[2017] IEHC 448

THE HIGH COURT

2016 No. 47CA

BETWEEN:

FATE PARK LIMITED t/a FINN VALLEY OIL

Plaintiff

– and –

CATHAL McCRUDDEN t/a McCRUDDEN'S FILLING STATION

Defendant

2016 No. 127CA

FATE PARK LIMITED t/a FINN VALLEY OIL

Plaintiff

– and –

CATHAL McCRUDDEN t/a McCRUDDEN'S FILLING STATION

Defendant

JUDGMENT of Mr Justice Max Barrett delivered on 11th July, 2017.

I. Background

(i) Summary Chronology.

1. In September, 2007, Fate Park Oil Limited t/a Finn Valley Oil obtained judgment against Mr McCrudden, in default of appearance and defence, in the amount of €24,641. Subsequently that judgment was registered as a mortgage on certain properties in County Donegal. Thereafter, well-charging proceedings were commenced. At this time, Mr McCrudden had a solicitor on record. But notwithstanding an appearance being entered to the well-charging proceedings, no defence was entered. On 20th April, 2009, the Circuit Court ordered that Fate Park's judgment mortgage was well-charged and made separate order in relation to accounts and enquiries and various other matters. The order was served on Mr McCrudden personally and also on his solicitor. No appeal was lodged against this order within the applicable 10-day timeframe.

2. By notice of motion returnable for 24th May, 2010, application was made to have a named individual appointed as auctioneers to sell property on which the judgment mortgage had been deemed well charged. This notice of motion was duly served on the then solicitors for Mr McCrudden. On 24th May, 2010, the requested order and a related order for recovery of the costs of the application were made. No appeal was lodged against this order within the applicable 10-day timeframe.

3. Notices to attend before the Examiner were served on Mr McCrudden and his then solicitor and a related affidavit for debt of 10th April, 2013, was filed, which affidavit was never challenged. Pursuant to the Circuit Court order of April, 2009, a County Registrar's Certificate on the Results of Inquiry as to Incumbrancers issued on 13th February, 2015. This was adopted, received and made a rule of court by the Circuit Court on 24th March, 2015. There was no appearance in court by or on behalf of Mr McCrudden on that date. No appeal was lodged against this order within the applicable 10-day timeframe.

4. By notice of motion of 22nd June, 2015, Mr McCrudden sought to have the judgment of 24th March, 2015 set aside. Suffice it for the purposes of this summary chronology to note that the Circuit Court, on 21st July, 2015, affirmed its order of 24th March, 2015. That order of July, 2015 was not appealed within the applicable 10-day timeframe.

5. By notice of motion of 4th February, 2016, returnable on 11th February, 2016, an application was made by Mr McCrudden seeking to re-enter the matter for the purposes of a clarification of orders that already existed in relation to costs. On 11th February, 2016, the Circuit Court made an order for the costs of all of the applications in the action to date. Mr McCrudden appears to consider the 10-day timeframe for appeal against this order to afford him an opportunity to challenge the entirety of the various Circuit Court applications and every order made in the course of same. Thus, by notice of motion of 2nd March, 2016, he has sought to appeal all the orders of the Circuit Court from September, 2007 onwards. (Proceedings No. 2016/47 CA).

6. Separately, by notice of motion of 9th June, 2016, Mr McCrudden has sought an order extending the time for service of the notice of appeal against the judgment of the Circuit Court of September, 2007, and all subsequent orders granted as a result of same (Proceedings No. 2016/127 CA).

(ii) The Basis of Mr McCrudden's Applications.

a. Application 2016/47 CA.

7. In an affidavit of 2nd March, 2016, Mr McCrudden avers, *inter alia*, as follows in respect of this application (which, it will be recalled, rests on the issuance of the Circuit Court order regarding costs on 11th February, 2016):

> "*3. I say that I did lodge the notice of appeal in the Circuit Court Office…Letterkenny…on the 18th February, 2016* [a copy of same, date-stamped 18th February, 2016 by the Court Office, is exhibited]….
>
> *4. I say that the aforesaid notice of appeal was served on the plaintiff….*
>
> *5. I say that the Circuit Court office must have transmitted the documents lodged…to the High Court, because I received a letter stating that the time for appeal had passed….*

6. I say it was my full intention to appeal these proceedings within the appropriate timeframe[….H]owever it was by error that the appeal was lodged in the Circuit Court office…I was following the rules of the superior courts order 61(4), which I believed to be the correct procedure...".

