

THE HIGH COURT

[2022] IEHC 200
[2020 98 CA]

BETWEEN

START MORTGAGES DESIGANTED ACTIVITY COMPANY

PLAINTIFF

AND

JOHN RYALL AND DOLORES SHIELDS

DEFENDANTS

JUDGMENT of Ms. Justice Bolger delivered on the 4th day of April, 2022

1. This is an application by the plaintiff to extend the time in which they may serve and file a notice of appeal against the whole of the Order made by Her Honour Judge O'Malley Costello on 10 March 2020 in Circuit Court proceedings bearing record number County Louth 88 EJ/15.

Background

2. These proceedings were commenced by Civil Bill dated 14 May 2015 seeking possession of the defendants' family home as a result of the defendants' mortgage having fallen into arrears.
3. The background to various adjournments sought by the plaintiff is set out in the defendants' affidavit and has not been disputed by the plaintiff. The current plaintiff acquired the mortgage debt and in January 2019 sought an adjournment of the proceedings, then before the County Registrar, to substitute the plaintiff. When the matter came before the County Registrar in April of 2019 the plaintiff sought a further adjournment to October 2019. On that occasion the plaintiff sought another adjournment for the purpose of preparing for the hearing which was granted and the County Registrar assigned a hearing date of 11 December 2019. On that date the plaintiff sought a further adjournment for the purpose of filing a supplemental affidavit. His Honour Judge O'Sullivan of the Circuit Court granted the adjournment making it peremptory against the plaintiff and awarded costs to the defendant. No affidavit was filed by the plaintiff between then and when the matter came on for hearing on 10 March 2020. At the call over on that day the plaintiff's solicitor applied for an adjournment but did not furnish any substantial reason. Her Honour Judge O'Malley Costello allowed the matter to stand to enable the plaintiff's solicitor to take instructions. Later in the day counsel was instructed by the plaintiff to renew the application for an adjournment. Her Honour Judge O'Malley Costello refused the adjournment and struck out the proceedings with costs to the plaintiff.
4. Whilst the plaintiff's counsel (who was not the same counsel instructed in the Circuit Court) claimed before this court that the Circuit Court judge refused to allow the matter to proceed to hearing for which counsel claimed the plaintiff was ready, no such claim is made by the plaintiff's deponent in the three affidavits filed before the Master and before this court in relation to this motion. The only claims asserted by the plaintiff in those affidavits were (1) that the Circuit Court judge should have adjourned the proceedings; and (2) that the plaintiff has strong grounds upon which to appeal the order of the Circuit Court judge striking out the proceedings. Counsel for the plaintiff before this court

claimed that the plaintiff was denied its right to a hearing before the Circuit Court. There is no reference in the plaintiff's affidavit to any attempt made by the plaintiff to proceed to a hearing after the second application for an adjournment was made and refused.

5. Counsel for the plaintiff before this court said the Circuit Court should have proceeded to a hearing without the supplemental affidavit for which the plaintiff had sought the adjournment in December. The affidavit sworn on behalf of the plaintiff grounding this application, in referring to the adjournment granted in December to enable a supplemental affidavit to be filed, described that supplemental affidavit as one that "needed to be filed...". Counsel for the plaintiff before this court confirmed that the plaintiff had intended to challenge the defendant's averments claiming various breaches by the plaintiff which the defendants claimed disentitled the plaintiff to possession, in the supplemental affidavit that was never sworn or filed. Counsel for the plaintiff also said that the Circuit Court would have required an update on any repayments made by the defendant within six months of the hearing in any possession hearing and that the plaintiff would have intended dealing with that in the supplemental affidavit. Counsel for the plaintiff asserted before this court that the plaintiff could have, as of 10 March 2020 and still can now in the event that time is extended by this court, proceed to a possession hearing without that update or denial of the plaintiff's claims being put on affidavit, by the plaintiff.

