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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (COMMERCIAL)

Between:

J P MURPHY LIMITED

Plaintiff/Appellant:

AND

DAVID DOWNEY AND MICHAEL DOWNEY

Defendants/Respondents:

Before: Keegan LCJ and Rooney J

ROONEY J

Delivering the judgment of the court

[1] The plaintiff/appellant seeks leave to appeal the decision of McCloskey LJ [2020 NIQB 6] in which the learned judge refused the plaintiff/appellant's application for (a) specific discovery; and (b) leave to serve a *Khanna* subpoena for discovery.

[2] The defendants/respondents argue that McCloskey LJ was correct to dismiss the plaintiff/appellant's application for discovery and that the test for leave to appeal has not been satisfied. Even if leave to appeal is granted, it is submitted that the appeal should be dismissed on the basis that the decision was within the discretion of the judge and that it cannot be shown that it was plainly wrong.

[3] Mr Philip McEvoy BL, in most comprehensive submissions on behalf of the defendants/respondents, also seeks to persuade the court that the appeal should be dismissed on the basis that a director of a company, who is not an employee of the company, cannot apply for leave to represent the company in any proceedings. We do not consider it necessary to make any decision with regard to this argument. Master Bell granted leave to Mr Murphy to represent the plaintiff. On appeal, Sir Richard

McLaughlin also granted leave conditional upon security for costs. Furthermore, the issue was not raised before McCloskey LJ.

Background

[4] In order to fully analyse the issues for consideration, it is necessary to set out in some detail the nature of the plaintiff/appellant's substantive claim, the background circumstances relevant to the plaintiff/appellant's application for discovery and the chronology of hearings before the Master of the High Court.

[5] The plaintiff/appellant, J P Murphy Limited, trading as JPM Consulting Engineers, brought proceedings against the defendants/respondents claiming a liquidated sum totalling £129,986·29. The plaintiff/appellant alleges that the said sum is for professional engineering fees owed by the defendants/respondents to the plaintiff/appellant and arising out of an agreement between the parties in respect of a proposed new multi-storey hotel development at Trevor Hill, Newry, Co. Down. The plaintiff/appellant alleges it was appointed by the defendants/respondents as part of a designated design team comprising a number of related professional consultancy firms. As the appointed consulting engineers, the plaintiff/appellant alleges that it engaged in a considerable amount of work on the project, to include completion of inspections and structural surveys, designs for related site development works and the structural designs for the development of the proposed new hotel project. The plaintiff/appellant claims that its fee was an agreed percentage of the overall project costs.

[6] A Specially Indorsed writ of Summons was issued on 14 August 2014. On 11 August 2015, the plaintiff/appellant posted letters to the defendants/respondents enclosing writs by first class recorded mail. When the defendants/respondents failed to enter an Appearance, the plaintiff/appellant obtained a default judgment for the said liquidated sum.

[7] The defendants/respondents, by a summons dated 28 September 2015, sought the following forms of relief. Firstly, an order pursuant to Order 19, rule 9 of the Rules of the Court of Judicature (NI) 1980 setting aside the judgment in default. Secondly, an order pursuant to Order 12, rule 8 setting aside the writ and/or purported service thereof on the ground that the writ had expired before service. Thirdly, a declaration pursuant to Order 12 that the writ had not been served on the defendants/respondents.

[8] The defendants/respondents' applications for the said relief were grounded on the affidavits of the defendants/respondents sworn on 24 September 2015. Both defendants/respondents aver that the Writ of Summons was issued on 14 August 2014 and that they were advised by their solicitor that the date of expiry of the Writ of Summons was 13 August 2015.

[9] In an affidavit, sworn by Mr Murphy on 19 January 2016, it is averred that the writ was contained in an envelope and sent by recorded delivery to both defendants/respondents on 11 August 2015. By reference to a document from the Royal Mail, Mr Murphy claims that the writ was received and signed for by "Downey" at the home address of the first defendant/respondent at 10.09 a.m. on 12 August 2015. In his

affidavit, Mr Murphy states that Royal Mail failed to obtain the required signature confirming receipt of the letter containing the writ to the second defendant/respondent at his home address on 12 August 2015. However, Mr Murphy states that since both letters containing the writs were sent by recorded delivery on 11 August 2015 at the same time, and that they were processed at the same Royal Mail office, it is reasonable to conclude that both letters would have been delivered and received by the defendants/respondents on the same day, namely, 12 August 2015.

