APPROVED **[2021] IEHC 132**

THE HIGH COURT
CIRCUIT APPEAL

2019 No. 427 CA

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

ANNE KEATING
PAUL CONNORS

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 25 February 2021

INTRODUCTION

1. This matter comes before the High Court by way of an application to discharge an order of the Master. The impugned order had granted the second named defendant an extension of time within which to appeal orders made by the Circuit Court on consent. One of the striking features of this case is the significant lapse of time between the making of the consent orders by the Circuit Court (14 November 2013) and the bringing of an application for an extension of time to appeal (25 October 2019). This represents a delay of some six years.

2. The principal ground advanced in support of the application for an extension of time is that, as a result of subsequent developments in the case law, a defence to the proceedings

is now available. This defence did not, or so it is said, exist at the time judgment had been entered by the Circuit Court.

PROCEDURAL HISTORY

3. The within proceedings were commenced by way of Civil Bill for Possession issued before the Circuit Court on 17 August 2012. The plaintiff ("***the bank***") had sought an order for possession to enforce a mortgage entered into between the bank and the two defendants on 2 September 2005. The fact that the mortgage had been entered into prior to 1 December 2009 had the consequence that the proceedings were not governed by the Land and Conveyancing Law Reform Act 2009.

4. The proceedings had been listed for hearing before the Circuit Court for the South Eastern Circuit on 14 November 2013. In the event, the proceedings were not contested, and an order for possession and an order for the sale of the lands were made on consent. In each instance, a stay of six months was placed on the execution of the respective order. The Circuit Court directed that the bank was to have carriage of sale of the mortgaged property.

5. The shorthand "***the borrower***" will be used where convenient to refer to the second named defendant, Mr. Connors, in circumstances where he alone is pursuing an application for an extension of time to appeal. The first named defendant has not participated in the proceedings before the High Court.

6. Given the nature of the grounds of appeal which the borrower now seeks to advance, it is necessary to explain how the question of the rateable valuation of the mortgaged property had been addressed in the pleadings before the Circuit Court. (As discussed in more detail presently, the Circuit Court's jurisdiction was, at the relevant time, subject to

an exclusion (save by consent of the necessary parties) where the rateable valuation of the land exceeded €253.95. See paragraphs 17 to 23 below).

7. The special indorsement of claim in the Civil Bill for Possession recites that the rateable valuation of the (mortgaged) property does not exceed €253.95. The grounding affidavit states that the "Poor Law Valuation" of the property is less than €253.95, and exhibits what is described as a "certificate" of the Poor Law Valuation. The relevant exhibit consists of a letter of 4 December 2012 from an official in the Valuation Office in the following terms.

> "I refer to your application for a certificate showing the rateable valuation for the above property.
>
> I regret that I am unable to issue such certificate as the property is not as yet valued for rating purposes, however if a building is erected/re-constructed in accordance with the dimensions shown on the deed plan submitted, I certify that the rateable valuation of the said buildings will not exceed €253.95 (two hundred & fifty two Euro and ninety five cent)."

8. It seems that letters in this format were regularly issued by the Valuation Office at the time. This practice had subsequently been criticised by the High Court in a judgment delivered some two years after the orders had been made against the defendants by consent in the present case (*Bank of Ireland Mortgage Bank v. Finnegan* [2015] IEHC 304). The borrower seeks to rely on this High Court judgment in support of an argument that the bank had failed to establish that the Circuit Court had jurisdiction. As discussed presently, however, the judgment in *Finnegan* now has to be read in the light of the Supreme Court judgment in *Permanent TSB plc v. Langan* [2017] IESC 71; [2018] 1 I.R. 375.

9. On the same date as it made the orders for possession and for sale (14 November 2013), the Circuit Court also dealt with a partition application as between the two defendants *inter se*. It seems that it had previously been agreed between the parties that Ms.

Keating's interest in the property is to be bought out. The bank suggests that the partition order would remain extant even if Mr. Connors succeeded in his putative appeal.

10. It is common case that Mr. Connors has remained in residence in the mortgaged property notwithstanding the order for possession. More recently, on 27 June 2019, the bank obtained the leave of the Circuit Court to seek an execution order. The bank's solicitors subsequently wrote to the solicitors who had acted for Mr. Connors in September 2019 and notified them that the execution order had been lodged with the Sheriff for execution. Shortly thereafter, on 25 October 2019, Mr. Connors issued a motion to extend time to appeal the order of 14 November 2013.

11. The Master made an order extending time on 25 February 2020, and the bank applied by way of motion to discharge the said order on 28 February 2020. The hearing of that application had been delayed as a result of the restrictions on court sittings imposed as part of the public health measures in response to the coronavirus pandemic. The application to discharge the Master's order ultimately came on for hearing before me on 18 February 2021.

