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Ref: **GIL10276**

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

Delivered: **26/04/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

DR WINIFRED MOONEY

Petitioner/Appellant;

-and-

DEREK KEYS (1)
DERMOT FALLER (2)
MAIDEN CITY DEVELOPMENTS LIMITED (3)

Respondents.

Before: Gillen LJ, Weir LJ and McBride J

GILLEN LJ (giving the judgment of the court)

Introduction

[1] In this matter the appellant seeks an extension of time within which to lodge an appeal against a High court judgment dated 10 September 2012("the judgment"). The date of the Notice of Appeal is 19 September 2016.

[2] The appellant was represented by Mr Downey, solicitor. He informed the court that he had been unable to obtain the services of counsel and in the particular circumstances of this case the court granted him a right of audience pursuant to s106 (2) of the Judicature (Northern Ireland) Act 1978. The three respondents were represented by Mr Keys and Mr Faller in person. We were provided with a company resolution authorising Mr Keys and Mr Faller to represent the company at this hearing.

The factual background

[3] The factual background to this case is largely set out in the opening paragraphs of the judgment where it recorded:

> "[1] This action relates to a private limited company which owns a block of flats in the City of Derry. The facts are complicated but of varying degrees of relevance and importance. The plaintiff is a medical practitioner in that city. By summons of 7 January 2010 she sought various reliefs including the winding up of the company, an order for purchase of "the shares of the petitioner in the company" or in the alternative an order that she be registered as the owner of shares in the company.
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> [2] On 18 January I received an application from Mr Kevin Downey of Downey Property, solicitors. Mr Ronan Lavery had been instructed for the earlier hearing but his instructions had been withdrawn by the petitioner. The circumstances were conveyed to the court in chambers and there is no reflection on Mr Lavery. However his fees had not been discharged and nor were they agreed and Mr Downey felt unable in the circumstances, after an adjournment of some hours, to obtain counsel to replace Mr Lavery. As the case had been in the list before and as both parties were anxious to proceed with it I gave Mr Downey leave to appear in the case, which he then conducted conscientiously and vigorously on behalf of the petitioner. … The first two respondents were represented together as the majority shareholders in the company and were directors of it."

[4] We pause at this stage to observe that Mr Downey indicated to this court that the circumstances of Mr Lavery's withdrawal were as follows. Shortly before the hearing of the action, Mr Lavery had advised the plaintiff that "whilst the law was on her side, the trial judge would rule against her because of his personal dislike toward D, a friend and business associate of Dr Mooney".

[5] Mr Downey related to this court that the plaintiff decided to dispense with the services of Mr Lavery. Mr Downey, the solicitor on record, made an application before the judge in chambers, apprised him of what had occurred with Mr Lavery but did not suggest to the judge that he should recuse himself from the hearing. Mr Downey claimed before this court that he did not feel sufficiently experienced or possessed of sufficient weight to suggest such a course to the learned trial judge.

[6] Mr Downey's skeleton argument in the instant application asserted "I deemed it prudent, appropriate and respectful to bring the matter to the attention of the learned judge in the context of an application to represent Dr Mooney without counsel. At that point, whilst I could not make any allegation of prejudice, it was open to the learned judge to recuse himself which he did not. When judgment was delivered, it was clear to me that a considerable weight had been placed by the learned judge on the involvement of [D]".

[7] Turning again to the background of the case, the judge outlined the following facts in the course of his judgment:

