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2013/107426

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

ARTHUR BOYD and JOHN HANSEN
(AS JOINT SUPERVISORS OF THE PRESBYTERIAN MUTUAL SOCIETY LIMITED (IN ADMINISTRATION) AND SCHEME OF ARRANGEMENTS)
Plaintiffs/Respondents

and

JOHN HEGARTY
Defendant/Appellant

_____

McBRIDE J

Introduction

[1] This is an application by the defendant/appellant ("the appellant") for an extension of time to bring an appeal pursuant to Order 5 Rule 3 of the Rules of the Court of Judicature (Northern Ireland) 1980. The applicant seeks to appeal an order made by Master Hardstaff on 23 September 2014 when he:

> "… declared that the monies secured by the deposits including interest and thereon in accordance with the facility letters and the costs hereinafter mentioned are well-charged on the defendant's interests in the said lands,
> IT IS ORDERED that upon the defendant within 93 days from the service of this Order paying to the plaintiff £89,000, the plaintiffs do deliver up (upon oath if required) all deeds and writings in the plaintiff's custody or power relating to the said lands to the defendant or to

whom they shall appoint and execute a vacate or release of the notices of deposit,

AND in default of payment to the plaintiffs of the said monies as aforesaid within the said time,

IT IS ORDERED as follows:

(i) The defendant shall forthwith deliver to the plaintiffs possession of the said lands …

AND IT IS ORDERED as follows:

(i) The plaintiffs are entitled to the costs of this application …"

[2] The appellant was represented by Mr McCausland of counsel and the plaintiffs/respondents ("the respondents") were represented by Mr Michael Neeson of counsel. I am grateful to both counsel for their well-researched and clearly presented skeleton arguments.

History of Proceedings

[3] As appears from the various affidavits filed by the parties the history of the proceedings is as follows:

(a) On 21 October 2013 the respondents issued an originating summons seeking possession of the lands comprised in Folios AN12678 and AN12677 and 5975 Co Antrim. These folios comprise a dwelling house and agricultural lands ("the lands").

(b) The originating summons was grounded on an affidavit sworn by Cahal Maurice Carvill, solicitor in Arthur Cox Solicitors, on 18 December 2013. He averred as follows:

> (i) On 26 January 2007 Presbyterian Mutual Society Limited ("PMS") sent a facility letter to the appellant offering him a bridging loan of £800,000 towards the purchase of a 59 acre farm with two dwellings at Killycowan Lane, Glarryford, the redemption of a bank overdraft (£30,000) and a mortgage (£70,000). This loan was approved on the following terms:
>
> > 1. Repayable over a maximum period of 1 year with interest only payable on the capital

balance outstanding at the current Bank of England base rate, plus 2%.

2. The loan is to be secured by way of an undertaking from your solicitor to hold the title deeds of the property being purchased together with the title deeds of your farm of 37 acres including the house, yard and a building site at 9 Inshinagh Lane, Bendorragh, Ballymoney, to the order of the Society pending repayment of the loan.

(ii) The appellant entered into a facility agreement with the PMS on 26 January 2007 and the PMS advanced £89,000. As evidence of this he refers to exhibits which consist of two letters dated 2 January 2007 and 18 April 2008.

(iii) Letter, in error, dated 2 January 2007 rather than 2 January 2008 was sent to the appellant's solicitors and provided as follows:

> "Please find enclosed a copy of our original letter of offer dated 26 January 2007.
>
> As an interim arrangement the Society is prepared to redeem the mortgage of £70,000 and the bank overdraft of £30,000 using the applicant's farm of 37 acres including the house, yard and building site at 9 Inshinagh Lane, Bendooragh, Ballymoney.
>
> Please forward your undertaking over the property and confirm the total amount required to redeem the mortgage and overdraft."

(iv) On 4 January 2008 the appellant's solicitors granted undertakings to the PMS to hold the original land certificates relating to the lands as security for all present and future monies due and owing from the appellant to PMS. This letter was not exhibited to the affidavit.

(v) On 18 April 2008 PMS wrote to the appellant as follows:

> "I am pleased to inform you that your application for a bridging loan of £15,000 towards the purchase of the site lines has been approved on the following terms:
>
> 1. Repayable over a maximum period of 1 year with interest only payable on the capital balance outstanding at the current Bank of England base rate, plus 2%. … The loan is be secured by way of an undertaking from your solicitor to hold the title deeds of 37 acres including the house, yard and building site at 9 Inshinagh Lane, Bendooragh, Ballymoney.
>
> Please confirm whether or not these terms are acceptable, and if so, please instruct your solicitor to forward their undertaking directly to this office and advise me when the funds are required …"

(vi) On 28 April 2008 the appellant's solicitors granted undertakings to PMS to hold the original land certificates of the lands as security for all present and future monies due and owing by the appellant. This letter is not exhibited to the affidavit.

