

THE HIGH COURT

[2017 No. 124 CA]

BETWEEN

ICS BUILDING SOCIETY

PLAINTIFF

AND

KILLIAN MCGRATH

DEFENDANT

JUDGMENT of Mr. Justice Meenan delivered on the 28th day of April, 2020

Introduction

1. The motion which this Court is considering is the plaintiff's appeal against an Order of the Master of the High Court (the Master) given on 30 May 2017 whereby he extended the time for the defendant to appeal an Order of the Circuit Court made, over five years earlier, on 28 February 2012.
2. On 28 February 2012, the Circuit Court granted the plaintiff an Order for possession of all that the premises comprised in Folio 34317F, County Waterford situate at Coolbagh, Clashmore, County Waterford (the property). In excess of five years later, 3 May 2017, the defendant issued a Notice of Motion returnable before the Master seeking to extend the time to appeal said Order of the Circuit Court. The time which is allowed by the rules of the Circuit Court for making such an appeal is ten days. On 30 May 2017, the Master extended time for an appeal.

Background

3. On or about 28 March 2006, the plaintiff and the defendant entered into a mortgage loan agreement which was contained in a mortgage loan offer letter of 20 March 2006 whereby the plaintiff agreed to provide to the defendant a loan facility in the sum of €1 million euro repayable monthly over 30 years. The defendant agreed to repay the loan facility on the terms and conditions contained therein. The defendant failed to make the repayments when due so the plaintiff issued an ejectment Civil Bill on the title on 27 April 2009. On 4 September 2009, a firm of solicitors entered an appearance on behalf of the defendant.
4. On 10 November 2009, a motion for summary judgment was issued by the plaintiff seeking, *inter alia*, an order for possession of the property. This motion was listed for hearing before Waterford County Registrar on some six occasions, being adjourned on dates commencing 7 December 2009 till 6 December 2010. During this period the defendant made numerous promises to make payments to the plaintiff, including applying banker's drafts and the proceeds of the sale of a property in Portugal to the arrears.
5. On 6 December 2010, the motion for summary judgment was transferred to the judge's list for 14 December 2010. At that stage, solicitors instructed by the defendant applied successfully to come off record and thereafter the defendant represented himself in the Circuit Court proceedings. The motion for summary judgment was adjourned to June, 2011 on the basis that the defendant would make a particular payment to the plaintiff and would also make his best efforts in the intervening period to meet repayments. Those payments were forthcoming from the defendant.

6. When the matter came on for hearing on 7 June 2011, it was further adjourned to allow for payments that had by then been received by cheque to clear. The motion was relisted on 13 December 2011 when the Court granted the defendant the final adjournment to sort out his affairs.
7. The matter finally came on for hearing before Waterford Circuit Court on 28 February 2012 when the Court was informed that no payments of any sort had been made since June, 2011. The Circuit Court, having heard submissions from counsel on behalf of the plaintiff and the defendant in person, made an Order for possession of the property. Since the making of this Order, the defendant continued to reside in the property and, apparently, made no attempt to deal with the outstanding arrears. In fact, the next step taken by the defendant was the motion in May, 2017 before the Master to extend time for an appeal.

Motion before the Master

8. The affidavit of the defendant grounding the application to extend time was, to say the least, brief. In the course of his affidavit, the defendant stated: -

“3. I was suffering from severe stress, anxiety and depression and I am presently on (sic) under the medical care to help alleviate my medical ailments and am awaiting a report to submit with this application to court.

4. It was always my intention to appeal the Circuit Court order but due to my medical ailments I did not do so within the time allowed.”

As for the grounds of his proposed appeal, the defendant stated: -

“I say that there are a number of issues that the Circuit Court failed to take into consideration, as a consequence I believe made an invalid order.

6. I further say that the plaintiff did not afford me the protection as provided under the Mortgage Arrears Code of Conduct issued by the Central Bank.”

9. In response to this application, a detailed affidavit was sworn by Mr. Brendan Moriarty, Solicitor, on behalf of the plaintiff. This affidavit made the obvious point: -

“11. Moreover, the defendant has given no plausible explanation for this five year delay since making of the possession order beyond a wholly unparticularised and unsupported allusion to ‘medical ailments’.”

As for the defendant’s issue of him not being given the benefit of the Mortgage Arrears Code of Conduct, Mr. Moriarty stated that the code then in force was complied with in that the plaintiff had waited in excess of the six months’ moratorium before commencing possession proceedings. In fact, a period of some fourteen months had elapsed.

10. The Master extended time for an appeal.

Principles to be applied

11. I refer to the well-known passage from the judgment of Lavery J. in *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] I.R. 170 in which is stated the conditions that are required to be satisfied in order for a court to allow an extension of time for an appeal: -

“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.”

The *Eire Continental* decision has been considered most recently by the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Derek Gately and Anor.* [2020] IESC 3, where O'Malley J. stated: -

“63. While bearing in mind, therefore, that the *Eire Continental* guidelines do not purport to constitute a check-list according to which a litigant will pass or fail, it is necessary to emphasise that the rationale that underpins them will apply in the great majority of cases.”

and: -

“71. I would therefore find against the appellant on the basis that there is no arguable ground. However, even if the situation was less clear-cut, such that it could be said that the appellant's case was ‘arguable’ or ‘stateable’, I would nonetheless consider that in the circumstances of this case the Court should not exercise its discretion in favour of extending time. As I said earlier, it seems to me that where there is significant delay before seeking an extension, the appellant will need to show a correspondingly strong case. ...”

