Neutral Citation no. [2008] NICh 6 | *Ref:* **DEE7127**

Judgment: approved by the Court for handing down | *Delivered:* **07/04/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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FRANCIS GERVIN

Plaintiff;

-v-

JOHN CAVANAGH T/AS ROSEWOOD HOLDINGS

First Defendant;

-and-

PAUL McCANN

Second Defendant;

AND THE PERSONAL REPRESENTATIVES OF THE ESTATE OF PATRICK DUFFY DECEASED

Third Defendant;

-and-

BRIGAR HOLDINGS LIMITED

Fourth Defendant.

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DEENY J

[1] This matter comes before the court by way of an appeal from Master Ellison. His order, filed 8 November 2006 dealt with a number of matters. The plaintiff by summons filed 23 May 2006 applied for leave to amend its proceedings and extension of time for compliance with an Unless Order of court. The Master dismissed both those applications. The application of the first defendant was that the judgment be entered on its behalf on foot of its application and in accordance with the order of 4 April 2006. The consequential effect was that an injunction dated 8 September 2005

was dissolved. In the hearing before me Mr Mark Horner QC led Mr Gibson for the plaintiff and Mr Mark Orr QC led Mr O'Brien for the first defendant. Mr McNamee appeared for the proposed third and fourth defendants who were objecting to be joined if the plaintiff succeeded in its appeal. The matter began as a civil bill in the County Court for the Division of Fermanagh and Tyrone dated 8 September 2005. It is significant to note the terms of that civil bill brought by the plaintiff against the first and second defendants. It claimed £15,000 damages "for loss and damage caused by the defendants, their servants and agents on 7 September 2005 to the plaintiff's chattels, fixtures and fittings and further or in the alternative for loss and damage as a result of the defendant's breach of covenant arising out of a tenancy agreement dated 1 April 1999 in respect of premises situated at 7 Washingbay Road, Coalisland, County Tyrone." Furthermore in that civil bill an injunction was sought restraining the defendant from further such damage or breach of covenant. This arose out of an incident, it was averred in an affidavit of the plaintiff, by which the first defendant instructed the second defendant to clear the site in the exercise of the first defendant's perceived ownership of the property. Some damage was caused to the premises. The matter was halted.

[2] Counsel for the first defendant draws attention to the averments in the affidavit of the plaintiff to the following effect:

> "2. On 1 July 1981 the then trustees of the club bought the premises from Tyrone Brick Limited. In or around 1985 the club (Clonoe Boxing Club) ran into financial difficulties and it was my understanding that the Catholic church had acquired the premises. I beg leave to refer to a copy Tenancy Agreement dated 1 April 1999 upon which I have marked my initials 'FG1' at the date of swearing hereof. From that time Father Rice duly collected the rent from me."

The Tenancy Agreement is between the parish priest of the parish Very Rev. Seamus Rice PP and Frank Gervin on behalf of the club.

[3] This civil bill and these averments should be borne in mind given the plaintiff's subsequent claim to either be the owner of this building and the land on which it sits or to have some kind of equitable right to become the owner. It is clear that the club did indeed get into financial difficulties many years in the past owing £40,000-£60,000 to the Ulster Bank. The late Patrick Duffy, solicitor, made arrangements to discharge the loan which did seem to involve the property being at one time owned by a company of which his sons were the directors. However the premises seem to have been

passed back to the parish and to have changed hands several times since then.

[4] An important thrust of Mr Orr's submissions on behalf of the first defendant is that any claim for ownership of the property is very far fetched indeed. At no point has the plaintiff demonstrated that he had the means, furthermore, to buy back the premises at a market value. Furthermore it is not at all clear that he has any right to bring these proceedings on behalf of the trustees of the club. What he might have some right to is a business tenancy in foot of the statutory protection of the Business Tenancies (NI) Order 1996 to which he expressly refers in his original affidavit. However this again is wholly contrary to the case he is now making in the appeal which he is bringing. One of the significant considerations for a court in dealing with an application of this type for a discretion to be exercised to extend time is whether or not the plaintiff will be deprived of a hearing. In this case the plaintiff will be entitled to a hearing before the Lands Tribunal relating to whether or not he or it still has a valid business tenancy. I say nothing about the merits one way or another of that application. One can see that a number of issues will arise. But it does seem at least an arguable proposition unlike the extremely far fetched claim which the plaintiff now seeks to advance. The reference in the civil bill is clearly not to the building itself (although some damage was apparently done to the building) but to fixtures and fittings, consistent with the plaintiff's assertion that he was the tenant of the club but not that he was its owner. Any loss and damage sustained in that way as tenant will have been trivial, if indeed there was any unlawfulness, upon which I do not rule.