(vii) On 26 January 2012 and 11 February 2013 the respondents provided the original land certificates to Arthur Cox, solicitors who then had Notices of Deposits executed and registered against the relevant land certificates in respect of the lands.

(ix) On 4 July 2013 the respondents were appointed as joint supervisors of a Scheme of Arrangement between PMS and its creditors and members pursuant to Section 899 of the Companies Act 2006.

(x) On 9 August 2013 a demand was made to the appellant for arrears of payment due under the equitable charge.

(xi) As of 18 December 2013 the amount due and owing by the appellant to the respondent was £90,306.82.

(c) The appellant in his replying affidavit sworn on 18 September 2014 accepted that a letter dated 2 January 2007 was sent to his solicitors and on foot of it his solicitors, on 4 January 2008, gave the relevant undertakings for title documentation in respect of his property to be held on trust for the loan which was being advanced in the sum of £89,000. He took issue with the calculation of interest and put the respondents on strict proof of the sums claimed. He further enclosed a "Mallett Letter" together with proposals to repay the debt and asked the court, in its discretion to either adjourn the case to permit him to sell part of the lands and/or in the alternative to suspend any order for possession to allow him to discharge the monies due and owing from the sale proceeds.

(d) On 23 September 2014 Master Hardstaff made the Order for Possession ("possession order").

(e) On 20 January 2015 the Master gave the respondents liberty to enforce the possession order.

(f) On 9 June 2015 the appellant made an application to stay the possession order on the basis of a proposed refinance by a third party and sale of sites on the lands. The appellant was represented by Housing Rights Service, counsel and solicitors. This application was dismissed on 2 February 2016.

(g) On 30 May 2016 the appellant tendered a cheque for the principal sum due under the mortgage. This cheque was not honoured.

(h) On 13 June 2016 the appellant issued a further application for a stay of enforcement of the possession order. This application was dismissed on 14 June 2016. This time the appellant had assistance from a common law group otherwise known as "Sovereign Men".

(i) On 16 June 2016 the respondents attempted to take possession of the lands but were prevented from doing so by the appellant who blocked access to the lands.

(j) On 15 June 2016 the appellant appealed Master Hardstaff's decision dated 14 June 2016 when he refused to grant a stay of enforcement of the possession order.

(k) On 25 October 2016 Horner J dismissed the appeal.

(l) On 7 November 2016 the appellant filed a further application requesting the Chancery Master to set aside the possession order. This application was dismissed by Master Hardstaff on 8 February 2017. At that hearing the appellant had again enlisted the assistance of the common law group. This decision was not appealed.

(m) The appellant issued a writ against the respondents in September 2016. The action was struck out on 3 May 2017. During these proceedings the appellant damaged property belonging to a process server and also made threats to kill him. He was convicted of these offences on 30 May 2017.

(n) On 12 April 2017 the appellant applied for a stay of enforcement of the possession order together with a declaration that there was an unfair relationship under the Consumer Credit Act 1974 and further sought a variation of the credit agreement.

(o) On 20 November 2017 Master Hardstaff ordered that the respondents were at liberty to enforce the possession order.

(p) On 24 November 2017 the appellant appealed this decision.

(q) At a review hearing on 23 February 2018 it was agreed that, in order for the appellant to properly ventilate the issues he wished to raise it was necessary for him to seek to appeal the possession order out of time. The court made the necessary directions and on 2 March 2018 the appellant lodged an appeal against the possession order and applied for an extension of time to bring the appeal.

[4] The present hearing relates to the question whether the court should extend time for appeal.

Evidence in respect of extending time

[5] The appellant's application was supported by affidavits filed by him sworn on 2 March 2018 and 2 May 2018. The respondents filed a replying affidavit sworn by Mr Carvill, solicitor, on 6 April 2018.

[6] As appears from the appellant's affidavit evidence he seeks to explain the delay from the date of the possession order until 2016 on the basis that he initially understood he had lost his case and therefore made attempts to satisfy the respondent's claim. It was only in 2016 that he learned that the possession order was a consent order. Although the respondents state it was made on consent there is no reference to that on the face of the order. The appellant avers that if he had known it was a consent order he would have immediately taken steps to have it set aside as he never consented to the making of the possession order. After he became aware it was a consent order he averred that there was further delay because he suffered ill

health and had no-one to advise him of his right to appeal. At that time he was a litigant in person and only had the assistance of the common law group.