PRINCIPLES GOVERNING AN EXTENSION OF TIME

12. In most instances, an application for an extension of time to appeal will be determined by reference to the criteria identified in the well-known case of *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] I.R. 170 ("***Eire Continental***"). There, counsel for the respondent had submitted that the following three conditions must be satisfied before a court would allow an extension of time.

> "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."

13. The Supreme Court, *per* Lavery J., accepted that these three conditions were proper matters for the consideration of the court in determining whether time should be extended, but went on to state that they must be considered in relation to all the circumstances of the particular case.

14. The principles governing an application for an extension of time have recently been reaffirmed by the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3; [2020] 2 I.L.R.M. 407 ("***Seniors Money Mortgages***"). The judgment reiterates that, in exercising its discretion to extend time, the underlying obligation upon a court is to balance justice on all sides, and that all the circumstances of the case must be taken into account. The Supreme Court emphasised that the *Eire Continental* criteria are guidelines only, and do not purport to constitute a check-list, according to which a litigant will pass or fail. The judgment goes on to emphasise, however, that the rationale that underpins the guidelines will apply in the great majority of cases. In this regard, the judgment in *Seniors Money Mortgages* endorses the approach taken in *Goode Concrete v. CRH plc* [2013] IESC 39 ("***Goode Concrete***").

15. As explained by the Supreme Court in *Goode Concrete*, a court, in exercising its discretion to grant or refuse an extension of time to appeal, must seek to balance a number of competing interests. See paragraph 3.3 of the judgment as follows.

> "The reason why the *Éire Continental* test applies in the vast majority of cases is clear. The underlying obligation of the Court (as identified in many of the relevant judgments) is to balance justice on all sides. Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice. Excluding parties from potentially meritorious appeals also runs the risk of injustice. 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 the proceedings) are at an end, must also be a significant factor. The proper administration of justice in an orderly fashion is also a factor of high weight. Precisely how all of those matters will interact on the

facts of an individual case may well require careful analysis. However, the specific *Eire Continental* criteria will meet those requirements in the vast majority of cases."

16. The relevant legal principles have been summarised as follows in *Seniors Money Mortgages*.

> "62. The rationale for holding parties to the stipulated time limits for appeals is, as Clarke J. observed [in *Goode Concrete*], that in most cases a party to litigation will be aware of those limits and should not be allowed an extension unless the decision to appeal was made within the time, and there is some good reason for not filing within the time. Further, in most cases, the parties will be aware of all the evidence called, the submissions made and the reasoning of the judge – they have, therefore, all the information necessary for the purposes of making a decision. *Goode Concrete* was an exception because the appeal was based on information that had come to the attention of the appellants only after the conclusion of the High Court process. It is notable that in granting an extension of time the Court did not permit the appellants to appeal in respect of any aspect that was known to them in the ordinary course.
>
> 63. While bearing in mind, therefore, that the *Éire 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.
>
> 64. It should also be borne in mind that, depending on the circumstances, the three criteria referred to are not necessarily of equal importance inter se. As Clarke J. pointed out in *Goode Concrete* it is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside the time if the Court is not satisfied that there are arguable grounds, even if the intention was formed and there was a very good reason for the delay. To extend time in the absence of an arguable ground would simply waste the time of the litigants and the court.
>
> 65. By the same token it seems to me that, given the importance of bringing an appeal in good time – the desirability of finality in litigation, the avoidance of unfair prejudice to the party in whose favour the original ruling was made, and the orderly administration of justice – that the threshold of arguability may rise in accordance with the length of the delay. It would not seem just to allow a litigant to proceed with an appeal, after an inordinate delay, purely on the basis of an arguable or stateable technical ground. Since the objective is to do justice between the parties, long delays should, in my view, require to be counterbalanced by grounds that go to the justice of the decision sought to be appealed. Not every error causes injustice."

DETAILED DISCUSSION

CIRCUIT COURT'S JURISDICTION IN MORTGAGE SUITS

17. To assist the reader in understanding the argument that there has been a change in the case law such as to justify the granting of an extension of time, it is necessary to explain the limits of the Circuit Court's jurisdiction as of the time the consent orders were made.

18. As of November 2013, the interaction of two bodies of legislation had produced the anomalous result that notwithstanding that "domestic premises" (as defined) did not attract the payment of rates, the Circuit Court's jurisdiction in certain types of cases continued to be delimited by reference to the "rateable valuation" of the mortgaged property. More specifically, whereas the Valuation Act 2001 provided that "domestic premises" were not "rateable", the Courts (Supplemental Provisions) Act 1961 excluded the Circuit Court's jurisdiction in certain mortgage suits where the rateable valuation of the mortgaged property did not exceed €253.95.