8. In later affidavit evidence provided in the course of the application concerning Proceedings No. 2016/47CA, Mr McCrudden makes largely, albeit not exactly, the same points as are averred to in the affidavit of 9th June, 2016, to which reference is made below in the court's consideration of Proceedings No. 2016/127CA.

c. Proceedings No. 2016/127CA.

9. In an affidavit of 9th June, 2016, Mr McCrudden avers, *inter alia*, as follows in respect of this application:

> *"3. I say that the result of the Circuit Court proceedings was a judgment in default of appearance/defence [on] 3rd September 2007*
>
> *4. I say that I was never served the civil bill for the above proceedings, and therefore never given a true opportunity to defend same, thus I believe it to be a breach of due process.*
>
> *5. I say around the time of the 2007 judgment, a member of staff from An Post had been signing for registered letters without my consent, without delivering the said letters to me. This may be irrelevant as I feel that service wasn't even attempted at any stage.*
>
> *6. I say that I have a full defence for the matter, firstly on the basis that I did not received any of the goods claimed for and secondly that the invoices did not duly constitute a bill of sale and[/]or any contract.*
>
> *7. I say that I only became aware of the judgment in 2008 when well charging proceedings were issued, this was a shock and surprise, I immediately contacted my then solicitor Mr Shiel and he entered an appearance on these proceedings.*
>
> *8. I say that I did contact the aforementioned solicitor to appeal the order and was advised not to appeal as he would sort it out, and advised that a settlement would cost less than the proceedings.*
>
> *9. I say that it was always my intention to appeal this judgment but due to exceptionally bad advice received from by then solicitor…I did not….*[H]*owever the process of obtaining information to ground an appeal was started. Therefore the plaintiff was aware from 2008 on discovery of the judgment that it was my intention to appeal. I however was not privy to this information until very recently.*
>
> *10. I say that I could not appeal these proceedings earlier due to the lack of co-operation with the plaintiff and the fact my solicitor was not acting bona fide in my interests. I have only just obtained the record number for the appeal on the 1st June 2016, this was contained in an affidavit which was submitted and relates to…* [Application] *2016/47CA.*
>
> *11. I say that I believe that Fata Park t/a Finn Valley Oil, was never a legal entity and therefore not entitled to, sue, be sued or obtain this order or any others….*
>
> *12. I say that I never traded as McCrudden's Filling Station….*
>
> *14. I say in relation to lodging this appeal proceedings, it has been difficult to do so, as paperwork has not been returned to me from the aforementioned solicitor Mr Shiel….*
>
> *16. I say that I was given terrible advice in relation to not making an appeal but I do note if it wasn't for my previous solicitor, I would have made the appeal to the order from 2007 and all subsequent orders. Therefore, I can say it was always my intention to appeal.*
>
> *17. I say that an intention to appeal was formed from the discovery of the 2008 proceedings…".*

10. Though the court considers that the above-quoted averments capture the substantive thrust of the applications made by Mr McCrudden, it of course has had regard to the entirety of the evidence before it in respect of each application.

II. Applicable Law and Principle

11. Order 61, rule 2 of the Rules of the Superior Courts (1986), as amended (the 'RSC'), provides, *inter alia*, as follows:

> *"Every appeal under Part IV of the* [Courts of Justice Act 1936] *shall be by notice of appeal which shall be served on every party directly affected by the appeal within 10 days from the date on which the judgment or order appealed from was pronounced in open court…".*

12. No rule of court is referred to in the notice of motion issued by Mr McCrudden in each of Proceedings Nos. 2016/47CA and 2016/127CA. So the extension of time sought in each set of proceedings appears to rely upon the inherent jurisdiction of the court and/or O.122, r.7 of the RSC, which rule provides as follows:

> *"Subject to any relevant provision of statute, the court shall have power to enlarge or abridge the time appointed by these Rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the court may direct, and any such enlargement may be ordered although the application for same is not made until after the expiration of the time appointed or allowed."*

13. In its judgment earlier this year in *Griffiths v. Collins* [2017] IEHC 110, the court considered the various principles applicable to applications of the type now presenting and proposes merely to state in summary form the principles identified in that case by reference to (1) *Eire Continental Trading Company Ltd v. Clonmel Foods Limited* [1955] I.R. 170, (2) *Goode Concrete v. CRH plc and ors* [2013] IESC 39, (3) *Kavanagh v. Healy* [2015] IESC 37, (4) *AN v. Minister for Health and Children* [2015] IEHC 396 and (5) the decision of the Court of Appeal of England and Wales in *Smith v. Brough* [2005] EWCA Civ. 261. Those principles are as follows:

> (1). The applicant must show that he had a *bona fide* intention to appeal formed within the permitted time. (*Éire Continental*).