[7] The respondent avers that the appellant's application is another attempt by him to frustrate enforcement of its order for possession. They refer to his affidavit filed on 18 September 2014 and aver that the case now being made by the appellant was not made by him when the possession order was made. The respondents further aver that the possession order was an agreed order consequent upon negotiations between the parties. They further aver that the appellant knew a consent order had been made prior to 2016 as he was present in court on a number of occasions prior to 2016 when they made submissions to the Master that the possession order was a consent order.

Grounds of Appeal

[8] The appellant seeks to appeal, in summary, on the following grounds:

(a) There was a misrepresentation as to the period of the mortgage.

(b) He never provided or consented to provide security for the loan.

(c) There was an unfair relationship as PMS did not investigate his income.

(d) The loan was an unconscionable and an extortionate credit agreement.

(e) The lending was negligent.

Appellant's Submissions

[9] The appellant submitted that, in accordance with the principles set out in *Davis v Northern Ireland Carriers [1979] NI 19*, the court should extend time for appeal for the following reasons:

(a) The delay as explained in the appellant's affidavit arose because he lacked knowledge that the possession order was a consent order. Once he learned it was a consent order the further delay arose due to his ill health and lack of proper legal advice.

(b) The respondents can be compensated in costs if the application is granted as the security held by the respondents greatly exceeds the debt owed by the appellant. Therefore no question of negative equity or inability to pay costs arises.

(c) The appellant has never had a hearing on the merits.

(d) The appellant has points of substance to be made, which if the time for appeal was not extended would not otherwise be heard. In particular the appellant wished to make the following points of substance:

(i) The mortgage was entered into on the basis of a misrepresentation

(ii) He never consented to PMS having security in respect of the loan monies advanced.

(iii) There was an unfair relationship between PMS and the appellant.

(iv) The PMS breached lending codes of practice.

(v) The loan was governed by the Consumer Credit Act 1974 and was an extortionate credit agreement and the terms of the credit agreement should be varied by the court.

Respondents' Submissions

[10] The respondents submitted that when all the criteria in *Davis* are considered the application ought to be refused. They submitted that this was a case where there had been significant unexplained delay for a period of 3½ years. Any further extension of time to allow an appeal would lead to further costs and delay and would continue to frustrate the respondents in enforcing the possession order. Insofar as the appellant sought to appeal the possession order on the basis of the merits they submitted that he faced an uphill task as he was now seeking to raise matters which had not been raised initially when the matter was before the Master. They further submitted that in any event the appellant had no points of substance to raise and in these circumstances the important principle was that the rules of court should be observed. Therefore the court ought to dismiss the application.

Relevant Legal Provisions

Time Limits

[11] Order 58 Rule 1 of the Rules of the Court of Judicature (Northern Ireland) 1980 provides:

> "(1) …Except as provided by Rules 2 and 3, an appeal shall lie to a judge in Chambers from any judgment, order or decision of a Master …
>
> (2) The appeal should be brought by serving on every other party to the proceedings in which the judgment, order or decision was given notice to attend before the judge on a date specified in the notice.

> (3) Unless the court otherwise orders, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the date fixed for hearing the appeal."

[12] Order 3 Rule 5 provides that:

> "The 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 these rules, or by any judgment, order or direction, to do any act in any proceedings."

[13] The seminal case on the principles the court should apply when determining whether to exercise its discretion to extend time is *Davis v Northern Ireland Carriers [1979] NI 19*. Lowry LCJ at page 20 set out the following guidelines:

> "(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) to be made 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."

[14] Similarly, in *Data Select Limited v HMRC [2012] UKUT 187* Morgan J in the Upper Tribunal held at paragraph 34 as follows:

> "… As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions."

[15] In *Benson v Morrow Retail Limited (T/A Morrows Super Value) [2010] NIQB 140* Gillen J did not consider that the criteria in Davis:

> "… should be approached artificially as a series of hurdles to be negotiated in succession by an appellant with loss of the right to obtain an extension if he cannot pass any one or more of them. To do so would be to focus too closely on appearance rather than substance. Courts must not fall into the trap of missing the woods for the trees. The central underlying question is always whether in the particular circumstances and in accordance with an overall desire to achieve justice, the discretion ought to be exercised in favour of the appellant."

Discussion

[16] In deciding whether to extend time I consider that it is appropriate to consider each of the factors set out in *Davis* and thereafter in the exercise of my overarching discretion to determine whether it is in the overall interests of justice to exercise my discretion to extend time for appeal.