19. This anomaly had been addressed to some extent by the Land and Conveyancing Law Reform Act 2009. The Circuit Court now enjoys exclusive jurisdiction in the case of a "housing loan" mortgage, and does so without reference to the rateable valuation of the land. This jurisdiction does not, however, extend to mortgages, such as that in the present proceedings, which had been entered into *prior to* the commencement of the relevant legislative provisions on 1 December 2009.

20. The anomalous status of "domestic premises" gave rise to a debate in the case law as to whether the Circuit Court's jurisdiction was, in effect, ousted in the case of new dwellings which had never been valued for rating purposes. This debate was ultimately resolved by the Supreme Court in its judgment in *Permanent TSB plc v. Langan* [2017] IESC 71; [2018] 1 I.R. 375 ("***Langan***"). The Supreme Court had explained that it is necessary to distinguish between the following two concepts. The first is the concept of "rateability"

which, when the term is properly used, refers only to the question of whether rates can actually be levied on the property concerned. The second is the concept of "rateable valuation", which refers to the question of whether a property has (or could have) a valuation attributed to it in accordance with the Valuation Act 2001. Whereas a domestic premises is not liable to rates, it is capable of having a rateable valuation attributed to it under section 67 of the Valuation Act 2001. This section provides that, on application, the Commissioner for Valuation may cause the value of a property to be determined as if the property were rateable, and that the value of the property so determined shall be *deemed* to be the rateable valuation of the property. A financial institution would have sufficient interest to make an application to have a "rateable valuation" determined in respect of a mortgaged property.

21. The Supreme Court in *Langan* noted that the distinction between the terms "rateable" and "rateable valuation" had not always been observed in the earlier case law. The Supreme Court set out its conclusions as follows (at paragraphs 84 and 85 of the reported judgment).

> "For the purposes of these conclusions I use the term rateable valuation to include a deemed rateable valuation under s. 67 of the 2001 Act. For the reasons set out in this judgment, I am of the view that the Circuit Court has jurisdiction to entertain possession proceedings of the type which are the subject of this appeal in cases where a relevant property either has a rateable valuation which is shown not to exceed €253.95 or where property is shown not to actually have a rateable valuation at all. I note that it is important to keep in mind the distinction between the question of whether a property is 'rateable' as that term is used in a technical fashion in the 2001 Act and whether a property has a rateable valuation.
>
> I further conclude that a plaintiff must establish jurisdiction either by demonstrating that the relevant property has a rateable valuation which does not exceed €253.95 or by showing that the property in question does not actually have a rateable valuation at all. These matters may be demonstrated by any admissible evidence."

22. It follows from the judgment in *Langan* that, under the legislative regime as it stood in November 2013, the Circuit Court had jurisdiction to entertain possession proceedings in cases involving a domestic premises in circumstances where either (i) a rateable valuation which did not exceed €253.95 had been attributed to the premises, or (ii) no rateable valuation had been attributed to the premises. Put otherwise, it was only where a mortgaged property had been valued, and that rateable valuation exceeded €253.95, that the exclusion under the Third Schedule of the Courts (Supplemental Provisions) Act 1961 would apply. Even then, it was always open to the parties to enlarge the Circuit Court's jurisdiction by consent.

23. Finally, for the sake of completeness, it should be explained that matters have progressed in the intervening years, and the present day position is that any monetary limits on the Circuit Court's jurisdiction are now prescribed by reference to the "market value" of the relevant lands. There is also an evidential presumption, until the contrary is proved, that the market value of land does not exceed the monetary amount prescribed. (See section 53A of the Civil Liability and Courts Act 2004 (as inserted by the Courts Act 2016)).

DECISION ON APPLICATION FOR AN EXTENSION OF TIME

24. I turn next to apply the principles identified by the Supreme Court in *Seniors Money Mortgages* to the present proceedings. This requires consideration of *all* of the circumstances of the case. For ease of exposition, I have broken down the relevant considerations under a number of sub-headings.

(i). No arguable grounds of appeal

25. The principal argument advanced in support of the application for an extension of time is that, as a result of supposed developments in the case law in the interim, a new defence

to the proceedings is now available. More specifically, it is said that the Circuit Court did not have jurisdiction in circumstances where the bank did not formally prove that the rateable valuation of the mortgaged property did not exceed €253.95. It will be recalled that the bank had relied upon a letter dated 4 December 2012 from the Valuation Office to the effect that the mortgaged property had not yet been valued for rating purposes. (The letter is set out at paragraph 7 above). Counsel on behalf of the borrower cites the following passage from the judgment in *Bank of Ireland Mortgage Bank v. Finnegan* [2015] IEHC 304 (at paragraph 35), as authority for the proposition that such a non-statutory letter from the Valuation Office is inadmissible as proof of rateable valuation.