The plaintiff's submissions

6. The plaintiff submitted that the Circuit Court should not have struck out the proceedings, should have allowed the adjournment it sought, or should have proceeded to a hearing. The plaintiff claimed that immediately following the Circuit Court decision, they formed an intention to appeal and instructed their solicitors to do so. The appeal was not lodged in time and the plaintiff proceeded instead to issue the within application to extend the time allowed for a notice of appeal. In the plaintiff's first grounding affidavit sworn by their solicitor on 2 April 2020, the plaintiff set out the following reasons for not lodging the appeal in time:

"I say that due to practical difficulties arising from the Covid-19 pandemic it was not possible for this office to instruct Counsel to prepare the aforesaid appeal, for Counsel to draft same, for my client to approve same and for this office to file same with the Central Office of this Honourable Court within the ten daytime period provided for by the Rules of this Honourable Court."

7. In a subsequent affidavit the plaintiff described the delay as a legitimate delay caused by the Covid-19 pandemic (at para. 5 of Kevin Callan's affidavit sworn on behalf of the plaintiff on the 16th June, 2021). Mr. Callan swore a further affidavit on the 8th October, 2021 in which, he averred to the following:

9. "I say that this office requested the appeal papers from Counsel early the following week and by email dated 18 March 2020 Counsel confirmed that papers were being prepared but noting it was unclear if the Courts Service were even operating at the time in circumstances where the country went into full lockdown earlier that week".

10. "By email dated 20 March 2020 this office noted that it would not be possible for an appeal to be filed within the 10 day time limit due to the unprecedented situation and countrywide lockdown. Accordingly, Counsel was requested to prepare a notice of motion and Affidavit seeking an extension of time to appeal against the Order of the Circuit Court as there was no practical means of having an appeal filed in time".
 11. "I say that further papers and instructions were required to prepare the application to extend time to appeal and the Motion and Affidavit were returned by counsel on 31 March 2020, only 11 days after the period within which to appeal had elapsed".
 15. "Whilst it may have been the case that the Central Office was open at the relevant time, I say that the confusion caused by the pandemic and Government announcements in the critical period between 10 March and 20 March 2020 lead to a reasonable belief that attending the Central Office to file an appeal would be unwise, unsafe and/or impossible. I say that after the lapsing of the deadline on 20 March the Plaintiff moved swiftly to apply to extend time by drafting and swearing the Grounding Affidavit within 2 weeks. With respect, I say that Mr Ryall's averment that the impact of the Covid 19 pandemic in mid to late March 2020 merely caused some additional inconvenience is not credible and most unreasonable".
8. Nowhere in the plaintiff's three affidavits grounding this application to extend time is anything identified or referred to as a mistake either by the plaintiff or their solicitor or counsel. Initially the plaintiff claimed that it was not possible to prepare and file the appeal on time given the difficulties created by the Covid-19 pandemic. In a subsequent affidavit the plaintiff claims that the confusion caused by the pandemic led to their reasonable belief that it was not possible to attend at the Central Office at the relevant time.
 9. In his oral submissions to this court the plaintiff's counsel described the delay as having occurred at a unique time in global history. He referred to his solicitor's "inability" to file the notice of motion by the 20 March. In replying to the submission made by the defendant's counsel that no mistake had been identified by the plaintiff, the plaintiff's counsel stated that there was a mistake and submitted that evidence of a mistake had been put forward in Mr. Callan's second affidavit of 8 October 2021.
 10. The plaintiff claimed it would suffer prejudice if time was not extended in that it may be precluded by *res judicata*, issue estoppel, or the rule in *Henderson v. Henderson* from reissuing its possession proceedings. The plaintiff argued that this prejudice outweighs any prejudice caused to the defendant by the plaintiff's delay in filing its notice of appeal in time.
 11. The plaintiff relies on the decision of O'Malley J. in the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3 as authority for the proposition that the *Eire Continental* principles for an extension of time to file an appeal are not rigid rules

but are guidelines to be considered in all of the circumstances of the case in determining the balance of justice on all sides.

The defendants' submissions.