[17] This is a case where the time for bringing the appeal expired in September 2014. The application was not made until 2 March 2018 and therefore the time limit for bringing the application has expired by a period in excess of 3½ years. This is a very significant period of delay.

[18] The appellant's explanation for the delay is set out in his affidavit evidence. On his own evidence he understood in 2014 that he had lost his case. No explanation is given for his failure to launch an appeal. He had the benefit of legal advice at that time and was not hampered by any difficulty appealing a consent order might have presented as he was unaware the possession order apparently was a consent order. I

further find that his explanation for the delay from 2016 to 2018 is unconvincing. During this period the appellant had the benefit of advice from solicitors, counsel, Housing Rights Service and latterly a common law group. I am satisfied that if he had wished to appeal the possession order he would have been advised accordingly. I further find that all his actions after the possession order was made indicate that he did not wish to appeal but was rather seeking to take steps to comply with the terms of the stay and thus prevent repossession. I therefore find that the appellant has not given any adequate explanation for the very significant period of delay in this case.

[19] The effect of granting the application is to further delay the respondents in enforcing the possession order. This invariably will lead to further costs. I accept however that the respondents can be compensated in costs because the security in this case greatly exceeds the debt. This is a case where the security consists of 37 acres of land together with a dwelling house and the debt is only in the order of £110,000 approximately.

[20] It was accepted by all the parties that there has been no hearing on the merits of the case which the appellant now seeks to make. I am satisfied however that it is not the refusal of an extension of time to appeal which will deny the appellant a hearing on the merits of the case he is now making but rather his actions in not making this case when the possession order was originally made. When he originally filed his affidavit evidence on 18 September 2014, in response to the originating summons, he did not make the case he is now making. His affidavit never averred that there was a misrepresentation, that he did not consent to security for the loan, that there was unfair relationship or that there was otherwise an unconscionable or extortionate consumer credit agreement or that there was negligence in the lending. Rather, in his affidavit he accepted that PMS advanced a loan to him on the basis of a facility letter dated 2 January 2007 and his solicitors thereafter provided the relevant undertakings for title documentation to be held on trust on foot of the advance of £89,000. The only matter the appellant disputed was the calculation of interest.

[21] In accordance with the principles set out in *Ulster Bank Ltd v Esmaili [2017] NICA 63* at paragraph 50:

> "A first instance trial is the "main event" factually rather than a "try out on the road".

Further, as appears from *Bailie v Cruickshank [1995] 6 BNIL 79*, *Lough Neagh Exploration v Morris [1999] NIJB 43* and *AIB Group v McElroy [2011] NICh 8* a party has a duty to put his or her case properly and fully before the Master. This is in accordance with the good administration of justice. I am therefore satisfied that on appeal the appellant would not be permitted to raise the new legal arguments he now makes as he did not raise any of these matters before the Master at the original hearing when the possession order was made. I consider that there are no exceptional circumstances which exist to allow him to now raise new factual and

legal arguments especially as he had representation by solicitor and counsel when he appeared before the Master when the possession order was made.

[22] Hence the reason why there will not be a hearing on the merits of the case the appellant now seeks to raise is because he is seeking to make a new case, one that he never made previously and one that he did not make before the Master even though he could have done so.

[23] In respect of the question whether there is a point of substance to be made I consider that the appellant has no points of substance to make. He submits that he entered into the loan on the basis of a misrepresentation as to the term of the loan. There is no evidence before the court to support such an argument and all the documentary evidence before the court points to the fact that the loan was always for a short-term period. All the facility letters exhibited to the affidavits of both the respondent and appellant refers to a term of one year. Whilst the correspondence in respect of the loan is unsatisfactory in many respects, not least because the letter erroneously dated 2 January 2007 refers to a different loan to the one advanced and the terms on which the loan was advanced are based on an earlier letter which relates to a very different facility, the appellant in his affidavit before the Master did not raise any issue about these matters. Rather he accepted that he obtained a loan from PMS based on the facility letter dated 2 January 2007 and further accepted his solicitors agreed that the title deeds of his lands be held as security for the loan. As appears from the various facility letters the only terms ever offered in respect of advances by the PMS was that the loan would be for a term of one year. I therefore find that he has no arguable case that he entered into the loan on the basis of a misrepresentation made to him by the PMS that the loan was offered on the basis of a term of something in the order of 20 or 25 years.