> "It appears to the Court on the evidence, that the plaintiff and others have devised and used an ad hoc non-statutory process which is devoid of legal effect, for the purpose of persuading the Circuit Court that it has a jurisdiction which it does not in fact enjoy. This is a matter of serious concern to the Court. The standard letter issued by the Valuation Office in this and other cases may be derived from the type of letter issued by them in respect of rateable properties such as off licences which are in the process of being valued, but the fact is that the content of these letters, however unintentional, is misleading when applied to domestic premises. The letter states '*I refer to your application for a certificate showing the rateable valuation for the above property. I regret that I am unable to issue such a certificate as the property is not as yet valued for rating purposes*'. The clear import of the terminology used is that the property is rateable but not yet rated, when as the Valuation Office well knows, the property is by virtue of the Act not rateable at all. In so far as this practice may be ongoing it should cease forthwith."

26. Counsel submits that the letter of 4 December 2012 from the Valuation Office exhibited by the bank in the present proceedings is in almost identical terms to that criticised by the High Court in *Finnegan*.

27. In response, counsel for the bank submits that the effect of the subsequent judgment of the Supreme Court in *Langan* (discussed in detail at paragraphs 20 to 22 above) is to overturn the "fundamental premise" on which the decision in *Finnegan* had been reached.

28. It is neither necessary nor appropriate for this court, in determining an application for an extension of time, to reach a concluded view on the merits of the intended appeal. Rather, the question to be asked is whether the intended grounds of appeal are arguable. The judgment in *Seniors Money Mortgages* indicates (at paragraph 65) that the threshold of arguability may rise in accordance with the length of the delay, and that it would not seem just to allow a litigant to proceed with an appeal, after an inordinate delay, purely on the basis of an arguable *technical* ground of appeal.

29. I have concluded that the ground of appeal in the present case does not meet the threshold of arguability. The judgment of the Supreme Court in *Langan* held that jurisdiction may be demonstrated by producing admissible evidence that the property concerned does not, in fact, have a rateable valuation. The judgment goes on to indicate that this could take the form of evidence from an appropriate officer of the Commissioner of Valuation to the effect that, having checked the records, a specified property does not actually have either a rateable valuation or a deemed rateable valuation. Whereas the evidence in the present case falls short of that standard, it is unlikely that the borrower would succeed in persuading a court that the letter of 4 December 2012 is insufficient evidence in a case where no jurisdictional objection had ever been raised.

30. The criticisms of this type of letter made in *Finnegan* cannot be relied upon given that that judgment had been predicated on the mistaken understanding that the Circuit Court did not have jurisdiction in respect of domestic premises where no rateable valuation had been determined, and that section 67 of the Valuation Act 2001 could not be relied upon by a financial institution.

31. Perhaps more importantly, however, the ground of appeal is entirely technical. The borrower does not contend that a rateable valuation has ever been determined for the mortgaged property, nor that any such deemed rateable valuation (had it been

determined) would have exceeded the exclusionary limit of €253.95. There is no suggestion, therefore, that the proceedings did not come within the Circuit Court's jurisdiction. Rather, the sole objection is that the (alleged) absence of formal proof on the question had the consequence that the Circuit Court could not exercise its jurisdiction in this case. This is so notwithstanding that the borrower consented to the making of the orders.

32. With respect, it would not be in the interests of justice to grant an extension of time to allow an appeal to be brought, some six years after the orders were made, on such a narrow, technical basis. The ground of appeal sought to be advanced is not one which, even if well founded, goes to the justice of the order of the Circuit Court. At the risk of belabouring the point, there is no suggestion that the exclusionary limit on the Circuit Court's jurisdiction in mortgage suits, i.e. the monetary limit of €253.95, had been exceeded.

33. Moreover, even if it had been exceeded, the parties could always have enlarged the Circuit Court's jurisdiction by consent under section 22 of the Courts (Supplemental Provisions) Act 1961. On the facts of the present case, the parties expressly consented to the orders made by the Circuit Court, and did so with the benefit of legal advice. It is correct, of course, to say that section 22 provides that such consent is to be given in the form prescribed by rules of court, and a consent in this precise form was not given in the present case. The fact that the parties consented to the orders is, nevertheless, relevant in assessing where the interests of justice lie for the purposes of the application to extend time. This is a case which came squarely within the Circuit Court's jurisdiction.

34. In summary, the proposition that it is in the interests of justice that a party who even now accepts that the proceedings come within the Circuit Court's jurisdiction; who consented to the making of the relevant orders; and who never raised a jurisdictional objection

which had been open to him at the time, should be permitted to appeal those orders some six years after the event is untenable.

(ii). No actual change in the law

35. The application for an extension of time is predicated on the assumption that there had been a change in the law subsequent to the making of the orders on 14 November 2013. The principal judgment relied upon in this regard is that in *Bank of Ireland Mortgage Bank v. Finnegan* [2015] IEHC 304, which was delivered on 20 May 2015. This judgment is cited as authority for the proposition that the Circuit Court did not have jurisdiction to make orders for possession in relation to property without a rateable valuation (see §2.7 of the borrower's written legal submissions).

