Neutral Citation: [2017] IEHC 110

THE HIGH COURT

[2016 No, 169 CA]

BETWEEN:

PETER GRIFFITHS

APPELLANT

– AND –

ZABRINA COLLINS

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 21st February, 2017.

I. Key Question Arising

1. Should the court now make an order extending time for leave to appeal a Circuit Court order previously made?

II. Background

2. On 25th April, 2016, after the reading aloud of a reserved judgment, the Circuit Court (O'Donohoe J.) ordered after the hearing of defamation proceedings:

> *"1. That the Plaintiff [Mr Griffiths] do recover from the Defendant [Ms Collins] the sum of €5,000…[and]*
>
> *2. That the question of costs be adjourned to a date to be fixed in the Circuit Court Office, such date to be early in the Trinity Term, 2016."*

3. On 14th July, 2016, following the hearing of the costs application, the Circuit Court ordered "*that the Plaintiff do recover from the defendant the costs of proceedings to be taxed in default of agreement, such costs to be measured on the Circuit Court scale and to include reserved costs, if any*."

4. On 25th July, 2016, a notice of appeal issued wherein it was stated "*that the Plaintiff, hereby appeals to the High Court sitting in Dublin at the first opportunity after the expiration of ten days from the date of service hereof or such shorter period the Court may permit, from the quantum of damages awarded by the judgment and Order of the Circuit Court given…on the 14th of July 2016*." [Emphasis added].

5. The notice of appeal contains an obvious error in that the quantum of damages was ordered in the order of 25th April, 2016. Although this fact was pointed out to the appellant's lawyers some months ago, no application has ever been made to seek an amendment to the said notice of appeal. As the only order of quantum made in the within proceedings was made on 25th April, 2016, it must be that the order to which the notice of appeal of 25th July, 2016 makes reference is the order of 25th April, 2016.

6. Order 61, rule 2 of the Rules of the Superior Courts (1986), as amended, 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…".*

7. Ms Collins maintains in the within application that the order being appealed against is the order of quantum (made on 25th April, 2016) and that a notice of appeal that issued on 25th July is hopelessly outside the 10-day timeframe set by O.61, r.2. (The court notes in passing that if it were the later order that was appealed against, a difficulty might still arise because although the issuance of the notice of appeal would appear to benefit from the grace-day(s) allowed by O.122, r.3[1], the 24th of July 2016 having been a Sunday, it does not appear that the notice was served (and it is service to which O.61, r.2 relates) until a day or two later. This is a delay that would itself require the making of an application by reference to O.122, r.7[2] and/or the inherent jurisdiction of the court; however, all this is *obiter* because it must be, it can only be, that the notice of appeal seeks to appeal the order of 25th April, 2016, as that was the order relating to quantum).

[1] Order 122, rule 3 provides as follows:

> *"Where the time for doing any act or taking any proceeding expires on a Saturday, Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open."*

[2] Order 122, rule 7 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."*

8. When it comes to O. 61, r.2, Mr Griffiths maintains, inter alia, that it is more suitable to wait until a case is fully disposed of and then to bring an appeal within ten days thereafter. He may be right that this would be more sensible; certainly the ideal he contends for would, for example, avoid the potential of (a) multiple appeals having to be filed (albeit that the inherent delay in a case coming on the High Court means that appeals successively commenced could likely nonetheless be heard together), (b) a case being heard partly in the Circuit Court and the High Court at the same time (albeit it seems likely that the High Court would adjourn its hearing of matters until the matter had been heard *in toto* in the court below). But whatever the attractions of the ideal for which Mr Griffiths contends, it is not the scheme for which the Rules of the Superior Courts currently provide.

9. By notice of motion of 30th November, 2016, Mr Griffiths seeks, inter alia, "[a]n *Order extending time for leave to appeal the*

Circuit Court Order in the above entitled action". In point of fact, as mentioned above, there were two orders pronounced in open court by the Circuit Court in the within proceedings, viz. that of 25th April, 2016 and that of 14th July, 2016. The notice of motion, in truth, seeks an extension of time for leave to appeal the earlier order. No rule of court is referred to in the motion but the court assumes that it is it O.122, r.7 and/or the inherent jurisdiction of the court that is being relied upon in this regard.

III. Applicable Legal Principles

(i) *Overview*.

