Neutral Citation No. [2013] NICA 56

Ref: **MOR9022**

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

Delivered: **22/10/2013**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

RYAN HEGARTY

Applicant;

-and-

THE ENFORCEMENT OF JUDGMENTS OFFICE

Respondent.

Before: Morgan LCJ, Girvan LJ and Coghlin LJ

MORGAN LCJ (delivering the judgment of the Court)

[1] This is an application to extend time to appeal a decision by the Master (EJO) on 23 October 2012 dismissing objections to the seizure of a BMW X5 motor vehicle and Caravelle caravan by the EJO on 13 September 2012.

Background

[2] The proposed appellant is a 35-year-old man who has suffered poor health in recent years. On 15 November 2010 his consultant neurologist, Dr McMonagle, concluded that he had signs of an idiopathic spastic paraparesis. He had pain in his right leg and a clear gait disturbance. He was also suffering symptoms from Crohn's disease. On 18 February 2011 that diagnosis was supported by Dr Craig who noted that his biggest problem was in relation to walking. He had quite limited exercise tolerance and needed to use crutches to walk. When seen by Dr Armstrong on 21 December 2011 he was using a wheelchair and had spastic changes in the lower limbs and to a lesser degree the hands.

[3] Unfortunately this coincided with difficulties in a property business in which he was involved with his father-in-law. On 30 March 2010 AIB obtained judgment in the High Court for the delivery of the BMW X5 motor vehicle. On 27 July 2010 the EJO accepted an application for the enforcement of that judgment. On 24 May 2010

the High Court give judgment for the delivery of the Caravelle caravan. The EJO accepted a further application for the enforcement of that judgment on 15 September 2010. Three further applications for enforcement of money judgments totalling approximately £75,000 had been lodged by August 2011.

[4] On 13 September 2012 the BMW X5 motor vehicle and the caravan were seized by the EJO on foot of a Seizure Order made by the Master. On 14 September 2012 the applicant lodged a letter of objection to the Seizure Orders and that objection was listed before the Master on 18 September 2012. No written judgment is available but the Master's notes indicated that he was advised that the applicant needed the vehicles for mobility. The grounding affidavit in this application makes it clear that the Master was provided with medical evidence on the applicant's condition. It was explained that his wife also suffered from a disability and that the BMW had been adapted to fit their needs. He currently had a Citroen motor vehicle which was financed by Motability but said that he could not drive it. He depended upon his father-in-law who was his carer to drive that vehicle.

[5] It was indicated on behalf of the applicant that he attends the Royal Victoria Hospital 18 times per annum. Because of the difficulty in travelling from his home and back on a single day he uses the caravan to come up the day before, sleeps in the caravan and goes to hospital. In this way he is able best to avail of his treatment. The likely value of the caravan at auction was £2000 and the BMW motor vehicle somewhere between £5000 and £6000. The Master dismissed the objections on 23 October 2012.

[6] On 2 November 2012 the applicant's solicitors wrote to the EJO advising them that the applicant had instructed them to apply for judicial review of the Master's decision. On 6 December 2012 the solicitors lodged a legal aid application which was refused on 10 December 2012. An appeal was allowed on 22 January 2013 and judicial review proceedings issued on the same day. The leave hearing came on before Treacy J on 22 February 2013 and he adjourned the matter generally to enable the applicant to pursue an appeal under Article 140 of the Judgments Enforcement (Northern Ireland) Order 1981 (the 1981 Order).

[7] On 7 March 2013 the applicant lodged an application for legal aid to pursue the appeal. A panel granted that application on 3 May 2013 and the applicant's solicitors were notified the following week. There was some misunderstanding over an affidavit as a result of which the application to extend time and to pursue the appeal was lodged on 26 June 2013 some eight months after the decision of which complaint is made.

[8] Order 59 Rule 4 of the Rules of the Court of Judicature (Northern Ireland) 1980 provides that the relevant period within which a notice of appeal must be served is six weeks from the date on which the judgment or order of the court below was filed. It is common case, therefore, that this application is significantly out of

time. The applicant wishes to make the case on appeal that the dismissal of the objections by the Master was in breach of the positive obligation in Article 8 ECHR upon states to ensure respect for private life, including respect for human dignity and the quality-of-life in certain respects. The applicant submits that the dismissal of the objections was disproportionate.