36. In truth, the judgment in *Finnegan* did not effect any lasting change in the law. The judgment in *Finnegan* was not followed in *Bank of Ireland Mortgage Bank v. Hanley* [2015] IEHC 738. The finding in *Finnegan*, i.e. to the effect that the Circuit Court did not have jurisdiction in respect of domestic premises where no rateable valuation had been determined, no longer represents good law in light of the judgment of the Supreme Court in *Langan*. (See discussion at paragraphs 17 to 23 above).

37. The argument which the borrower wishes to advance on appeal, far from being one which only became available in consequence of the judgment in *Finnegan*, is actually inconsistent with that judgment. The argument is that the bank failed to put formal proofs before the Circuit Court which established either (i) that a rateable valuation had been determined for the mortgaged property and that the valuation did not exceed €253.95, or (ii) that no rateable valuation had been determined. It would have been open to the borrower to make this argument in 2013. *Finnegan* does not assist in advancing that argument because, on that judgment's analysis, the Circuit Court would not have had jurisdiction in the second contingency.

38. Moreover, the judgment in *Finnegan* expressly cited with approval the judgment in *Harrington v. Judge Murphy* [1989] I.R. 207. There, the question of proofs had been addressed as follows.

> "The applicants claim that formal proof of the rateable valuation of the lands was necessary in order to give the respondent jurisdiction to entertain the claim, but I do not construe the provisions of the Courts (Supplemental Provisions) Act, 1961, s. 22 and the Third Schedule to the Act (as amended) in this manner. It appears to me that proof should be given in every case to show that the matter is within the jurisdiction of the court, but that if it is not given and the case is allowed to proceed a situation arises in which the court may or may not have jurisdiction to deal with the dispute which is being litigated before it. If it proceeds to judgment and it transpires that the matter was not within the proper jurisdiction of the Circuit Court, then the court has made an order without having jurisdiction to do so and that order should, in the normal course of events, be set aside, *ex debito justitiae*, on the application of a party who is affected by the making of the order.
>
> If, however, it transpires that the matter was, in fact, within the jurisdiction of the Circuit Court, then it does not appear to me that the failure of the respondent to insist on proper proof being adduced to establish his jurisdiction has the effect of depriving him of jurisdiction, or of invalidating an order made by him in the course of the proceedings. […]"

39. The pragmatic approach to formal proofs adopted in *Harrington*—and approved in *Finnegan*—is the polar opposite of the highly technical approach urged upon this court by the borrower. His argument is, in effect, that the absence of a formal proof deprives the Circuit Court of jurisdiction even in a matter which properly comes within its subject-matter jurisdiction. This is precisely the argument rejected by the High Court in *Harrington*.

(iii) Would a change in the case law justify an extension of time?

40. There was much debate at the hearing before me on the question of whether a change in the case law could constitute a good reason for granting an extension of time. Strictly speaking, it is not necessary to resolve this issue in the present case given my finding, at (ii) above, that the borrower has not identified any actual change in the law.

41. Lest I am incorrect in this finding, and out of deference to the submissions of counsel, I set out my findings on the issue below.

42. The starting point of the analysis must be the judgment of the Supreme Court in *A. v. Governor of Arbour Hill Prison* [2006] IESC 45; [2006] 4 I.R. 88. In brief, the Supreme Court held that even a fundamental change in the law (on the facts, the finding that a particular statutory provision was invalid having regard to the Constitution of Ireland) did not have retrospective effect. This conclusion was predicated on the principle of legal certainty. The matter is summarised as follows by Murray C.J. (at paragraphs 114 and 115 of the reported judgment).

> "It follows from the principles and considerations set out in the cases, which I have cited, that final decisions in judicial proceedings, civil or criminal, which have been decided on foot of an Act of the Oireachtas which has been relied upon by parties because of its status as a law considered or presumed to be constitutional, should not be set aside by reason solely of a subsequent decision declaring the Act constitutionally invalid.
>
> The parties have been before the courts. They have, in accordance with due process, had their opportunity to rely on the law and the Constitution and the matter has been decided. Once finality has been reached and the parties have in the context of each case exhausted their actual or potential remedies the judicial decision must be deemed valid and lawful."

43. The principles in *A. v. Governor of Arbour Hill* were applied in the context of non-constitutional proceedings in *Ulster Bank Ireland Ltd v. Kavanagh* [2014] IEHC 299. The case concerned an application to set aside a judgment entered in default of appearance. One of the grounds relied upon in support of the application was that there had been developments in the jurisprudence on the operation of the rule against hearsay in debt collection proceedings in the intervening years since judgment had been entered. Baker J. (then sitting in the High Court) held that it would offend against the principle of certainty and finality in litigation to allow the default judgment to be set aside on this basis. See paragraph 15 of the judgment as follows.

