

APPROVED

[2023] IEHC 110



THE HIGH COURT
CIRCUIT APPEAL

2021 No. 137 CA

BETWEEN

NIAMH CLYNE
FIONA WEDRYCHOWSKI

PLAINTIFFS

AND

LIAM CLYNE

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 10 March 2023

INTRODUCTION

1. This judgment is delivered in respect of an application to extend the time for the lodging of an appeal against an order of the Circuit Court. The order of the Circuit Court is dated 12 May 2021. The order required the defendant to return possession of a dwelling house situated at 63 Clonmore Heights, Mullingar, County Westmeath to the plaintiffs. The defendant did not lodge an appeal against that order within the ten day period prescribed by Order 61 of the Rules of the Superior Courts.

NO REDACTION REQUIRED

PROCEDURAL HISTORY

2. The within proceedings were commenced before the Circuit Court on 10 January 2020 by way of an Ejectment Civil Bill – Permissive Occupant. It is pleaded that the plaintiffs are suing in their capacity as the personal representatives of the late William Clyne (“*the deceased*”). The deceased died on 6 January 2019. The deceased is survived by four adult children: these include the two plaintiffs and the defendant. It is further pleaded that, by his last will and testament dated 3 February 2015, the deceased left all the rest, residue and remainder of his estate to be divided between his four children. The dwellinghouse the subject-matter of these proceedings falls into the residue of the estate.
3. Judgment was entered against the defendant in the Circuit Court in default of appearance on 12 May 2021. The order for possession was drawn up on 2 June 2021. The defendant would have had a period of ten days within which to lodge an appeal to the High Court against this order. In the event, no appeal was lodged within time. Nor was any application made to the Circuit Court, pursuant to Order 30 of the Circuit Court Rules, to set aside the default judgment.
4. A number of months later, the defendant, on 12 August 2021, issued a notice of motion before the High Court seeking an extension of time for the lodging of an appeal. The motion is grounded on an affidavit of the same date. This affidavit does not provide any meaningful explanation for the failure to lodge the appeal within time. Nor does the affidavit identify the grounds of appeal which the defendant wishes to pursue.
5. The motion seeking an extension of time was initially returnable before the Master of the High Court on 30 November 2021. The Master explained to the defendant that it was necessary to set out the basis upon which the extension of

time was being sought by reference to matters such as the grounds of appeal. The Master afforded the defendant an opportunity to file a further affidavit addressing these matters. The defendant filed a supplemental affidavit on 7 January 2022.

6. For completeness, it should be noted that the plaintiffs have prepared an affidavit dated 2 November 2021. This affidavit has not, however, been filed in the Central Office of the High Court. Indeed, the affidavit does not bear the correct title. In circumstances where the affidavit does not form part of the record and there is no affidavit of service confirming that same was furnished to the defendant, I have not had any regard to the contents of this affidavit in preparing this judgment.
7. The motion for an extension of time was transferred by the Master for hearing by a Judge of the High Court. Following a number of aborted hearing dates, the matter ultimately came on for hearing before me on 3 March 2023.
8. Much of the content of the affidavits filed by the defendant consists of allegations to the effect that one of the plaintiffs had taken control of the deceased's affairs to the exclusion of the defendant and other family members.
9. The defendant sought to elaborate upon these allegations at the hearing before me. In brief, the defendant alleges that coercive control was exercised over the deceased during his lifetime and that his last will and testament was "*corrupt*". The defendant frankly acknowledged, however, that he failed to issue proceedings within time seeking to challenge the validity of the last will and testament. The defendant also acknowledged that it is now too late to bring such a challenge: as the defendant put it "*that ship has sailed*".

10. It was explained to the defendant at the hearing before me that one of the matters which is relevant to an application for an extension of time is whether or not there are arguable grounds of appeal. The defendant was offered an opportunity to outline to the court what grounds of appeal he would rely upon in the event that an extension of time was granted. The defendant frankly admitted that he was unable to identify any grounds of appeal and that he was, instead, inviting the court to impose some sort of stay on the order for possession.