10. The court has been referred to a quintet of cases that identify the relevant principles arising in an application of the sort now presenting, viz. (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 (this decision involves a faithful application of the principles identified, *inter alia*, in *Eire Continental* and *Goode Concrete*, and is not considered in further detail below), and (5) the decision of the Court of Appeal of England and Wales in *Smith v. Brough* [2005] EWCA Civ. 261.

(ii) *Eire Continental*.

11. The judgment of Lavery J., for the Supreme Court, in *Eire Continental* is the starting-point for a consideration of the law in this area. Per Lavery J., at 173:

> *"Mr McGonigal submitted that three conditions must be satisfied before the Court would allow an extension of time. These conditions were:–*
>
> *1, The applicant must show that he had a bona fide intention to appeal formed within the permitted time.*
>
> *2, He 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.*
>
> *3, He must establish that an arguable ground of appeal exists.*
>
> *In my opinion these three conditions are proper matters for the consideration of the Court in determining whether time should be extended but they must be considered in relation to all the circumstances of the particular case. In the words of…Greene M.R., in Gatti v. Shoosmith…'The discretion of the Court being, as I conceive it, a free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised.'"*

12. Lavery J.'s closing paragraph in the above-quoted text has consistently been interpreted by the courts as an iteration (or reiteration) of the point that ultimately the decision on whether or not to extend time is within the discretion of the court and that the court in exercising that discretion must have regard to all the circumstances of a particular case. (See in this regard the judgment of Clarke J. in *Goode Concrete*, at 5. See also the observations of Geoghegan J. in *Brewer v. Commissioners of Public Works* [2003] 3 I.R. 539, where he observes in relation to the last-quoted paragraph: "*I would interpret these words of Lavery J. as indicating that while these three conditions were proper matters to be considered, it did not necessarily follow in all circumstances that a court would either grant the extension if all these conditions were fulfilled or refuse the extension if they were not. The court still had to consider all the surrounding circumstances in deciding how to exercise its discretion*." A further iteration of the last-mentioned principle is to be found in Kavanagh, where Clarke J. observes, at 8, that "*[T]he fact that a court has a jurisdiction to extend time does not mean that the Court must extend time in all cases. The question of the extent of leeway which should be given to any party which is in default of complying with time limits set out in the rules of court is a matter to be considered on the merits in all the circumstances of the particular case*").

(iii) *Goode Concrete and Kavanagh*.

13. What additional principles or elaborations on existing principle can be identified from the cases referred to at (2)–(5) above? It seems to the court that they are as follows:

a. *Goode Concrete*.

14. *(1) Length of delay is of relevance to the exercise of the court's discretion*.

That this is so was disputed by counsel for Ms Collins in the within application. However, it seems to the court to be implicit in the observation of Clarke J. in Goode, at para.1.4, that "[I]*t was said on behalf of Goode Concrete that there are unusual circumstances which apply in this case which ought to persuade this Court to extend time notwithstanding…a lengthy period having elapsed since the orders in respect of which appeals are now sought to be brought were perfected*" that there is a general acknowledgement that time is of relevance, and, with every respect, how could it not be so? The court is being asked in an application of the sort now presenting to exercise a discretionary power, and while one is not in equitable territory, notions akin to laches or, to put matters more simply, an assessment of how a party has generally approached matters (including whether it has been guilty of, for example, egregious delay) will sensibly play a role in whether and in what form discretionary relief is to be granted (if granted) by the court.

15. *(2) The court's underlying obligation is to balance justice on all sides.*

What types of injustice might arise? In *Goode Concrete* Clarke J. points to three such examples, though there is no suggestion that these are intended to be exhaustive: failure to bring finality to proceedings in a timely manner; excluding parties from potentially meritorious appeals; and the potential for prejudice to successful parties who have operated on the basis that, once the time for appeal has expired, the proceedings, or any relevant aspect of same, are at an end. Precisely how such matters interact may require careful analysis. Closing out his observations in this regard, Clarke J. notes, at para.3.3, that "[T]*he specific Eire Continental criteria will meet those requirements in the vast majority of cases*." What the court understands Clarke J. to suggest in this regard is that if, to re-word as questions the three limbs ((1)–(3)) identified by Lavery J. in *Eire Continental* (*viz*. (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.