[24] The appellant further submits that he never consented to security being given for the loan advanced by PMS. In his affidavit before the Master however he accepted that his solicitors gave an undertaking to hold title to the lands as security. The appellant's case now is that he consented to his home but not his farmlands as security for the loan and his solicitors acted contrary to his instructions. If there is a point of substance it is one which the appellant can "otherwise make" as he can bring proceedings against his former solicitors for negligence if they did not act in accordance with his instructions. He does not however have a point of substance to make against the respondents who were entitled to rely upon the security given by the appellant's solicitors as they were acting as the appellant's agents. I therefore find that this is not a point of substance the appellant could not otherwise make.

[25] The appellant's argument in respect of an unfair relationship and negligence, even if correct, would give rise to a claim in damages only. They are not therefore a basis upon which the court could refuse to make a repossession order. I therefore find that there is no point of substance to be made which would not otherwise be put forward. The applicant can put this point forward in other proceedings.

[26] The applicant's final argument was that the loan was an extortionate consumer credit agreement and that there was an unfair relationship between the parties such that the court was empowered to rewrite the terms of the agreement. Notwithstanding the fact that Mr Carvill's affidavit which grounded the originating summons stated that the debt which was secured by the deposit of land certificates did not arise under an agreement regulated by the Consumer Credit Act 1974 the appellant did not take issue with this statement when he filed his replying affidavit. The first time he took issue with this matter was in the present proceedings. The appellant has not provided any evidence in support of this claim. Further, his counsel did not, either in his written skeleton or in oral submissions, seek to set out the factual or legal basis for making such a claim. Given that the appellant is seeking an extension of time the burden is on him to establish that he has a point of substance to make which would not otherwise be heard. I find that he has failed to do so.

[27] On the basis of all the evidence before the court I am satisfied that the appellant has no point of substance to make save points which can be put forward in other proceedings.

[28] The parties agreed that there was no point of general importance.

[29] In respect of the important principle that the rules of court are there to be observed the respondents submitted that the appellant was well aware of the rules of court as he had had the benefit of legal representation by lawyers, Housing Rights Association and the common law group. The respondents further submitted that the appellant in this application was simply attempting to delay and obfuscate matters. This was demonstrated by the fact the appellant had brought a large number of applications to the court. In all there had been 34 appearances before the court. All of the appellant's applications had been dismissed. His actions had led to delay and increased costs incurred by the respondents and further his actions had prevented the respondents enforcing its order.

[30] I accept that the appellant has at times during this sorry saga acted in an ill-advised manner. Initially, he acted sensibly and took legal advice and attempted to pay off the debt. As a result of circumstances beyond his control he was unable to sell sites on the land. Thereafter he then acted in an ill-advised way by taking advice from a common law group which led to a number of baseless applications. I accept however that the appellant was desperate as he faced with the possibility of losing his home and farm.

[31] Nonetheless, I am satisfied that during the period of delay the appellant was well aware of the rules of court and the time limits imposed. At this juncture, after a period of 3½ years and after 34 court appearances the time has come for there to be finality and certainty. As Coghlin J noted in *Lidl (UK) GmbH v Curley's Limited and Seamus Kearney [2002] NICA 16* the principle that rules of court are there to be observed reflects "the important values of certainty and finality which are essential

components of our legal system". Finality and certainty are not only important in this case but are important to the existence of the lending market. It is important that members of the public are aware that possession orders are final and that any appeals against such orders must be brought within the prescribed time limits. Failure to enforce such time limits means there would be a lack of finality and certainty and this could ultimately adversely impact on the willingness of creditors to lend in this jurisdiction. Such action would clearly have a very serious adverse impact on the housing market.

[32] Taking all the factors into account and in particular the important overarching principle that the court should act in the interests of justice I am satisfied that this application be refused. The Court was however struck by the lonely figure the appellant presented. He sat at the back of the court, alone and without any support from anyone from the Presbyterian Church in Ireland, clutching his bible and praying the court would accede to his request to extend time for appeal. Although the court has not acceded to his request it is mindful that the only reason the appellant secured lending was because of his connection with the Presbyterian Church in Ireland. The security for the loan greatly exceeds the debt he owes and in all the circumstances, and in light of the identity of the lending institution it is very surprising that the respondents have been unable to reach an accommodation whereby the possession order can be limited to such lands and or premises as are necessary to secure the principal debt and costs, thereby giving the appellant the opportunity to retain at least part of his farm.

[33] I refuse to extend time for leave to appeal and dismiss the appellant's appeal dated 24 November 2017. That means the only extant application is an appeal from Master Hardstaff in respect of his refusal to grant a stay and his direction that the respondents are at liberty to enforce the possession order dated 23 September 2014. I will hear the parties in respect of trial directions for that appeal.

[34] I will also hear the parties in respect of costs of this application.