> "In this case, judgment was entered in the Central Office of the High Court. I do not accept that there is a frailty in service. Accordingly, the defendant may set aside the judgment only if she can raise a defence on the merits. She has not averred that she was not indebted to the plaintiff, but rather raises the procedural argument that the means by which the plaintiff sought to establish indebtedness fell foul of the rule against hearsay. She now seeks to take advantage of litigation which occurred in 2013 and 2014 to challenge a judgment obtained seven years ago. In my view, she cannot do so. To allow the defendant to impugn the affidavit of debt would be to offend the rule against retrospectivity, and the principles of certainty and finality in litigation. The rules of the Superior Courts permit the court to set aside a judgment in the interest of fairness, and this means fairness to both sides. In balancing the interests of the parties for this test of fairness I cannot accede now to the application by the defendant. The defendant could have, but did not raise the hearsay defence at the time when the affidavit of debt was filed. In addition, the defendant has not sought to show any arguable defence to this case on its merits."

44. It does not appear as if the specific question which arises in the present proceedings, namely whether an extension of time for appeal is justified by reference to developments in the case law, has been directly addressed in a written judgment. The closest one comes is, perhaps, the judgment of the Supreme Court in judicial review proceedings entitled *M. O'S v. Residential Institutions Redress Board* [2018] IESC 61; [2019] 1 I.L.R.M. 149. Before turning to consider that judgment, it should be acknowledged that any analogy between (i) an application for an extension of time to appeal, and (ii) an application for an extension of time within which to bring judicial review proceedings, is imperfect. In particular, an extension of time to appeal, by definition, only ever arises where there has been a judicial determination. I note, however, that the judgment in *Seniors Money Mortgages* had suggested that there might be some analogy to be drawn between the two types of time extension. See paragraph 66 of the judgment in *Seniors Money Mortgages* as follows.

> "There is an analogy here with delay in the context of judicial review. There may, in that context, be cases where a litigant can establish entitlement to relief as of right despite delay or other conduct that might in other circumstances constitute a bar to relief. O'Higgins C.J., discussing the discretionary nature of judicial review

> in *The State (Abenglen Properties Ltd.) v. Dublin Corporation*) [1984] I.R. 381, acknowledged that in certain cases, where a criminal conviction had been recorded otherwise than in due course of law, the discretion might be exercisable only in favour of quashing. However, he pointed out that in the vast majority of cases the court retained a discretion to refuse relief if, for example, the conduct of the applicant was such as to disentitle him from it. The fact that it can be established that there was an irregularity or defect in the impugned proceedings does not mean that the court is compelled to grant the remedy as of course. In judicial review proceedings, therefore, delay is a factor that may lead to a court concluding that relief should not be granted, even if there are factors present that could have led to success if the proceedings had been brought promptly."

45. It is instructive, therefore, to consider the judgments in *M. O'S v. Residential Institutions Redress Board* ("***M. O'S***"). The case concerned an application for an extension of time within which to apply for judicial review. Order 84, rule 21 prescribes a time-limit of three months, but the court has a discretion to extend time. The principal factor relied upon by the applicant in support of the extension of time was that there had been a significant change in the case law since the date of the administrative decision which it was sought to challenge in the judicial review proceedings. As of the date the administrative decision had been made, the state of the case law was that the High Court had already delivered two judgments in cases raising similar complaints to those which the applicant wished to pursue. In each instance, the application for judicial review failed because of the particular interpretation given to the relevant legislative provisions. Mr. O'S had been legally advised that if the same rationale were to be applied to his case, then an application for judicial review on his part would be unsuccessful. Mr. O'S decided not to pursue judicial review proceedings at that time.

46. A number of years later, the Court of Appeal delivered a judgment which effected a change to the interpretation of the relevant legislation. Mr. O'S then instituted judicial review proceedings. So significant was this change in the case law that the respondent to the judicial review proceedings accepted that were an extension of time to be granted,

then Mr. O'S would be entitled to an order of *certiorari* setting aside the administrative decision. To put the matter another way, the applicant in *M. O'S.* would be entitled to succeed in his proceedings "but for" the time point.

47. The Supreme Court divided on the question of whether an extension of time should be granted. Whereas both the majority and minority judgments accepted that a change in the case law could, in principle, represent a good and sufficient reason for an extension of time, the judgments differed on the outcome. Finlay Geoghegan J., writing for the majority, allowed an extension of time. The considerations relied upon in this regard included the fact that the applicant had taken legal advice at the time the administrative decision was made, and had determined not to seek judicial review based upon advice that he was not likely to succeed and that it was probable that an order for costs would be made against him if he failed.