[10] In his affidavit dated 24 September 2015 the first defendant/respondent accepts that the letter containing the writ was delivered to his house on 12 August 2015. However, he denies opening the letter until 18 August 2015. In a second affidavit sworn on 29 April 2016, the first defendant/respondent avers that the recorded signature on the Royal Mail device did not match his or his wife's signature. However, he was unable to say who signed for the delivery.

[11] The second defendant/respondent in his affidavit dated 24 September 2015 stated that the letter containing the writ "was left in an external post box at the gates of [his] property [and that he] would not check the post box on a daily basis." The second defendant/respondent then claims that he did not collect the letter until 15 August 2015. On receipt of the writ, the second defendant/respondent does not state that he contacted his brother promptly. Rather, the second defendant/respondent avers that he discussed the matter with the first defendant/respondent on 18 August 2015 (3 days after he received the writ) and asked him to look after it.

[12] Pursuant to salient observations made by the Mr Murphy in his affidavit dated 19 January 2016 in which he referred to photographs of the second named defendant/respondent's property, the second named defendant/respondent provided a further affidavit dated 29 April 2016 in which he claimed that he had made an error in his previous affidavit and that the post box was in fact at the front door of his property and not outside the external gates of his property as previously alleged. In this regard, Mr Murphy plainly attacks the credibility of the second defendant.

[13] In response to the plaintiff/appellant's claim for its professional fees for works completed by it arising out of an agreement between the plaintiff/appellant and the defendants/respondents, the first defendant/respondent states the following in his affidavit dated 24 September 2019:

> "11. Moreover I say that I and the second defendant have a full defence to the plaintiff's claim. We had plans to build a hotel and we were advised by an architect that advice from an engineer was required. While there was some preliminary contact with the plaintiff, the project did not go ahead and in those circumstances no fee was or is due. I am unaware of any contract or letter of engagement.
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> 12. Furthermore, if, which is denied, the plaintiff is entitled to some monies in respect of this aborted project, the quantum

> of same would be at the very most a very small fraction of the amount claimed. In those circumstances, I say that the judgment should be set aside to allow the defendants to contest liability and quantum."

[14] The first defendant/respondent's explanation for his failure to enter an appearance to the plaintiff/appellant's Writ of Summons was that he "did not take it too seriously." In responding affidavits, Mr Murphy raises real and pertinent concerns as to the first defendant/respondent's complacent attitude to receipt of a writ issued by the High Court.

[15] The first defendant/respondent also alleged in his affidavit dated 29 September 2015 that he did not receive a pre-action letter of claim from any solicitor. Attached to Mr Murphy's replying affidavit dated 19 January 2016, there is a copy of a letter written to the defendants/respondents advising them of the plaintiff/appellant's intention to issue court proceedings if the matter was not addressed within seven days.

[16] The plaintiff/appellant obtained a default judgment against the defendants/respondents on 14 September 2015.

[17] As highlighted by McCloskey LJ, a lengthy delay then ensued of almost two years.

[18] Master Bell, after some adjournments, fixed a date for hearing on 23 June 2017. On the said date, following no appearance on behalf of the plaintiff/appellant at the appointed time, Master Bell made an order setting aside the default judgment obtained by the plaintiff/appellant on 14 September 2015. Master Bell also granted the defendants/respondents leave to enter conditional Appearances and adjourned the application to set aside the writ.

[19] The plaintiff/appellant did not appeal the decision of the Master dated 23 June 2017. This court was advised by Counsel for the defendants/respondents that nothing turns on the plaintiff/appellant's failure to appeal the said order of the Master.

[20] The relevant summons seeking the relief sought was listed before Master Bell on 14 September 2017. Following a contested hearing, Master Bell granted the defendants/respondents' application to set aside service of the writ pursuant to Order 12, rule 8. Master Bell also granted the defendants/respondents' application to set aside the judgment dated 14 September 2015. It is not clear why the learned Master considered such an order necessary, having already granted the said order on 23 June 2017. We were advised by Mr McEvoy BL, counsel for the defendants/respondents, that no oral submissions were made on behalf of the parties regarding the application to set aside the default judgment. Mr Paul Murphy was granted leave by the court to represent the plaintiff company. The court also ordered that the plaintiff/appellant should pay the defendants/respondents' costs.