16. In passing, the court notes that when it comes to the interests of parties who operate in a particular manner on the basis that time for appeal has expired, it was twice suggested by counsel for Mr Griffiths at hearing that if a potential respondent considers that time for an appeal has passed it would not be unusual for that potential respondent's solicitor to apprise the potential appellant's

solicitor that the time for appeal has passed and to enquire whether matters are now at an end. This Court must admit that its inclination in such instances would be to 'let sleeping dogs lie', lest a letter sent prompts an unwelcome response. The court acknowledges, of course, that others may prefer the certainty that follows if such a letter brings a welcome response. Either way, however, the court does not accept the suggestion, if suggestion there was, that it is necessary or necessarily good practice to 'double-check' with one's opponents in such a way. If Party B is out of time for or in doing something, that is a matter for Party B.

17. *(3) Absence of arguable grounds of appeal makes an extension generally unlikely.*

Clarke J. moves on in *Goode Concrete* to observe, at para.3.4, that "[I]*t is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside time where the Court was not satisfied that there were any arguable grounds of appeal established*". It might perhaps be contended that there is something of a lightening of the *Eire Continental* criteria in this regard. Thus Lavery J. observes in *Eire Continental* that an applicant "*must establish that an arguable ground of appeal exists*"; by contrast, the words "[I]*t is difficult to envisage…"* seem to fall short of the notion that one "*must establish*" (even allowing for Lavery J.'s closing observation as to the all of individual circumstances presenting being of relevance).

18. *(4) Wholly unmeritorious appeals should not be allowed to progress.*

Clarke J., in *Goode Concrete*, at para.3.4, draws a distinction between appeals where there are "*arguable grounds*" (it will be recalled that the third of the *Eire Continental* criteria is "*He* [the *applicant] must establish that an arguable ground of appeal exists*") and those which are "*wholly unmeritorious*", with the latter appearing, per Clarke J., to have no chance of being found to support an extension of the time to appeal: "*It cannot be in the interests of justice to allow wholly unmeritorious appeals to progress*."

19. *(5) A decision to appeal must be made within time.*

(6) There must be good reason for not filing an appeal on time.

Whereas Lavery J. focused on the forming of a *bona fide* intention to appeal within the time for appeal ("*The applicant must show that he had a bona fide intention to appeal formed within the permitted time*."), Clarke J. in *Goode Concrete* appears, at first glance, to reformulate this test, into something more rigorous than was contemplated in *Eire Continental*, so that (i) intention to appeal no longer suffices; rather an actual decision to appeal must be made in time, and (ii) there must be good reason why (that decision to appeal having been made) the appeal was not filed on time. Thus, per Clarke J. at 7, [I]*n most straightforward cases, a party will be aware of the time limit within which an appeal should be brought (or if not, ought to be so aware) and should not be allowed an extension of time unless a decision to appeal was made in time and there is good reason for the appeal not having been filed within the time limit*." However, Clarke J. moves on, at 7, to affirm that "*the specific Eire Continental criteria will, in the vast majority of cases, be likely to be the only test applied by the court*". Thus it may be that any divergence between *Eire Continental* and *Goode Concrete* in this regard is more apparent than real.

20. *(7) The court's discretion arises to be applied exceptionally.*

Why do *Eire Continental* and *Goode Concrete* demand as much as they do of a would-be appellant before an extension of time will be allowed, at least in most straightforward cases? In *Goode Concrete*, Clarke J., at para.3.5, offers as a rationale for this approach that the potential appellant has available to it "all *of the evidence called* [at trial], *of the legal submissions made [at trial] and…the reasoning of the trial judge*" and so "*all of the information necessary to make its mind up as to whether it wishes to appeal*". Simply put, much is reasonably demanded of a party that has so much information to hand. Thus, per Clarke J., at para.3.5, "*In that context, it is not unreasonable to require the party, in the interests of the overall administration of justice and the balance of justice as and between the parties, to come to a decision within the time specified and to bring the appeal either within that time or such further period as the Court might, exceptionally, allow*".