12. The defendants highlighted the plaintiff's repeated applications to adjourn the possession proceedings and laid heavy emphasis on the peremptory nature of the final adjournment given by His Honour Judge O'Sullivan in December 2019. They argued that the Circuit Court must be permitted to regulate its own procedures as otherwise there would be no effective way to administer justice.
13. The defendants confirmed that the Central Office was never closed during lockdown (which was not challenged by the plaintiff). The defendants questioned the plaintiff's claim that it formed an intention to appeal within the permitted time as the first time they were told of the plaintiff's wish to appeal was when they were furnished with the notice of motion for this application on 8 June 2020 in spite of previous correspondence from the plaintiff's solicitors of 14 May 2020 about costs which did not mention the plaintiff's apparent intention to appeal. The defendants also dispute (1) that the plaintiff has furnished any satisfactory reason for their delay; (2) that Covid-19 would have delayed the plaintiff in filing their notice of appeal had the intention to appeal been made immediately; and (3) that the plaintiff's solicitors were prevented by Covid-19 from filing their notice of appeal within time.
14. The defendants acknowledge that their mortgage is in arrears but rely on the repayments they have been making towards the principal sum and the arrears as a very relevant consideration in determining where justice lies between the parties. Whilst the defendants acknowledge the risk that the plaintiff may fall foul of *res judicata*, issue estoppel, and the rule in *Henderson v. Henderson* if it were to seek to recommence the possession proceedings, they submitted that the plaintiff would still be entitled to pursue any arrears that still exist.

Decision

15. I accept the plaintiff's submission that the Eire Continental principles are not rigid rules but rather guidelines, and the clarification of their status as set out by O'Malley J. in the decision of the Supreme Court in *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3. O'Malley J. cited the decision of Lavery J. in *Eire Continental* in which he referred to the three conditions that must be satisfied before the court would allow an extension being:

- "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 a rule was not sufficient.
3. He must establish that an arguable ground of appeal exists."

O'Malley J. considered the decision of Geoghegan J. in *Brewer v. Commissioners of Public Works* [2003] IESC 51, [2003] 3 I.R. 539 in which the court confirmed that it still had to consider all the surrounding circumstances and where the court accepted there had been a mistake but it was an "irrational" mistake that could not be seen as operative. O'Malley J cited *Lough Swilly Shellfish Growers Co-op Society Ltd v. Bradley* [2013] IESC 16, [2013] 1 I.R. 227 where the court accepted that the *Eire Continental* criteria were guidelines and the court retained a residual discretion. O'Malley J also cited the decision of Clarke J in *Goode Concrete v. CRH Plc* [2013] IESC 39 in which Clarke J confirmed that the court's obligation when considering an application to extend time is "to balance justice on all sides" and identified the considerations likely to arise, including the proper administration of justice in an orderly fashion which he described as a factor of "high weight".

16. It is not clear to me that a mistake as might usually be understood within the *Eire Continental* principles did occur here. Counsel for the plaintiff submitted that evidence of a mistake had been put forward in Mr. Callan's second affidavit of 8 October 2021. That is the affidavit from which I have quoted at paragraph 7 above which refers to Mr. Callan's office noting that it would not be possible for an appeal to be filed and to the confusion caused by the pandemic and government announcements between 10 and 20 March 2020, leading to what Mr. Callan claimed was a reasonable belief that attending the Central Office to file an appeal would be unwise, unsafe and/or impossible. Mr. Callan did not describe or identify the views of the plaintiff and their legal advisers in relation to the Central Office as a mistake but as a reasonable belief.
17. Given the status of the *Eire Continental* principles as guidelines rather than rigid rules and the residual discretion of the court to determine whether time should be extended, it is possible that a belief not asserted as a mistake could justify the court exercising its discretion to extend time, having considered the surrounding circumstances and the need to balance justice on all sides. Any such analysis would have to consider the reasonableness of the belief.
18. In applying the appropriate test and guidelines to the facts of this case, I consider the following circumstances to be relevant to how the court should exercise its discretion:
 - (i) The peremptory nature of the adjournment granted by His Honour Judge O'Sullivan in December, 2019 on the plaintiff's third application for an adjournment of the date for hearing.
 - (ii) The proper administration of justice by the Circuit Court in an orderly fashion, identified by Clarke J. in *Goode Concrete* as "a factor of high weight".
 - (iii) The absence from the plaintiff's affidavits of any proposal by them to the Circuit Court of an alternative course of action. The affidavits only refer to a claim that the proceedings should have been adjourned on the plaintiff's application (as stated by Mary Laird at para. 9 of her affidavit sworn on 2 April 2020).