48. Emphasis was placed on the fact that the impugned administrative decision had been made pursuant to legislation which was for the purposes of administering a no fault redress scheme for a class of vulnerable and injured persons.

49. Relevantly, the majority judgment addressed the question of whether a distinction may be drawn between the finality of a judicial determination and the finality of an administrative decision. See paragraphs 70 and 71 of the judgment as follows.

> "The trial judge considered that it followed from the fact that a person who had already had his case finally determined is precluded from relying upon a later judgment which makes a relevant change to the law, that a person who has not applied for judicial review within the time specified in the Rules of Court may not rely upon the potential retrospective effect of the judgment in an application to extend time. He considered it would place an applicant who never sought leave in a better position than a person who had done so and their proceedings had been finally decided. This may be a factor to be taken into account in the exercise of discretion on an application to extend time depending on the facts and circumstances, but does not create an absolute rule. A person who has not commenced a claim which is the subject of an absolute limitation period is also in a different position.

> Accordingly, it does not appear to me to follow from the judgments in *A v Governor of Arbour Hill Prison* nor from the common law position, that a person who is outside of a three month period and applies for an extension of time and seeks to rely inter alia as a reason for the extension upon a change in the law by judicial decision, is in principle excluded from reliance upon the retrospective effect of the new judicial decision on the administrative decision sought to be challenged. It is, of course, a separate question as to whether a court will consider that the change in law effected by the judgment, when considered with all the other relevant facts and circumstances, constitutes good and sufficient reason for an extension of time. There may be many instances in which it would not be so considered, but there may be others in which it would."

50. These passages imply that the judgment in *M. O'S.* is not intended to suggest that the finality of judicial determinations is to be undermined by reference to developments in the case law.

51. It must be doubtful whether a party who has not appealed a judicial determination within time can rely on a subsequent development in the case law to justify an extension of time to appeal. There is a principled distinction between (i) a judicial determination which has become final as a result of the appeal period expiring without an appeal, and (ii) an administrative decision which has not been challenged by way of judicial review. There are public interest considerations, related to the need for finality in litigation, which apply uniquely to the former.

52. It is not necessary, however, to rule on this difficult question for the purpose of resolving the present proceedings. This is because, even allowing that an extension of time for an appeal might be granted by reference to a development in the case law, this would not be an appropriate case to grant an extension. The circumstances of the present case are entirely distinguishable from those at issue in *M. O'S*. for the following three reasons. First, the applicant in that case had considered challenging the administrative decision at the relevant time, but had received negative legal advice. The applicant moved to institute proceedings promptly following the subsequent judgment of the Court of

Appeal. By contrast, in the present case, the borrower never sought to challenge the Circuit Court's jurisdiction, and, in fact, consented to the orders. There is no suggestion that the borrower had wished to challenge the Circuit Court's jurisdiction at the time but had been advised that such a challenge would not succeed. No application was made for an extension of time following the delivery of the judgment in *Finnegan* in May 2015, nor, indeed, following the delivery of the judgment in *Langan* in December 2017. The notice of motion seeking an extension of time was not issued until 25 October 2019.

53. Secondly, the judgment of the majority in *M. O'S.* was informed by the legislative context, and, in particular, the remedial nature of the statutory redress scheme for those who had suffered abuse in residential institutions. No such considerations apply in the present case.

54. Thirdly, the strength of the grounds of challenge are vastly different. As explained earlier, the respondent to the judicial review proceedings in *M. O'S.* had conceded that, but for the time-limit issue, the applicant was entitled to relief. By contrast, the grounds of appeal sought to be advanced in the present proceedings are weak to the point of being inarguable.

(iv). Consequences of consent

55. I turn next to consider the consequences of the borrower having *consented* to the Circuit Court orders. In particular, I will consider whether a party who has consented to an order would ever be entitled to institute an appeal thereafter.

56. Both sides referred this court to the judgment of the Court of Appeal in *Bank of Ireland v. Daly* [2015] IECA 103 ("***Daly***"). On the facts, the party seeking an extension of time had consented to judgment being entered against her, only to apply, some two years later, for an extension of time to appeal. Irvine J. (as she then was) held that none of the three *Eire Continental* criteria had been met. In particular, a *bona fide* intention to

appeal had not been formed within time. Rather, judgment had been entered against the party with her written consent. Irvine J. stated that, in such circumstances, it is difficult to see how the party could ever seek to go behind that order on an appeal. Irvine J. also stated that it was difficult to see how, on appeal, the order of the High Court could be displaced, given that an appellate court has no jurisdiction to engage upon issues or arguments not advanced in a court of first instance.

57. Counsel on behalf of the borrower submits that it is implicit from the fact that the Court of Appeal in *Daly* embarked upon a consideration of all three limbs of the *Eire Continental* test that a court can, indeed, look behind a consent order where there are "considerable arguable grounds" (written legal submissions, §2.5).