21. *(8) Modified Eire Continental principles apply to appeals stemming from factual circumstances outside the materials that went before the trial court.*

What of instances where, for example, the basis of an appeal stems from factual circumstances outside of the materials that went before the trial court? Though not an issue in the within proceedings, the court mentions this aspect of matters for the sake of completeness. Such cases, by their nature, will be unusual cases because, in most cases materials outside those that went before the trial court will not be relevant to any appeal. However, there can be instances where they are, as was the case in *Goode Concrete* where an allegation of objective bias was made. In such instances, Clarke J., at para.3.7, considered that (1) an arguable basis for an appeal (here on grounds of reasonable apprehension of bias) must be established ("[T]*he interest of justice would not be served by extending time to allow an unmeritorious appeal to go ahead*"), with the *Eire Continental* criteria otherwise being modified in such instances so that a court would need to consider the following factors: "*(a) The time when the party seeking an extension of time first became aware of the facts on which it wishes to rely; (b) The extent to which it was reasonable for that party to engage in further inquiry before bringing an application to the Court for an extension of time; (c) The time which elapsed between information coming to the attention of the relevant party and the application for an extension of time measured by reference to the tight time limit of 21 days within which a party is expected, in an ordinary case, to appeal to the Supreme Court; and (d) Any other factors arising in the special circumstances of the case but in particular any prejudice which might be said to have been caused to the successful party in the High Court by reason of the overall elapse of time between the order sought to be appealed against and the application for an extension of time*."

b. *Kavanagh.*

22. *9) The court is given a wide power under O.122, r. 7 to enlarge the time for serving any document. (Kavanagh, para.3.5.*

(10) There is no mention in O. 122, r.7 that the consent of the applicant[3] be forthcoming before such enlargement can be ordered. (Kavanagh, para.3.5).

[3] *Kavanagh* was a judicial review application and it seems to be in this sense that the word "*applicant*" is used in this regard.

(11) An extension of time can be given under O.122, r.7 even after the original time limit has expired. (Kavanagh, para.3.6).

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

(Kavanagh, para.3.7).

(iii) *Smith.*

23. In truth, there is sufficient Irish case-law, from *Eire Continental* onwards, by reference to which the court can decide the within application. Even so, the decision *Smith*, another case of delay, this time from the neighbouring jurisdiction, is of interest, given Lady Justice Arden's invocation, at para. 34, of Lord Woolf's observations in *Taylor v. Lawrence* [2003] QB 528, 535–6, in which Lord Woolf explains the rationale which underpins that need for finality in litigation, drawing himself on the following observations of Lord Wilberforce in the *Ampthill Peerage* case [1977] AC 547, itself a notable case in which some 50 years out of time it was sought, unsuccessfully, to appeal a past legitimacy declaration, in part by reference to developments in the science of blood analysis, in a bid to upset the succession to the Ampthill Peerage. Per Lord Wilberforce, at 569:

> *"English law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to reopen disputes….Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth…and these are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."*

24. Ireland has, of course, a comparable legal system. Having made reference to the above-quoted text, Arden L.J. moves on to make, at para. 35, the following observation which has, perhaps, a particular resonance as regards the position of Ms Collins in the within proceedings: "*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*." In the within application it has been suggested that Ms Collins, following the expiration of the time for service of a notice of appeal, engaged in certain not insignificant personal and business-related expenditure that she likely would not have engaged in had she contemplated that an appeal might nonetheless be allowed out of time; that, it seems to the court, is a relevant factor for it to bring to bear in considering how best to balance justice between the parties.

25. Of possible interest, in the unlikely event that *Eire Continental* and related authorities do not provide an Irish court with an answer in an application such as that now presenting (and that line of authority does provide an answer so far as Mr Griffiths' within application is concerned), are the types of factor (mentioned at para. 35 of Arden L.J.'s judgment) 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 is 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".*

IV. Application of Applicable Legal Principle

(i) *Application of Principles Identified* in Eire Continental.

26. (A). The applicant must show that he had a bona fide intention to appeal formed within the permitted time.
A striking feature of the within application is that there is no affidavit sworn by Mr Griffiths. His solicitor, however, avers that "[M]*y client formed the view that he should appeal the case within ten days of the decision*." But with every respect, this is a vague averment. It immediately prompts a question as to which decision is being referenced. Moreover, it does not appear to the court that such a bald averment suffices as a basis on which the court may exercise a discretionary power that upsets the standard appeal timeframe; a more fulsome averment that explained how the solicitor is in a position so to aver or which exhibited, for example, an e-mail trail that supported this averment would be entirely more persuasive. Even an affidavit from Mr Griffiths himself, coupled with that of his solicitor and some greater precision, would likely have carried some greater weight.