(2). The applicant must show the existence of something like mistake and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient. (*Éire Continental*).

(3). The applicant must establish that an arguable ground of appeal exists. (*Éire Continental*).

(4). The discretion of the court being a free one, the only question is whether, upon the facts of the particular case in which application is made, that discretion should be exercised. (*Éire Continental*).

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(5). If, to re-word as questions the three limbs, (1)–(3), identified in *Éire Continental* (so (1) Did the applicant show..? (2) Did the applicant show..? and (3) Did the applicant establish..?), the answer to each of those three questions is 'no', then in the "*vast majority of cases*", an extension of time seems unlikely to be allowed. (*Goode Concrete*).

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(6) Length of delay is of relevance to the exercise of the court's discretion. (*Goode Concrete*).

(7) The court's underlying obligation is to balance justice on all sides. (*Goode Concrete*).

(8) Absence of arguable grounds of appeal makes an extension generally unlikely. (*Goode Concrete*).

(9) Wholly unmeritorious appeals should not be allowed to progress. (*Goode Concrete*).

(10) A decision to appeal must be made within time. (*Goode Concrete*).

(11) There must be good reason for not filing an appeal on time. (*Goode Concrete*).

(12) The court's discretion arises to be applied exceptionally. (*Goode Concrete*).

(13) Modified *Éire Continental* principles apply to appeals stemming from factual circumstances outside the materials that went before the trial court. (*Goode Concrete*)

(14) The court is given a wide power under O.122, r. 7 to enlarge the time for serving any document. (*Kavanagh*).

(15) There is no mention in O. 122, r.7 that the consent of the applicant be forthcoming before such enlargement can be ordered. (*Kavanagh*). (*Kavanagh* was a judicial review application and it seems to be in this sense that the word "*applicant*" is used in this regard).

(16) An extension of time can be given under O.122, r.7 even after the original time limit has expired. (*Kavanagh*).

(17) The fact that a court has jurisdiction to extend time does not mean that the court must extend time in all cases. (*Kavanagh*).

(18) Interest in the closure of litigation is not only the interest of the public. Successful claimants also have an interest in finality and they are entitled to expect that if they have won at trial, and the time for appeal has passed, that that is the end of the matter. (*Smith*).

(19) Of possible interest, in the unlikely event that *Éire Continental* and related authorities do not provide an Irish court with an answer in an application such as that now presenting are the types of factor (mentioned in Arden L.J.'s judgment in *Smith*) to which the courts of England and Wales, at least at the time of the decision in *Smith*, were enjoined by the applicable civil procedure rules to consider when it came to any application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, being (a) the interests of the administration of justice, (b) whether the application for relief had been made promptly, (c) whether the failure to comply was intentional, (d) whether there was a good explanation of the failure, (e) the extent to which the party in default had complied with other rules, (f) whether the failure to comply was caused by the party or his legal representative, (g) whether the trial date or the likely date could still be met if relief was granted, (h) the effect which the failure to comply had on each party, and (i) the effect which the granting of relief would have on each party. (*Smith*).

III. Application of Law and Principle to Proceedings No. 2016/127CA

14. Q. Has Mr McCrudden shown that he had a *bona fide* intention to appeal formed within the permitted time?
15. A. The Circuit Court must have satisfied itself in 2007 that there was good service of Mr McCrudden in order for it to give the judgment that it did. No appeal was entered thereafter. Mr McCrudden claims that the existence of the 2007 judgment came as a surprise to him when the well-charging proceedings commenced in 2008. He was minded to appeal, went to a solicitor, claims to have been advised that he should not appeal and, acting under that advice, did not appeal. It is clear from Mr McCrudden's affidavit evidence that he is not at all satisfied with the advice that he received concerning the bringing of an appeal. Nonetheless, it is clear that, for whatever reason, Mr McCrudden did abandon his plans to appeal back in 2008. Additionally and perhaps notably, Mr McCrudden also did not appeal any of the later orders made against him by the Circuit Court, at least until he commenced his current bid to do so, nor is there any evidence to suggest that he had any intention, never mind a *bona fide* intention, to appeal them within the permitted time; this is a course of successive inaction that, with every respect, appears to the court to sit uneasily with Mr McCrudden's purported lingering personal desire from sometime in 2008 to bring an appeal within the permitted time.