In this case the Orders that were sought to be appealed were made on 26 January 2017 and 9 March 2017. One of the Orders was for possession, which was perfected on 16 March 2017 so the time for lodging an appeal expired on 13 April 2017. A motion to extend time was issued on 13 April 2018. Thus, the period involved was one year.

Appeal from the Order of the Master

12. Central to the defendant's application to extend time is his assertion that because of the deterioration in his health he was unable to prosecute his appeal. This would suggest that the defendant's health had deteriorated to a point that he was no longer able to manage his affairs. If this was the case, one would have expected the Court to have been furnished with medical reports going back a number of years which would verify this. If the defendant's medical condition deteriorated to such a point such reports would most likely come from medical consultants who specialised in this particular area and, probably,

there would be evidence of prescription of the appropriate drugs. What the defendant in fact produced to the Court was not remotely close to this. The only medical report which the defendant exhibited in his grounding affidavit was from a Dr. Khashan from the Dame Street Medical Centre, dated 7 November 2018. This report stated: -

"To whom it may concern

Mr. McGrath is a patient of our clinic. He has been suffering from depression/anxiety disorder for a few years. This has affected his ability to do simple everyday tasks. He complained of depressed mood, loss of interest, inability to cope, tiredness, sleep disturbances, poor concentration, anxiety, agitation, irritability, panic feelings and was avoiding other people. This has been an ongoing disorder since mid-2011. He is on the mend and feeling better now and I feel he can take matters to hand."

13. When this medical report was opened to the Court I directed that Dr. Khashan attend court, with the defendant's medical records, so that he could elaborate on the contents of this report. The matter was adjourned on a number of occasions to allow for the doctor's attendance. Ultimately, the Court was informed that, in fact, Dr. Khashan had only seen the defendant on one occasion for the purposes of the report. On being informed of this, I was satisfied that Dr. Khashan's attendance was not required as the position concerning the defendant's state of health over the years since the making of the Circuit Court Order was clear. I am satisfied that the defendant was not suffering from a medical condition, as he asserted, that prevented him from prosecuting an appeal. Despite being given an opportunity to do so, the defendant produced no credible evidence to the Court to substantiate his alleged disabilities.
14. I am very mindful that the consequences of the economic crash were not just financial. An inability to repay monies that were borrowed in very many cases had a serious detrimental impact on the health of those involved. An inability to look after one's financial affairs caused by financial pressure is something that may well happen, but if reliance is being placed on this, some credible medical evidence has to be produced. The evidence produced by the defendant in this case fell well short of this.
15. I am satisfied that even if the defendant was minded to appeal the Order of the Circuit Court in 2012, he has given the Court no credible explanation as to why he failed to do so in the ten days allowed. Further, the defendant has given no credible explanation as to why he waited in excess of five years to seek an extension of time for such an appeal.
16. In considering whether the defendant has established that arguable grounds of appeal exist, I refer, again, to the judgment of O'Malley J. in *Seniors Money Mortgages (Ireland) DAC* where she stated that where there is significant delay before seeking an extension of time, the person wishing to appeal "*will need to show a correspondingly strong case*".
17. The defendant has advanced a number of grounds of appeal. Before the Master, the ground he relied upon was that the plaintiff did not comply with "*Mortgage Arrears Code*

of Conduct” issued by the Central Bank. As referred to earlier, this point has already been fully addressed in the replying affidavit of Mr. Brendan Moriarty, Solicitor, delivered on behalf of the plaintiff.

18. As affidavits were exchanged, the defendant began to elaborate on his grounds of appeal. These grounds have to be seen against the background of the multiple adjournments that took place in the Circuit Court which I have already referred to. The defendant was present, having initially been legally represented before the County Registrar, at all stages in the Circuit Court. The defendant has raised some technical issues concerning service of the Circuit Court proceedings. In particular, he alleges that there was a failure to say his partner was in occupation of the property with him. No affidavit has been delivered from his partner concerning this. The Circuit Court that gave the Order for possession was satisfied as to service and, in any event, there is a discretion under the rules of the Circuit Court to remedy any possible defects relating to service.
19. The defendant has also raised the issue of the interest rate which the plaintiff charged him. This point appears to have been first raised by the defendant in an affidavit sworn on 21 March 2019. This is some seven years after the Order of the Circuit Court. In any event, there is no dispute that the defendant borrowed the moneys from the plaintiff and failed to repay them and, indeed, appears to have remained in occupation of the property since the Order for possession was made in February, 2012. As the defendant is in arrears, the plaintiff is entitled to enforce its security by way of seeking and obtaining an order for possession. A dispute as to whether or not the correct interest rate was charged does not affect this but may affect the amount of the arrears.
20. I am satisfied that, at this stage, in excess of seven years after making of the Order for possession in the Circuit Court, the defendant has not established arguable grounds for appeal.

Conclusion

21. By reason of the foregoing, I will allow the plaintiff’s appeal against the Order of the Master of the High Court and set aside the Order of 30 May 2017.