plaintiff had never been approached for interview by the police service and the only 'evidence' that had been proffered to support such a suggestion had been that the plaintiff had been seen (and photographed) drinking in a public house near the courts with members of the jury *after* the verdict. Such behaviour would be wholly inconsistent with a sinister association between the plaintiff and the jury since they and he were readily identifiable and if he had been engaged in nefarious exchanges with the jury, it is entirely unlikely that he would have allowed himself to be seen in a public place so near to the Law Courts.

[8] Mr Lavery submitted that no argument had been presented by the appellant on the merit of the appeal. No requisition on the judge's charge to the jury was raised by the defendant, notwithstanding the prolixity of grounds in the Notice of Appeal attacking it. It had never been suggested that the plaintiff would be unable to repay the damages in the event of the appeal succeeding. He should not be deprived of the "fruits of his success".

[9] In the course of his reply Mr Fitzpatrick referred for the first time to the issues which arise on the appeal. He suggested that this case involved a point of law of general importance *viz* whether a reviewer was entitled to hold and freely express an opinion on a service provided to the public. Mr Fitzpatrick also sought to counter Mr Lavery's claim that the respondent was a successful businessman but since that submission would have depended on an account of inquiries apparently conducted by the appellant's solicitor which had not featured at all in any of the material that had been presented to the court, we did not permit it to be made.

The approach to be followed

[10] This is conveniently summarised in the 1999 volume of the Supreme Court Practice at 59/13/2 (pp 1076/7): -

"An appeal does not operate as a stay on the order appealed against, except to the extent that the court below, or the Court of Appeal ... otherwise directs. ... If an appellant wishes to have a stay of execution, he must make express application for one ... Neither the court below nor the Court of Appeal will grant a stay unless satisfied that there are good reasons for doing so. The court does not 'make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which *prima facie* he is entitled', pending an appeal (*The Annot Lyle* (1886) 11 P.114 at 116, CA; *Monk v Bartram* [1891] 1 QB 346) ... The question

whether to grant a stay is entirely in the discretion of the court (*Becker v Earl's Court Ltd* (1911) 33 SJ 206; *The Ratata* [1897] P 118 at 132; *A-G v Emerson* (1889) 24 QBD 56 at 58, 59) and the court will grant it where the special circumstances of the case so require ...

...

Where the appeal is against an award of damages, the long established practice is that a stay will normally be granted only where the appellant satisfies the court that, if the damages are paid, then there will be no reasonable prospect of his recovering them in the event of the appeal succeeding (*Atkins v Great Western Railway Co.* (1886) 2 TLR 400 following *Barker v Lavery* (1885) 14 QBD 769 CA ... [I]n *Winchester Cigarette Machinery Ltd v Payne (No 2)* (1993) *The Times*, December 15 ... the court made it clear that a stay should only be granted where there are good reasons for departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour. The court also emphasised that indications in past cases do not fetter the scope of the court's discretion."

[11] On the matter of the procedure for applying for a stay, the White Book is also instructive. At 51/13/9 it states: -

"The application must be made in the first instance to the court below ... but if it is refused the application to the Court of Appeal is not an appeal; the jurisdiction is concurrent ... The application should, if possible, be made to the court below at the time that it gives judgment ..."

[12] From these passages a number of useful rules can be recognised:

1. The grant of a stay lies within the discretion of the court; previous indications as to how that discretion has been exercised are instructive but not prescriptive and each case will depend on its own unique circumstances;
2. An application for a stay should be made first to the judge at trial; the reasons for this are obvious - the judge will normally have a greater

insight into the possible merits of an appeal than will be available to the Court of Appeal;

3. In general, good reasons that a stay should be granted must be demonstrated by the party that seeks it and the mere existence of an appeal will not normally qualify;
4. The ability of the plaintiff to repay damages in the event of a successful appeal is relevant to the question whether a stay should be granted but if the defendant maintains that the plaintiff will not be able to repay, he must support that claim with evidence.

The application of the rules to the present case

[13] In this case an application for a stay was made immediately after judgment was given but this was limited to a period of six weeks. This is the period normally chosen by a party against whom an award of damages has been made to allow for consideration of a possible appeal. The six week period normally coincides with the time allowed to lodge a Notice of Appeal. As a matter of common practice in this jurisdiction, where an appeal is lodged, parties will generally agree that enforcement of the judgment will not take place until the appeal has been determined. Absent an express agreement to that effect, however, a party appealing a judgment or verdict should apply for a stay first to the trial judge. That did not happen in the present case because the defendant's solicitors assumed when they sent their letter of 16 May 2007, that the plaintiff's legal advisers would have refrained from enforcement. This case serves as a salutary warning to practitioners that such an assumption should not be made.

[14] When the application was made to the Enforcement of Judgments office by the plaintiff, the defendant should have applied forthwith to Coghlin J and, if necessary, to this court for a stay. It was not appropriate to apply to the Master for a stay because an appeal was pending. In effect, this invited the Master to adjudicate on an issue that lay firmly within the authority of the trial judge and this court.

[15] The application for a stay ought to have dealt with the following matters:

1. The reasons for the delay in making the application;
2. The merits of and the issues arising on the appeal;
3. If it was a subject that the appellant wished to canvass, the ability of the plaintiff to repay the damages that had been awarded;
4. Any other reasons arising from the particular circumstances of this case that would justify a stay. In this context the material proffered about the police investigation into possible jury tampering was plainly inadequate. The current status of that investigation was not checked. It is not known whether it remains a live inquiry.

[16] Notwithstanding the failure of the appellant to deal with these matters, we have concluded that we should exercise our discretion to grant a stay. The hearing of the appeal will take place shortly. If it is unsuccessful, the plaintiff's enjoyment of the "fruits of the judgment in his favour" will not be long deferred. His position is protected by the fact that interest will be payable on the damages to be recovered if the appeal fails. If, as has been represented on his behalf, he is a successful businessman, his need to have the damages now is not as great as might be the case with many claimants. It is clear that the appellants are and will be in a position to meet the award of damages if it is upheld on appeal. A point of legal significance in relation to the boundaries of legitimate fair comment can be recognised from the pleadings, if not from the material put before this court on the present application.

[17] All of the factors adumbrated in the preceding paragraph have weighed with us in deciding that we should exercise our discretion in favour of granting a stay. It is also relevant that where interest is an integral and guaranteed element in the computation of damages that the plaintiff may ultimately recover and because of the relative speed at which appeals like this can be heard, (a listing date as early as September would have been possible) considerations such as the need to avoid denying the plaintiff 'the fruits of his success' are not perhaps as significant as they were some years ago.

[18] We should make it clear, however, that the suggestion that there might have been jury tampering has played no part in our decision that a stay should be granted. The evidence in relation to this was so slight and the position in relation to the police inquiry so uncertain that we do not consider that any weight whatever should be given to this factor.

[19] We have given consideration to the question whether conditions should be attached to the grant of a stay and have borne in mind the offer of the defendant to lodge the damages sum in court. In general a requirement to do so will only be imposed where there is a need to secure the amount. As we have said, there is no reason to doubt the capacity of the defendant to satisfy the judgment if the appeal fails and we therefore do not attach conditions to the stay.