- (iv) The absence of anything identified as a mistake in the plaintiff's affidavits.
 - (v) The plaintiff's reliance on their stated difficulties in filing and serving a notice of appeal within the required time limit which they said was due to the difficulties and confusion caused by Covid-19.
 - (vi) The fact that the matters at (v) occurred at a time when the Central Office remained open and available to litigants.
 - (vii) The absence of any explanation by the plaintiff as to the basis for their belief that they could not file a notice of appeal on time (which is different to the difficulties they encountered at the time due to confusion and the onset of the pandemic).
 - (viii) The absence of any evidence of the plaintiff attempting to contact the Central Office by phone or email or the result of any enquiry made.
 - (ix) The substantial repayments that the defendants have been making since the proceedings issued, covering repayments due on the principle sum and additional payments to address the still outstanding arrears.
19. I accept that the pandemic and the commencement of lockdown on 12 March 2020 was an unprecedented event which gave rise to great challenges in many areas of life, including in managing litigation. However the fact is that, in spite of the difficulties that existed, the administration of justice did continue and the Central Office remained open and their services remained available.
20. Counsel for the plaintiff identifies what the plaintiff has described on affidavit as difficulties and confusion, as a mistake. If this is correct then I do not consider firstly that it was a rational mistake to conclude that it was not possible to access the Central Office to file papers after the country went into lockdown on the 12 March 2020, and secondly that it was a mistake of the type that the court should exercise its discretion to extend time and in that regard I note from the *Eire Continental* guidelines that a mistake of counsel or solicitor as to the meaning of a rule is not sufficient.
21. Insofar as the plaintiff's solicitor refers to his 'reasonable belief' I do not consider his belief that it was not possible to draft and file appeal papers within time due to lockdown was reasonable, given that the Central Office remained open and given the absence of any evidence of enquiries made with the Central Office in advance of the plaintiff's solicitor formulating his belief about the difficulties in filing appeal papers in time or the ability or safety of attending at the Central Office.
22. Insofar as the court should consider the plaintiff's arguable grounds of appeal, I note the defendants' defences as set out by them on affidavit which the plaintiff apparently intended to refute in its supplemental affidavit. I note also the observations of the plaintiff's counsel (not disputed by the defendants) that the Circuit Court would require to be updated about the repayments being made by the defendant. The plaintiff could not advise the Circuit Court of either issue if time were to be extended as it did not file the

intended supplemental affidavit and could not do so at this stage even if time were to be extended.

23. The Circuit Court must be permitted to regulate its own procedures. The Circuit Court is entitled to ensure that there are consequences for a moving party seeking relief from the court against whom an adjournment is granted on a peremptory basis, who comes before the court on the adjourned date seeking a further adjournment because it has not filed the supplemental affidavit for which it sought the adjournment and which it claimed on affidavit before this court "needed to be filed".
24. The defendants have had these possession proceedings hanging over them for some time, during which they have been making meaningful repayments on the principle sum due and on the arrears.
25. In all of the circumstances I do not consider it would do justice to all the parties to exercise my discretion to extend time for the plaintiff to file a notice of appeal.
26. I therefore refuse the plaintiff's application.
27. My indicative view on costs is, in accordance with s.169 of the Legal Services Regulation Act 2015, that the plaintiff has not succeeded in their application and costs should therefore follow the event. However, I will consider such further submissions as either party may wish to make vis a vis costs or any final orders to be made and will list the matter for the purposes of doing so at 10 am on 26 April.