58. It is not necessary, for the purposes of resolving the present proceedings, to decide whether there is a bright line rule which precludes a party who has consented to an order or judgment from appealing, absent exceptional circumstances such as fraud. Even if one assumes for the purpose of argument that a party is not estopped from bringing an appeal, it would not be in the interests of justice to grant an extension of time in this case. It would be unfair to allow what is, in effect, a technical objection to be raised for the first time on appeal. Had the borrower sought to raise an objection to the Circuit Court's jurisdiction at the time, the bank might have had an opportunity to address this objection by further evidence and the Circuit Court could have ruled on the matter. It is inappropriate that these matters should only be raised for the first time some six years later.

(v). Prejudice

59. It is submitted on behalf of the borrower that the delay of some six years in seeking to appeal the consent orders of 14 November 2013 has not caused any prejudice to the bank. In particular, it is submitted that the bank has, in effect, acquiesced in the borrower's

continuing occupation of the mortgaged property by not returning regular payments of €500 made by him, and, more generally, by not seeking to enforce the judgment in the intervening years.

60. This submission is not well-founded for the following reasons. First, as explained by the Supreme Court in *Tracey v. McCarthy* [2017] IESC 7, [4.12], it is not necessary for a respondent to establish *prejudice* in order to resist an application for an extension of time.

> "[…] I should emphasise that, in mentioning this point, I do not seek in any way to depart from the well established jurisprudence which makes clear that it is not necessary for a respondent to establish prejudice in order to be able successfully to resist an application for an extension of time. Ordinarily appeals should be brought in time and if they are not, without good and sufficient reason, brought within the time specified then the right to appeal will be lost irrespective of any question of prejudice. However, the presence of prejudice can, in my view, make it unjust to extend time even in a case where the broad criteria might suggest that an extension should be granted. The presence of prejudice is not, therefore, a necessary basis for opposing an extension of time. Prejudice may, however, quite properly be relied on by a party to suggest that an extension of time, which might otherwise be granted, should be refused."

61. Secondly, the delay in the present case (some six years) is so inordinate that prejudice can be assumed. In this regard, the next passage from *Tracey*, [4.13] reads as follows.

> "In the main parties are entitled to assume, once the period for appeal has passed, that the litigation is at an end. They are entitled to order their affairs accordingly. An extension of time, and particularly an extension of time at a significant remove, inevitably runs the risk of prejudice. I would suspect that very many respondents, faced with an application for an extension of time at the remove of the eight years which is present in this case (or even significantly lesser periods), would very easily be able to persuade a court that it would be fundamentally unfair to allow proceedings which had been allowed lie as if finished for such a period to be reopened."

62. The delay of some six years in the present case has to be seen in the context of a 10 day time-limit for the making of an appeal.

(vi). Borrower's health

63. The borrower has averred on affidavit that he had been suffering from anxiety, depression and stress-related symptoms since 2011. Happily, the borrower avers that his medical and mental condition has improved over the two years prior to the date of his affidavit (22 January 2020).

64. It has not been seriously suggested in submission that the borrower's health had been such that he was incapable of managing his affairs nor that he had been incapable of understanding the legal advice received prior to consenting to the orders on 14 November 2013. This is not, therefore, a relevant consideration to the application to extend time.

Summary

65. Having regard to all of the considerations identified above, and applying the principles identified by the Supreme Court in *Seniors Money Mortgages*, I have concluded that it would not be in the interests of justice between the parties to allow the borrower to pursue an appeal some six years after the making of the orders on consent on 14 November 2013. The ground of appeal sought to be advanced, even if well founded, is entirely technical in nature.

CONCLUSION AND FORM OF ORDER

66. For the reasons set out above, the second named defendant has not satisfied the legal test for an extension of time within which to appeal, as recently affirmed by the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3; [2020] 2 I.L.R.M. 407. The Master's order of 25 February 2020 was, therefore, erroneous and should be discharged.

67. The attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

68. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "entirely successful" in proceedings is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order.

69. The starting position, therefore, is that the plaintiff is *prima facie* entitled to the costs associated with the application for an extension of time in that it has been entirely successful in resisting that application. My provisional view is that an order of costs should be made in favour of the plaintiff as against the second named defendant. The proposed costs order will include the costs before both the High Court and the Master. It will also include all reserved costs and the costs of the written legal submissions. If the second named defendant wishes to contend for a *different* form of costs order, his side should notify the plaintiff's solicitor accordingly; and both sides should then file written legal submissions within two weeks of today's date. Such submissions are not to exceed 2,000 words.

Appearances

Brian McGuckian for the plaintiff instructed by Whitney Moore, Law Firm
William Reidy for the second named defendant instructed by James O'Brien & Co. Solicitors

Approved Garrett Simons