> "In her petition, signed by Mr Downey on behalf of his firm and dated 18 November 2009, the plaintiff recited that the company was incorporated on 14 February 1995 and had 300 fully paid up £1 shares. At paragraph 5 she said that: 'By way of agreement dated 1 July 2005 the Petitioner purchased 100 £1 ordinary shares from Michael McCallion. The stock transfer form was stamped on 27 July 2005.' … At one point there was an agreement between Mr Martin McCallion who was one of the shareholders in the company to pledge some 15 of his shares in respect of a debt he owed to the company but that does not appear to have been registered. I therefore find that Mr McCallion was the registered shareholder of 100 shares in the company.
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> [6] The petitioner goes on as follows at paragraph 6. 'By way of letter dated 21 September 2005 the first respondent as Company Secretary wrote to Mr Michael McCallion in relation to the proposed transfer of 100 ordinary shares of £1 each to Dr Winifred Mooney declining to register the proposed transfer.' The petition, inter alia, later goes on to contend that in April 2007 Mr McCallion exercised a power of attorney in favour of Dr Mooney. At about the same time a sum of money was paid through Messrs Harrisons to Mr McCallion or to a Mr Ryan on his behalf.
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> [7] The petitioner claims that she is entitled, on foot of this payment, to be registered as a shareholder in the company. Quite remarkably, even in the closing submissions of the petitioner, the precise character of her claim is left in the alternative but includes putting herself forward as a nominee of

> JSDKE Limited, another private limited company, which provided the funds that were paid over by Messrs Harrison, solicitors in 2007. It is said that Dr Mooney is a director of JSDKE Limited. It was her evidence that throughout this matter she has been acting on the advice of [D]………. It appears that the voting shares in JSDKE Limited were originally registered to his late father and later to his mother. The Companies Office was informed on 2 April 2005 that Dr Mooney had become a director of the company and [D] then resigned as a director on 5 April 2005."

[8] Attempts were made by the appellant to register the shares but Mr Faller and Mr Keys have refused to do so. It is the appellant's case that at one stage they claimed that the reason they wanted to prevent Mr McCallion from transferring his shares to a third party was so as to secure the alleged debt that he owed to the company at that time. In 2007, Mr McCallion apparently found himself in further financial difficulty and this led to the completion of the sale of the shares to Dr Mooney. The full purchase price was apparently paid and in April 2007 Mr McCallion granted power of attorney to Dr Mooney with full power to exercise all rights in relation to his shares in Maiden City Developments Limited.

[9] Accordingly, in the wake of the directors' failure to provide accounts and information to Dr Mooney and as a result of their failure to register her shares, the appellant issued a summons on 7 January 2010 in which she sought a number of reliefs including that the respondents be ordered to register the transfer of the shares formerly belonging to Mr McCallion to Dr Mooney in accordance with the stock transfer form dated 27 July 2005.

The decision of the judge

[10] The judgment of 10 September 2012 dismissed the appellant's application. In the course of that judgment the learned judge said:

> "If therefore a ground for refusing to register the petitioner is the involvement in her affairs of [D]I find as a fact that that was a ground which the respondents could rely on as reasonably apprehending that he was indeed involved and was likely to continue to be involved on behalf of or advising Dr Mooney."

[11] Later in that judgment the court said:

> "They [*the respondents*] were also clear in their view that they did not want to become involved with [D]. Both of them were active in the city where [D] practiced. They were reluctant, even with the immunity of the witness box, to say too much but it was clear that when they enquired about him they were not reassured by his reputation. Counsel also point out and the respondents to some degree bear out that he had begun by July 2005 the prolonged course of litigation with which he became involved. Without going into the rights and wrongs of the various cases it cannot be disputed that [D]appeared to be prone to such disputes and to those disputes ending in litigation. In those circumstances it is not in the least surprising that the directors should refuse to register Dr Mooney. In my view they were perfectly entitled to do so."

[12] At the trial [D] was called to give evidence and of him the learned trial judge said:

> "The latter (*D*) was a fluent witness but listening to him being cross-examined … I was reminded of the remark made about a 20th century Irish leader 'that dealing with him was like picking up mercury with a fork'. One illustration of his elusiveness …"

In contrast the judge found the evidence of Mr Keys to be entirely satisfactory.

[13] Following the judgment, the respondents in this case issued a statutory demand against Dr Mooney to recover the costs of the unsuccessful action and the Master in bankruptcy refused to set this aside ("the Master's decision").