DISCUSSION AND DECISION

11. The legal test governing an application for an extension of time has been clarified recently by the Supreme Court in its judgment in *Seniors Money Mortgages (Ireland) DAC v. Gately* [2020] IESC 3, [2020] 2 I.R. 441, [2020] 2 I.L.R.M. 407. As appears, one of the principal matters to be considered is whether or not the putative appellant has arguable grounds of appeal. The Supreme Court stated that it is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside time if the court is not satisfied that there are arguable grounds. This is so even if the intention to appeal had been formed within time and there was a very good reason for the delay. To extend time in the absence of an arguable ground of appeal would simply waste the time of the litigants and the court.
12. Any appeal in the present case would take the form of a *de novo* hearing of the application for an order for possession. It would not be necessary for the defendant to demonstrate an error on the part of the Circuit Court. Rather, the application would be decided on its merits by the High Court. For the purpose of an extension of time, therefore, it would be sufficient for the defendant to

identify arguable grounds upon which the application for an order for possession might successfully be resisted. The defendant has failed to identify a single such ground. The defendant does not, for example, dispute that the plaintiffs have standing, in their capacity as the personal representatives of the deceased, to seek an order for possession.

13. The most that the defendant does is to allege that the last will and testament of the deceased, which divides the property between the four adult children, was procured by undue influence and is corrupt. The defendant frankly conceded, however, that he is now out of time to bring any challenge to the validity of the will. It would have been necessary for the defendant to have issued separate proceedings in this regard and any proceedings issued now, some four years after the date of death, would be liable to be defeated by delay or laches.
14. The defendant in the present case has been offered several opportunities to identify arguable grounds for saying that an appeal against the Circuit Court order might succeed. As appears from the procedural history recited earlier, the Master of the High Court had specifically adjourned the matter to allow the defendant to file a supplemental affidavit addressing this. The defendant was afforded an opportunity at the hearing before me to elaborate upon any grounds of appeal. The defendant has failed to identify any arguable grounds of appeal.
15. In circumstances where the defendant, as putative appellant, has been unable to identify a single ground of appeal, there is no basis for this court to grant an extension of time. It would not be in the interests of justice to grant an extension of time in circumstances where the appeal cannot succeed.
16. The defendant has requested that this court adjourn the proceedings to allow him time to obtain alternative accommodation. The defendant suggested that the

matter should be adjourned for a period of between twelve to eighteen months to allow this to happen. The defendant explained in submission—although this is not set out on affidavit—that he has taken steps to apply for accommodation from the local authority in circumstances where he is unable to source affordable accommodation in the private rental market. The local authority has, seemingly, indicated that there is no suitable accommodation available for him at this time.

17. Whereas the court has sympathy for the position that the defendant finds himself in, there is no jurisdictional basis for this court to adjourn the matter. This is because unless and until an extension of time is granted, there are no appeal proceedings properly before the High Court. For the reasons already outlined, the application for an extension of time must be refused. There are, accordingly, no proceedings extant before the High Court in respect of which an adjournment can be granted.

CONCLUSION AND FORM OF ORDER

18. The application for an extension of time to appeal is refused for the reasons explained herein. The practical consequence of this is that there is no impediment to the enforcement of the order for possession granted by the Circuit Court.
19. As to legal costs, my *provisional* view is that the plaintiffs, having been entirely successful in resisting the application for an extension of time, are entitled to recover their costs of the motion as against the defendant. Such costs to be adjudicated under Part 10 of the Legal Services Regulation Act 2015 in default of agreement between the parties.

20. If either party wishes to contend for a different form of order, then they should file short written submissions, not more than 2,500 words, within three weeks of today's date.

Appearances

James Hewson for the plaintiffs instructed by Robert B. Marren & Co. Solicitors
The defendant represented himself as a litigant in person

Approved
Samuel S. Moss