[21] The plaintiff/appellant issued a Notice of Appeal on 25 September 2017 challenging the Order of Master Bell dated 14 September 2017.

[22] On 12 February 2018, the defendants/respondents brought an application for security for costs in respect of the plaintiff/appellant's appeal. On 13 April 2018, Sir Richard McLaughlin granted leave for the plaintiff/appellant to be represented by Mr Murphy conditional upon security for costs being lodged in court. On 9 May 2018, security for costs was paid into court on behalf of the plaintiff/appellant.

[23] On 11 May 2018 the plaintiff/appellant brought an application for discovery against third parties pursuant to Section 32 of the Administration of Justice Act 1970. This application was dismissed by Master Bell with costs to the defendants/respondents.

[24] On 9 May 2019, the plaintiff/appellant issued an application for specific discovery and for leave to issue *Khanna* subpoenas. On 14 January 2020, following a contested hearing, McCloskey LJ dismissed the plaintiff/appellant's application for discovery and leave to issue *Khanna* subpoenas and subsequently awarded costs to the defendants/respondents.

[25] The issue for determination for this court is whether it should grant leave to the plaintiff/appellant to appeal the interlocutory order of Lord Justice McCloskey.

[26] It is worth pausing at this juncture to highlight that the plaintiff/appellant's appeal against the order of Master Bell dated 14 September 2017 remains undetermined. Accordingly, the substantive claim remains in abeyance. On 14 January 2020, McCloskey LJ ordered the plaintiff/appellant to lodge an appeal bundle with regard to the appeal against the Orders of Master Bell dated 14 September 2017. To date, this appeal remains outstanding. The court will return to this matter later in the judgment.

The plaintiff/appellant's application for discovery

[27] The plaintiff/appellant is seeking the following orders:

(a) Firstly, the plaintiff/appellant seeks an order for discovery of "all relevant papers and documents in the possession and/or power of the second defendant/respondent, due to their ready availability from other parties who/which have confirmed their possession of same, parties that are obliged to furnish the defendants/respondents with same on request."

(b) Secondly, the plaintiff/appellant seeks an order for leave to serve a *Khanna* subpoena for the discovery or provision of "relevant papers and documents from those persons or companies not party to the proceedings but who or which had possession of same."

[28] At para [7] of his judgment, McCloskey LJ stated that he would treat the plaintiff/appellant's application as an application for discovery of specific documents pursuant to Order 24, rule 7 of the Rules of the Court of Judicature. McCloskey LJ was correct to do so. The law is clear. Documents are only discoverable which are relevant to the issues raised with regard to the appeal. As stated by McCloskey LJ at para [7]:

> "I have drawn attention to the current litigation context because the court is obliged to apply a test of relevance in determining this application. Thus, the primary and fundamental question becomes: to what issue or issues do the documents pursued by the Plaintiff relate? Does the plaintiff's application identify any material issue or issues in the still undetermined appeal against the Master's order which can be linked with the documents pursued by this application?"

[29] It is clear that the documents requested by the plaintiff/appellant are clearly relevant to the issues in the substantive claim and will be properly discoverable. However, with regard to the subject matter of this appeal, this court agrees with the observations made by McCloskey LJ at para [8] of his judgment.

[30] During the course of this hearing, it was established that the reasoning behind the plaintiff/appellant's application was to establish that it had been formally retained by the defendants and was owed the amount claimed for services rendered. This court observes that, in Mr Murphy's affidavit dated 26 June 2016, the plaintiff/appellant was already in possession of documents, drawings and photographic records which confirm its appointment by the defendants and the extent of the works completed by it in relation to the project for the defendants. The affidavit also states that it was the intention of the plaintiff "to call relevant co-members of the design team to testify to our appointment and our role on that project and to verify the extent of the works which we completed prior to our summary dismissal by the defendants."

