Neutral Citation No. [2005] NIQB 26 | *Ref:* **SHEF5230**

Judgment: approved by the Court for handing down | *Delivered:* **18/03/2005**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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ON APPEAL FROM THE COUNTY COURT FOR THE DIVISION OF FERMANAGH AND TYRONE

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BETWEEN:

TONY DONNELLY DECEASED AND FRANCES DONNELLY

Plaintiffs/Respondents;

-and-

JIMMY DOYLE

Defendant/Appellant.

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SHEIL LJ

[1] The defendant/appellant by way of a summons issued on 21 December 2004 applies to this court, pursuant to Order 3, rule 5(1) of the Rules of the Supreme Court (Northern Ireland) 1980, to extend the 24 day time limit for lodging a requisition to state a case for the opinion of the Court of Appeal upon a point of law arising out of an appeal heard by this court.

[2] This litigation commenced with a title civil bill involving a dispute between the plaintiffs and the defendant as to the ownership of a laneway leading to the plaintiffs' house off the Derrybard Road outside Fintona in County Tyrone. The civil bill was issued on 8 November 2000. On 16 May 2002 the County Court decided the dispute in favour of the plaintiffs. On the 31 May 2002 the defendant appealed that decision to this court. On 8 October

2004 this court in a written judgment, following a protracted hearing in 2003 on 20 October, 12 and 28 November, 2 December 2003 and 17 September 2004, affirmed the order of the learned County Court judge in favour the plaintiffs. On 16 November 2004 the defendant/appellant served an ordinary notice of appeal to the Court of Appeal. By letter dated 22 November 2004 the Appeals and Lists Office of the Supreme Court wrote to the defendants/appellants' solicitors questioning the way in which they were proceeding, as no further appeal lay save by way of a requisition to the High Court to state a case on a point of law for the opinion of the Court of Appeal under Order 61, Rule 5(1) of the Rules of the Supreme Court (Northern Ireland) 1980. On 26 November 2004 the defendant/appellant lodged a requisition to state a case and sought an extension of the 24 day time limit provided by Order 61, rule 5(1) in which to do so, which time limit had already expired on 5 November 2004. As will be seen from that document dated 26 November 2004 the application to state a case merely restated the original grounds of appeal in the defective notice of appeal lodged on 16 November 2004. Subsequently, after this had been pointed out to counsel for the defendant/appellant, the present summons dated 21 December 2004 was issued seeking an extension of the 24 day time limit for lodging the requisition to state a case.

[3] The principles to be applied by the court in exercising its discretion to extend time are set out in the decision of Lord Lowry LCJ in Davis v Northern Ireland Carriers [1979] 19 at 20:

> "(1) 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;
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> (2) When the time limit has expired the extent to which the party applying is in default;
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> (3) The effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs;
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> (4) Whether a hearing on the merits has taken place or would be denied by refusing an extension;
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> (5) 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
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> (6) Whether the point is of general, and not merely particular, significance.

To these I add the important principle:

> (7) That the rules of court are there to be observed."

I also refer to the decision of the Court of Appeal in Graham v Quinn [1997] NI 338 and in particular to the judgment of Kerr J at 354-357.

[4] The first named plaintiff, Tony Donnelly, died on 8 May 2004, before legal submissions in the case had concluded.

[5] It is clear that this application is being made when time has already expired by eleven days. An explanation for that default is set out in an affidavit sworn by Mr Andrew Montague, principal in the firm of TTM Montague, solicitors for the defendant/appellant on 13 December 2004, in which he states at paragraph 11:

> "The defendant/appellant was at all times anxious to appeal against the said judgment of Lord Justice Sheil delivered on 8 October 2004. Counsel erroneously prepared a 'notice of appeal' and this was served within the six week time limit permitted by Order 59, rule 4(1)(c) of the Rules. Counsel readily accepts that he originally advised the wrong procedure but, unfortunately, the requisition to state a case was lodged in the Appeals and Lists Office outside the 24 day period permitted by Order 61, rule 5(1) of the Rules.
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> I verily believe that the defendant/appellant has good points of law to argue on an appeal and that the plaintiffs/respondents, have not been unduly prejudiced by reason of the delay and requisition a case stated herein."