27. (B) The applicant must show 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 is not sufficient).
The court does not see that any mistake or anything akin to mistake has been established. Mr Griffiths did not appeal the first of the two orders in time. He and his advisors simply waited for the second order and then sought to appeal the first order, by which time they were well out of time. Mr Griffiths' solicitor seeks to admit to a mistake in this regard, stating that "*In retrospect, I accept that I should have checked was there an earlier Order in existence. However, it simply did not occur to me in circumstances where the case had not been finalised…that there would have been an earlier Order. In addition, the Order from April was never sent out to me which in my experience is the earlier course*." Two points might be made as regards this averment:

> – first, on 25th April, 2016, an order as to quantum issued was made by the learned Circuit Court judge in open court and it is now sought to appeal that order; it is not logically tenable for a party to acknowledge (through its attempt to appeal same) that an order as to quantum was made on a particular date but that time for appealing same does not run from that date.
>
> – second, the admission in the averment is in any event misdirected. Solicitor and counsel were present in the Circuit Court on 25th April, 2016, when the order was pronounced by the learned Circuit Court judge in open court. O.61, r.2 is crystal-clear that it is from the moment of pronouncement of an order in open court that time for service of the notice of

appeal runs. There was no need for the solicitor to check whether a perfected order had issued and there is no basis for complaint that it was not sent out to him: it is the oral pronouncement of the order in open court that has the effect of kick-starting the 10-day period under O.61, r.2. Solicitor and counsel in this case, as it happens, were present to hear that order made; and lest there be any doubt as to the legal effectiveness of that order, it has been clear since at least the time of the decision of Clarke J. in Kavanagh, at para. 3.12 (and, in truth, for much longer than that) that "[A]*n order made orally by a judge is an order of the Court. It does not require to be in writing to be valid and binding*."

28. (C) The applicant must establish that an arguable ground of appeal exists.
Mr Griffiths was the victor in defamation proceedings. As a result, he was awarded €5,000 by way of damages. The defamation arising appears to have been serious and it is arguable that the learned Circuit Court judge erred in the level of damages settled upon. (Of course, just because a point is arguable does not mean that it is correct; as Charleton J. observed in *Oltech (Systems) Ltd v. Olivetti [*2012] IEHC 512, admittedly a case concerning a motion for security for costs but the point made, at para.8 of Charleton J.'s judgment, is one of broader application, "*Experience demonstrates that there is little that cannot be argued*"; the court here is concerned with the issue of arguability only, not that of the likelihood of success on such point as might be argued).

(ii) *Conclusion by Reference to Principles Identified in Eire Continental.*
29. The court does not consider that it has been established that Mr Griffiths had a *bona fide* intention to appeal formed in the permitted time. The court does not consider that any mistake or anything akin to mistake has been established. The court considers that there is an arguable ground of appeal. Thus Mr Griffiths fails to satisfy two of the criteria in *Eire Continental* and the court, bearing in mind, *inter alia*, the need for finality in litigation and the concomitant need that its discretion as regards the extension of time that the court is now being asked to apply should not commonly be exercised, respectfully sees nothing in the surrounding circumstances of this case that would justify its allowing such extension at this time.

(iii) *The Principles Elsewhere Identified in Irish Case-Law.*
30. As Clarke J. observed in *Goode Concrete*, the specific *Eire Continental* criteria should, in the vast majority of cases, suffice to determine how the court is to balance justice in an application such as that now presenting. The court considers the within application to be among that vast majority of cases and so not to require a protracted further consideration of matters by reference to such other principles as are identified in the later case-law touched upon above. Suffice it to note that the court does not consider that any of that case-law or principles identified therein requires an alternative conclusion to that just reached; on the contrary, the court considers that later case-law and the principles identified therein to support the conclusion it has reached.

V. Conclusion
31. The court must, for the reasons stated above, decline to accede to the within application. Although Mr Griffiths may be disappointed by this result, he can nonetheless continue to draw satisfaction from the fact that he sued for defamation in the Circuit Court and succeeded in that suit.