[31] Pursuant to Order 19, rule 9, the court has a discretion, "on such terms as it thinks just", to set aside or vary any judgment. Master Bell was clearly in possession of the said affidavit from Mr Murphy and the documents exhibited thereto when he made his decision to set aside the default judgment. Essentially, in considering whether to set aside a default judgment, the issue for the court is whether the applicant can show that he has real prospects of a successful defence or some other good reason to set the judgment aside. If he does, the discretion of the court will be exercised in the light of all the circumstances and the overriding objective of the Rules to enable the court to deal with cases justly and at proportionate cost. See *Melanie Stanley v London Borough of Tower Hamlets* [2020] EWHC 1622 (QB).

[32] The motivating factor behind this application for discovery, prior to the close of pleadings, was in effect to attack the credibility of the defendants regarding service of the writ. In affidavits sworn by Mr Murphy and in his detailed submissions, he has raised relevant and pertinent concerns which relate to the truthfulness of the accounts given by the defendants/respondents and their averments contained in their affidavits sworn on 24 September 2015 and 29 April 2016. It is the decision of this court that the documents sought by the plaintiff are not relevant to this issue. However, as emphasised in para [42] below, it will be a matter for the learned High court judge assigned to the appeal from Master Bell to assess the credibility of the parties in relation to this crucial issue. The court may, in the exercise of its discretion, direct the discovery of documents which has the potential to attack allegations made by the parties or to undermine averments in affidavits. The court may also, in the exercise of its inherent jurisdiction, require

witnesses to provide oral testimony in support of allegations made and to permit cross examination of those witnesses.

Leave to Appeal

[33] Section 35(2) of the Judicature (Northern Ireland) Act 1978 provides, where relevant, as follows:

> "(2) No appeal to the Court of Appeal shall lie-……….
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> (g) without the leave of the judge or of the Court of Appeal, from any interlocutory order or judgment made or given by a judge of the High Court, except in the following cases namely:
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> (i) where the liberty of the subject or the residence of or contact with minors is concerned;
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> (ii) where an injunction or the appointment of a receiver is granted or refused;
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> (iii) in the case of a decision determining the claim of any creditor or the liability of any contributory or the liability of any director or other officer under the Companies Acts (as defined in section 2 of the Companies Act 2006 in respect of misfeasance or otherwise;
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> (iv) in the case of a decree nisi in a matrimonial cause, a conditional order in a civil partnership cause or a judgment or order in an admiralty action determining liability;
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> (v) in such other cases as may be prescribed being cases appearing to the Rules Committee to be of the nature of final decisions."

[34] As the matter under appeal is an interlocutory order (as opposed to a final order), and does not fall within any of the exceptions appearing at (i) to (vi) of section 35(2)(g) above, and since leave has already been refused by the judge, the appellant requires the leave of the Court of Appeal to mount this appeal.

[35] The test for leave to appeal is whether there is an arguable case with a reasonable prospect of success or there are other compelling reasons why leave should be given. In *Ewing v Times Newspapers Ltd* [2013] NICA 74, Morgan LCJ stated:

> "[17] This court has held in McNamee and McDonnell's

> Application (leave stage) [2011] NICA 40 that the test for leave is generally whether the applicant has an arguable case with a reasonable prospect of success. We accept that there may be cases where there is some compelling reason to give permission to appeal despite the fact that this test is not met. We accept the appellant's submission that the test is no different from that set out in *Smith v Cosworth Casting Processes Ltd* (Practice Note) [1997] 1 WLR 1538 by Lord Woolf:
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> > '1. The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.
> >
> > 2. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying.'"

[36] For the reasons stated above, this court concludes that the appellant does not have an arguable case with a reasonable prospect of success. The decision of the learned Judge to dismiss the discovery applications was based on sound legal reasoning and entirely within his discretion to reach.

[37] There is no other reason why leave should be granted. Specifically, there is no public interest to be addressed and the case does not raise an issue where the law requires clarifying.

Review of a discretionary decision

[38] The defendants/respondents submit that the Court of Appeal should only intervene in cases involving the exercise of a lower court's discretion where the exercise of such discretion had been in such a manner as to be plainly wrong and not because it would have preferred the discretion to be exercised in a different way.