[14] Following the decision of September 2012, Mr Downey took no steps to institute an appeal on behalf of the applicant against that decision. Despite being aware of the comments allegedly made by counsel prior to the hearing, and having seen the judgment, no step was taken to file even a Notice of Appeal (which would not have been expensive) to protect the position of the appellant. Mr Downey's explanation for this was that he was sceptical himself about how strong the case on bias was *at that stage* and the appellant was not in a financial position to mount an appeal in any event. In short Mr Downey accepted that at that time there was no intention to appeal.

Events in 2014

[15] In January 2014 the appellant mounted an appeal from the Master's decision and her refusal to set aside the statutory demand made by the respondents on foot of the costs order in the original action. The statutory demand consisted of the amount of a taxed bill of costs arising out of those earlier proceedings. At the hearing of the appeal which came on before the same judge who gave the impugned judgment now before this court, an application was made to the judge to adjourn the appeal to allow further evidence to be given.

[16] In the course of exchanges between the judge and Mr Downey in that appeal, the judge indicated that he was not going to hear any more of D's cases and added the following comment

> "I have made it quite clear that he is somebody that no sensible person should touch with a barge pole in connection with any business matter because, as I have said in a judgment, his interventions seem to lead to disputes in litigation and not just in one transaction but in many transactions by now."

[17] Following these remarks, D engaged in a complaints process against the judge with the Lord Chief Justice's Office. It was concluded by the Lord Chief Justice that the comments fell outside the scope of the policy underpinning the Code of Practice on Judicial Conduct Complaints on 5 May 2015. That decision included the following finding:

> "The judge was entitled and possibly required to make a finding about the suitability of the complainant as a business partner. His expression of his view may have been robust but the issue was one arising in the course of the case and therefore falls outside the scope of the policy."

[18] Being dissatisfied with this finding, a judicial review application was initiated by D on 29 July 2015. Maguire J heard that matter and determined that the decision of the Lord Chief Justice was not arguably unlawful and refused leave to apply for judicial review on 20 May 2016.

[19] That decision was then appealed to the Court of Appeal.

[20] The Court of Appeal dismissed that appeal on 17 January 2014 having concluded that the remarks did arise from the process of making a judicial decision. Being satisfied that the test was one of relevance rather than necessity, the court determined that the acceptability of the business association with the witness D was

an issue in the proceedings before the judge and the terms used were not extraneous to the judicial decision.

[21] Finally, we observe that on 30 January 2014 a further summons was issued on behalf of Dr Mooney to register these shares based on the provisions introduced by section 771 of the Companies Act 2006 which now require a director to provide reasons for refusal to register shares once an application is made. At the time of the original decision, the directors could refuse without providing reasons. Burgess J has adjourned those proceedings pending the resolution of the matters now before us.

The Notice of Appeal

[22] On 19 September 2016, the appellant filed a summons seeking to extend time under Order 3 of the Rules of the Court of Judicature (Northern Ireland) 1980 to lodge an appeal against the judgment of September 2012.

[23] The grounds of appeal set out are that:

(i) The judgment was tainted by bias against the petitioner and her witness.

(ii) The judgment was obtained by perjury by witnesses for the respondents.

(iii) The learned judge erred in law in relation to his findings regarding the director's duties to register shares.

(iv) The learned judge erred in law in that his judgment does not in any meaningful way bring finality to the dispute.

Conclusion

[24] Under Order 3(5)(i) of the Rules of the Court of Judicature (Northern Ireland) 1980, this court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by those rules, or by any judgment, order or direction, to do any act in any proceedings.

[25] This appeal is four years out of time. The principles governing an application for extension of time to appeal to this court have been examined on a number of occasions by this court (see for example Magill v Ulster Independent Clinic [2010] NICA 33 and Connolly v Western Health and Social Care Trust [2016] NICA 4). Those cases cite with approval the principles identified by Lowry LCJ in Davis v Northern Ireland Carriers [1979] NI 19 where at 20A-D he stated:

> "Where a time limit is imposed by statue 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 … the court must exercise its discretion in each case and for that purpose the relevant principles are –
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> (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 of 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) which could not otherwise be put forward; and
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> (6) whether the point is of general and not merely particular, significance.
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> (7) that the rules of court are there to be observed."