[6] Mrs Frances Donnelly, the second named plaintiff, filed a replying affidavit on 4 March 2005 in which she avers at paragraphs 7 to 9:

> "(7) On each occasion when this matter was considered, evidence was called and cross-examined by both the plaintiff and the defendant. The vast majority of the evidence on behalf of the plaintiffs was given by my late husband. He was possessed of all information and details relating to his dealings with Jimmy Doyle, he gave evidence about various conversations and incidents which took place

> exclusively between himself and Jimmy Doyle; my late husband gave evidence about various actions undertaken exclusively by him in relation to the upkeep and maintenance of the laneway; my late husband gave evidence about the conversations and dealings he had with previous solicitors in this case when he acquired our property including the disputed laneway; my late husband gave evidence about discussions and conversations he had with our predecessors in title.
>
> (8) I remain extremely upset and distressed by the fact that Jimmy Doyle is now attempting to prosecute a further attempt at appeal/case stating of this case. All the parties have now given evidence twice and been cross-examined twice. Two separate findings of fact and law upheld in my favour. The cost implications of a further appeal/case stating are extremely distressing as I have been advised and verily belief that the current bill of costs in relation to this matter runs in tens of thousands of pounds.
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> (9) However, and notwithstanding the above considerations, any future appeal which may remit a case for a complete rehearing would fundamentally prejudice my cause as I have no lawful means of introducing my late husband's evidence or responding to cross-examination of the same. The appellant has indicated through his counsel that he would sustain and be subject to an injustice if he were not entitled to appeal/case state this matter. I cannot understand this assertion given the two trials which have already been conducted and have been found in my favour. In my opinion, it remains an injustice that Mr Doyle proposes to proceed with this matter and did not attempt to meet his costs obligations arising out of the previous trials."

[7] Returning to the principles enunciated by Lord Lowry in Davis v Northern Ireland Carriers, it has to be accepted that there have been two hearings on the merits in relation to this dispute about a laneway, both of which were resolved in favour of the plaintiffs.

[8] Is there a point of substance to be made which could not otherwise be put forward, and is that point of general, and not merely particular,

significance? The points of law as finally set out by counsel for the defendant/appellant in the requisition dated 1 March 2005 are as follows:

(i) Was the learned Lord Justice correct in law in concluding that the McIlroys had acquired title to the disputed laneway by adverse possession at some unspecified time prior to 1985 and were therefore in a position to "grant" a right of way to the appellant between points C to B in 1985?

(ii) If the answer to question (i) is "No", then was the continued user of the laneway between points C to B by the appellant a sufficient act in law to negate any supposed "discontinuance" of his own possession of the disputed laneway?

[9] I refer to the reserved judgment delivered by me in this case on 8 October 2004. I consider that the defendant/appellant is attempting in the present case to raise as points of law what in reality were findings of fact made by this court. If I am wrong about that and there is some point of substance to be made, that point is not of general, as distinct from merely particular, significance.

[10] The plaintiff understandably regarded this litigation as at an end when, following almost four years of litigation over this laneway, the case was decided in her favour by this court, affirming the order of the learned County Court judge, and the time for any appeal by way of a case stated had expired. As already stated, her husband had died on 8 May 2004, following the conclusion of all of the evidence but before legal submissions were made in the case. He was the principal witness on behalf of the plaintiffs as appears from the affidavit of Mrs Donnelly sworn on 4 March 2005, to which I have already referred. If she has been prejudiced by the untimely death of her husband, that prejudice already existed prior to judgment being delivered by this court on 8 October 2004 and accordingly is not attributable to any delay on the part of the defendant in lodging his requisition to state a case. As stated by Kerr J in Graham v Quinn [1997] NI 338 at 356e, "incurable prejudice will exist where the party's position is changed *since the expiry of time to appeal* in a way which cannot be compensated by costs."

In Finegan v Parkside Health Authority [1998] 1 All ER 595 the Court of Appeal in England stated that the overriding principle in relation to both parties is that "justice must be done": Hirst LJ at 605c.

[11] In the exercise of my discretion, I refuse to extend the time for the lodging of the requisition to state a case having regard to the principles set out in Davis v Northern Ireland Carriers, and in particular because I consider that the two purported points of law are not points of law but are in effect an attempted appeal on the facts, in respect of which there have been two hearings on the merits both of which were resolved in favour of the Plaintiffs/Respondents.