[39] In *HSBC Bank plc v Robinson and another* [2020] NIJB 71, [2017] NICA 64, Stephens LJ stated as follows;

> "[28] An appeal will not be entertained from an order which it was within the discretion of the judge to make unless it be shown that he or she exercised discretion under a mistake of law (*Evans v Bartlam* [1937] 2 All ER 646, [1937] AC 473) or in disregard of principle (*Young v Thomas* [1892] 2 Ch 134) or under a misapprehension as to the facts, or that he or she took into account irrelevant matters (*Egerton v Jones* [1939] 3 All ER 889 at 892) or failed to exercise his or her discretion (*Crowther v Elgood* (1887) 34 Ch D 691 at 697) or the conclusion which the judge reached in the exercise of his or her discretion was 'outside the generous ambit within which a reasonable disagreement is possible' (*G v G* [1985] 2 All ER 225, [1985] 1 WLR 647)."

[40] In *Flynn v Chief Constable of the Police Service of Northern Ireland*[1] [2017] NICA 13 which involved an appeal from the decision of a first instance judge regarding specific discovery, Keegan J stated:

> "[22] This is an appeal from an interlocutory order. As such a considerable discretion is placed with the trial judge. We note the recent dicta in *DB v Chief Constable of Police Service of Northern Ireland (Northern Ireland)* [2017] UKSC 7, [2017] NI 301 (at [80]) wherein Lord Kerr states as follows:
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>> '[80] On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in Anderson that the first-instance trial should be seen as the "main event" rather than a "tryout on the road" has resonance even for a case which does not involve oral testimony. A first-instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she had reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral

[1] [2017] NICA 13

> evidence has been given, remains cogent. In the present appeal, I consider that the Court of Appeal should have evinced a greater reluctance in reversing the judge's findings that they appear to have done.'

> [23] It follows from this that caution should be exercised when the application is to upset an order of the lower court, even where no oral evidence has been heard. We are particularly guided by the fact that the learned judge applied a considerable attention to the issues in this case demonstrated by the careful judgment that he delivered.
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> …
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> [26] It cannot be said that the decision of the learned Judge herein was plainly wrong. He did not exercise his discretion under a misapprehension of the facts or a mistake in law. He did not take into consideration irrelevant matters or facts. He applied the relevant test for discovery and was entitled, in the exercise of his discretion, to come to the conclusion that the documentation sought by the plaintiff had no relevance to the issues to be determined by the Master, namely whether the Master was correct to set aside the default judgment and the service of the writ. Also, the plaintiff's application did not lay the foundation for a prima facie case that the specified documents are, or were, in the defendants' custody, possession or power."

Conclusion

[41] For the reasons given, leave to appeal is refused.

Case Management

[42] As highlighted above in para [23], the plaintiff/appellant's appeal against the order of Master Bell dated 14 September 2017 remains undetermined. It is imperative that this appeal is listed before the High Court without further delay.

[43] It is clear from the summary of the background circumstances at paras [2] to [21] above, the crucial issue for determination is whether the Writ of Summons was served on the defendants/respondents on or about 12 August 2015 and certainly prior to expiry of the writ on 13 August 2015. Mr Murphy, on behalf of the plaintiff/appellant and in his comprehensive submissions has raised real and salient concerns with regard to the credibility of the defendants/respondents and their averments contained in their affidavits sworn on 24 September 2015 and 29 April 2016.

[44] Plainly, it is a matter for the learned High Court Judge to assess the credibility of the parties in relation to this crucial issue. This court makes the observation that, pursuant to the overriding objective pursuant to Order 1 rule 1A of the Rules of the Supreme Court of Judicature (Northern Ireland) 1980, the learned judge will ensure that cases are dealt with justly. The appeal is a complete rehearing and the court has a wide discretion to admit new evidence and to hear oral evidence. Accordingly, in the exercise of his/her discretion, the learned High Court Judge has the power to require relevant witnesses to give evidence. The court may, in the exercise of its discretion, direct the discovery of and thereafter admit documentary evidence which casts doubts on the allegations made by the parties or undermines averments in affidavits or has the potential to impeach the truthfulness and accuracy of the testimony of witnesses.

[45] Whereas, as observed, it is entirely a matter for the discretion of the court assigned to hear the appeal against the order of Master Bell, the circumstances as alleged in the affidavits are likely to require careful scrutiny and the necessity to hear oral testimony.