[26] Applying these principles to this case we have come to the following conclusions.

(i) Time has clearly sped in this instance.

(ii) The party now applying is clearly in default. There is no good reason why this appeal should not have been mounted long ago. In the first place, following the judgment in 2012, at the very least a Notice of Appeal could have been lodged to keep the matter open. Both the solicitor on record and the appellant were well aware of the allegation of bias which had been raised by counsel apparently and armed with the judgment there is no reason why the point could not have been ventilated if it was felt there was any substance in it. We add for completeness that, apart from the allegation of bias, all of the other

grounds raised in the proposed Notice of Appeal and grounds of appeal could easily have been raised independently of the bias point in the immediate aftermath of the 2012 judgment.

[27] Secondly, even if there was good reason for delay in the aftermath of the 2012 judgment, by January 2014 there was absolutely no reason why a question of bias could not have been the subject of appeal application albeit time would have been required to be extended even then. The appellant and her advisors are once more entirely in default. The judicial comments which are now the basis of the application have not changed since January 2014 and the nature of the appeal and the grounds now advanced would have been precisely the same in 2014. In the event almost three more years were allowed to pass.

[28] The fact that D was raising the matter of the judge's comments by way of complaint with the Lord Chief Justice's Office with the subsequent proceedings is to no avail. That issue concerned whether or not the remarks had been made in the process of judicial proceedings and was quite separate from the issue of judicial bias in the context of this appeal. It provides no foundation for further delaying an appeal from the 2012 judgment.

[29] In any event, there is no substance in the argument that a decision about the appeal awaited the outcome of the complaint because in fact the application for extension of time in the instant matter was mounted before those judicial proceedings had been completed i.e. before the matter was finally determined by the Court of Appeal in January 2017.

[30] It is noteworthy that the decision of Maguire J was handed down on 20 May 2016. Why then was there a further delay until September 2016 before launching the application for an extension of time? Mr Downey frankly conceded that he could provide no plausible explanation for the continued delay between May 2016 and September 2016.

[31] This has been a saga of protracted dimensions and persistent inertia. The need for promptness has been shrouded in total disregard. The appellant herself is not free of reproach because she has been aware of this issue from the earliest possible stages and yet gave no instructions to her solicitor to process the appeal.

[32] In short it would do a disservice to the cause of promptness and legal certainty in the administration of justice and the need to observe the rules if such flagrant delay were to be ignored.

[33] Certainty in law is important. These respondents are entitled to finality and to conduct their affairs on the basis that the 2012 case had been completed within a reasonable time. Compensation by costs could not meet the effect of this delay. Costs do not address the right to receive justice in a timely and proportional manner. It is not a concomitant of a fair hearing process that one side is entitled to take as

much time as they wish or ,for that matter, as long as solicitor or counsel or their clients think appropriate. Time itself is a resource. Allowing the litigation to meander sluggishly to its eventual conclusion is unacceptable in the modern era.

[34] There has been a hearing on the merits of the substantive case. There is nothing in this judgment of 2012 which smacks of bias reading the judgment by itself, as is evidenced by the lack of any appeal at that time.

[35] It is argued that the subsequent comments in 2014 may carry a resonance with the judge's earlier thought process in 2012, but if the appellant believed that there was merit in that point then it is inexplicable that the she did not raise the appeal in early 2014.

[36] The point now raised is not of general rather than particular significance and therefore there is no pressing need for an extension of time to appeal to be granted.

[37] The fact of the matter is that rules of court are there to be observed and in this instance they have been flagrantly ignored without any substantive reason. We have no reason to believe that the likelihood of success of the point in any event is such that all of these other adverse factors to which we have referred should be overridden. Hence we dismiss any suggestion that there is a possibility of injustice in our refusal to extend the time.

[38] In all the circumstances therefore we dismiss this application to extend time.