[5] Against the context of those matters I think I can deal with the other issues relatively expeditiously. The plaintiff's solicitors following the issuance of the civil bill proceedings moved to remove the proceedings into the High Court by a summons of 12 October 2005. This application was successful before the Master on 19 January 2006. The plaintiff was ordered to file a statement of claim by 16 February 2006. This was not done nor was any request for an extension of time granted.

[6] On 15 March 2006 the first defendant issued a summons to strike out the plaintiff's claim which was dealt with by the Master on 4 April 2006. He ordered that unless within 42 days of 4 April 2006 the plaintiff served a statement of claim, so much of the plaintiff's claim as relates to the first defendant was dismissed with judgment in favour of that defendant with costs. 42 days meant that the statement of claim had to be served by 14 May 2006. Given that the proceedings had been initially served by a civil bill, serving the function of a writ, on 8 September 2005 nobody could complain that the Master was behaving either precipitately or onerously in making such an order against the plaintiff. However the statement of claim was not served. On the contrary the first defendant, ex abundante cautela issued a

summons to strike out the plaintiff's claim on 18 May 2006. It was only after that on 23 May, the day before the further hearing before the Master that any application was made to extend time. Some explanation has been given of that. It would appear that the matter was overlooked in the plaintiff's solicitor's office, although there is some suggestion that there was difficulty in getting instructions at one point from the plaintiff. Learned junior counsel clearly did everything that he was required to do and no criticism of him attaches in any way.

[7] It will be noted that the application for an extension of time was brought after the time had expired. This is a factor against the extension of time in that way although not determinative of it. I have taken into account the matters set out in the affidavits including that of the plaintiff's solicitor. However it seems to me entirely understandable that when the matter did come before the Master for further hearing that he stood over his earlier Unless Order and refused the plaintiff an extension of time but confirmed the judgment in favour of the first defendant.

[8] It is true to say, and it is not necessary for me to refer to the authorities helpfully addressed by counsel, that the court has a discretion to extend time. A number of factors play a part in that discretion and I have already mentioned several of those in the course of this short judgment. Mere inadvertence on the part of a solicitor may well be excused in the proper case. But the proceedings here seem to me so insubstantial and unlikely to succeed that I consider the proper case is to affirm the decision of the Master. The plaintiff, of course, is at liberty to debate his tenancy before the Lands Tribunal or any other tribunal properly seized of that issue.

Proposed Third and Fourth Defendants

[9] The above appeal was listed for hearing on 2 February 2007 but taken out on the application of the plaintiff on that occasion without significant objection from the other parties. However by 27 February the plaintiff still seemed uncertain as to whether or not they wished to join the third and four defendants. I directed on that occasion that they should clarify their position. There was still uncertainty at the next review of 14 May 2007 and indeed at a further review on 4 June. On that occasion I fixed the hearing of this appeal for 25 October and it proceeded then. The application to join the third and fourth defendants as parties to the action would not necessarily fall away as there are proceedings before this court against the second defendant. I consider those proceedings to be of the most fragile kind. It would be appropriate for the plaintiff to discontinue, or the second defendant to apply to have them struck out. In any event they are clearly not appropriate for the High Court and should be remitted back to the County Court if they are to survive at all. I may say, however, that I consider that the application to join the third and fourth defendants should fail in any event. There are very

serious limitation issues in the way of the plaintiff's claim. There is grave and undoubted prejudice to the estate of the late Mr Patrick Duffy in dealing with this claim. He died more than ten years ago. Furthermore my strictures on the plaintiff's claim to be in some way the equitable or true owner of these premises apply in this case also i.e. his claim against the third and fourth defendants is inconsistent with his own initial pleadings and his earlier affidavit. There was no evidence that he has ever been able to provide the market value of this property. He has not satisfied the court that he is lawfully entitled to proceed on behalf of the trustees. It is suggested that the plaintiff may still be able to issue proceedings against the third and fourth defendants. He and even more the Legal Services Commission, if they are approached, will want to carefully reflect on whether those are proceedings likely to justify the expense and trouble involved. For my part I refuse the plaintiff's application to join the Third and Fourth Defendants.