[9] Article 140 (3) of the 1981 Order provides that a party aggrieved by an order or decision of the EJO may appeal therefrom on a question of law to the Court of Appeal. We are satisfied that the issue as to whether the dismissal of the objections was disproportionate is a question of law. We are entirely satisfied that it is a question which can properly be considered within the context of the proposed appeal and that judicial review proceedings were inappropriate having regard to the alternative remedy available to the applicant.

Consideration

[10] The leading authority on the extension of time in these circumstances in this jurisdiction is the decision of Lord Lowry LCJ in Davis v Northern Ireland Carriers [1979] NI 19. He set out a number of applicable principles.

> "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 such as is that found in Order 64 rule 7 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;
> (2) when the time-limit has expired, the extent to which the party applying is in default;
> (3) the effect on the opposite party of granting the application and, in particular, whether he can be compensated by costs;
> (4) whether a hearing of the merits has taken place or would be denied by refusing an extension;
> (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
> (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."

[11] The temptation to analyse the application to extend time by reference to the evaluation of each of these issues should, however, be resisted. The broad nature of the exercise required in considering whether to accede to such an application was captured in the conclusion of the judgment.

> "If we had left the case here my view would undoubtedly have been that the delay had not been satisfactorily explained and, that all the more so because there had been a hearing on the merits (which must, judged by the very exhaustive and obviously careful written decision, have been both full and painstaking), the application should be refused.
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> We decided, however, that in order to do justice it would be better to find out the strength of the appellant's case, so far as it was founded on points of law and therefore remained capable of being pursued by way of case stated. We therefore discussed the legal merits of the case in some detail …..It is not, however, necessary to expatiate on this branch of the case, if only because it may come before this court in another guise. I am content to say that nothing emerged to make me feel that justice demanded an extension of time in face of the principles to which I have already adverted."

[12] The applicant submits that the breach of Article 8 was the dismissal of the applicant's objection to the Seizure Orders. Baroness Hale gave useful guidance on the structured approach to the determination of a breach of Article 8 in <u>H (H) and others v Deputy Prosecutor of the Italian Republic of Genoa and others</u> [2010] UKSC 25 at paragraph 30.

> "….the court would be well advised to adopt the same structured approach to an article 8 case as would be applied by the Strasbourg court. First, it asks whether there is or will be an interference with the right to respect for private and family life. Second, it asks whether that interference is in accordance with the law and pursues one or more of the legitimate

> aims within those listed in article 8.2. Third, it asks whether the interference is 'necessary in a democratic society' in the sense of being a proportionate response to that legitimate aim. In answering that all-important question it will weigh the nature and gravity of the interference against the importance of the aims pursued. In other words, the balancing exercise is the same in each context: what may differ are the nature and weight of the interests to be put into each side of the scale."

[13] The applicant states that the BMW motor vehicle allows himself and his wife to enjoy family life together outside the home. He accepts, however, that both he and his wife benefit from the mobility element of Disability Living Allowance and that each of them has a Motability vehicle. In each case the leases on the vehicles have been extended, in the case of the applicant's Citroen estate to the end of 2014 and in the case of his wife's Ford Mondeo to February 2015. Disability Living Allowance is a significant mechanism by which the state recognises its positive duty to those who suffer from mobility difficulties. Although the applicant expresses his dissatisfaction with the vehicle available to him under the Motability scheme he retains the advantages of that scheme which arguably satisfies the positive duty to ensure respect for private life in this case.

[14] If the applicant gets over that hurdle there is no doubt that the interference is on foot of a court order flowing from a regularly obtained judgment and is in accordance with law. The interference of which the applicant complains pursues the legitimate aim of ensuring that those who have the ownership of property should have possession of that property transferred to them if they so wish.

[15] If this case gets to proportionality we consider that the availability of the disability living ability arrangements from which the applicant is now benefiting represents a material positive step on the part of the state to ensure respect for private life in the circumstances. Any interference which the applicant might be able to establish would be modest when compared to the property rights of those entitled to the benefit of the judgment.

[16] The submission in respect of the caravan adds little to the applicant's proposed case. There is no medical or independent evidence to suggest that the overnight arrangements which he adopts when due to visit the hospital have any appreciable effect on his medical treatment or condition. This use of the caravan apparently occurs once or twice a month. The evidence does not indicate that the interference is substantial.

Conclusion

[17] The period in default in this case is substantial. There is no issue of general importance arising in this application. There has been a hearing on the merits and it is clear from the notes that the Master has taken into account the personal circumstances upon which the applicant relies. We have taken into account the general merits of the appeal and do not consider that there is an arguable case with a reasonable prospect of success. For those reasons we refuse leave to extend time for appeal.