16. Q. Has Mr McCrudden shown the existence of something like mistake? (Mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient).

17. A. No such mistake has been shown.

18. Q. Does an arguable ground of appeal exist?
19. A. Taking Mr McCrudden's case at its height and as he presents it, the court's answer to this question is 'yes'. (Whether Mr McCrudden would succeed at hearing is not a matter on which the court has or offers any view).

20. Q. The discretion of the court being a free one, upon the facts of the particular case in which application is made, does the court consider that its discretion should now be exercised in favour of Mr McCrudden?
21. A. Having regard to the various factors presenting, the court respectfully does not consider that its discretion should now be exercised in favour of Mr McCrudden. The court is heedful in this regard of Arden L.J.'s observation in Smith that interest in the closure of litigation is not only the interest of the public; successful claimants, such as Fate Park Limited, also have an interest in finality and they are entitled to expect that if they have won at trial, and the time for appeal has passed, that that is the end of matters.

IV. Application of Law and Principle to Proceedings No. 2016/47CA

22. Q. Has Mr McCrudden shown that he had a *bona fide* intention to appeal formed within the permitted time?
23. A. The court's answer to this question is 'yes' insofar as appealing the order as to costs is concerned, but only in that regard. Mr McCrudden's attempt to construct a general appeal against all that the Circuit Court must fail for the reasons stated in respect of the application brought in Proceedings No. 2016/127CA.

24. Q. Has Mr McCrudden shown the existence of something like mistake? (Mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient).
25. A. Mr McCrudden filed a notice of appeal against, *inter alia*, the judgment of 11th February, 2016, with the court office of Letterkenny Circuit Court on 18th February, 2016. Pursuant to s.5(1) of the Companies Act 2014, service was effected on 18th February, 2016, on Fate Park Limited by sending the notice of appeal by post (registered post, though ordinary post would have sufficed) to the registered office of Fate Park Limited, with such service being good once posted. Five days after the notice of appeal was filed in Letterkenny (so on 23rd February, 2016) the notice of appeal arrived at the Central Office here in Dublin and was correctly held to be out of time.

26. It appears to the court that, if any arguable ground of appeal had been identified in respect of the costs order of 11th February, 2016, the above-described circumstances are ones in which that need for certainty to which Arden L.J. refers in *Smith* would not be offended unconscionably by the court exercising its discretion to allow the appeal the order as to costs of 11th February, 2016 (and that order alone) out of time. (Again, Mr McCrudden's attempt to construct a general appeal against all that the Circuit Court must and does fail for the reasons stated in respect of the application brought in Proceedings No. 2016/127CA). Unfortunately, however, for Mr McCrudden, he has failed to show any ground of appeal in respect of the costs order of 11th February, 2016, never mind an arguable ground of appeal. The impression arises, rightly or wrongly, that Mr McCrudden has 'latched on' to the costs order of 11th February, 2016, as a vehicle through which to seek to assail the now unassailable orders that preceded it; however, whether or not this impression is correct, Mr McCrudden has in any event demonstrated no ground of appeal, never mind an arguable ground of appeal, against the costs order of 11th February, 2016.

27. Q. Does an arguable ground of appeal exist?
28. A. Taking Mr McCrudden's case at its height and as he presents it, the court's answer to this question is 'no'. Mr McCrudden has not identified any ground of appeal, never mind an arguable ground of appeal, against the costs order of 11th February, 2016.

29. Q. The discretion of the court being a free one, upon the facts of the particular case in which application is made, does the court consider that its discretion should now be exercised in favour of Mr McCrudden?
A. Having regard to the various factors presenting, the court respectfully does not consider that its discretion should now be exercised in favour of Mr McCrudden.

V. Conclusion

30. For the reasons stated above, and notwithstanding the natural sympathy that any court would likely have for the unenviable position in which Mr McCrudden now finds himself placed by virtue of his longstanding indebtedness to Fate Park Limited, the court must respectfully decline to accede to his present applications.