



**THE SUPREME COURT
DETERMINATION**

BETWEEN

ICS BUILDING SOCIETY

PLAINTIFF

AND

KILLIAN MCGRATH

DEFENDANT

Neutral Citation: [2021] IESCDET 15

Supreme Court record no: S:AP:IE:2020:000124

Court of Appeal record no: none

High Court record no: 2017 No. 124 CA

Date of Determination: Tuesday, 9th February 2021

Composition of Court: O'Donnell J., MacMenamin J., Charleton J.

Status: Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.4° OF THE
CONSTITUTION APPLIES**

RESULT: The Court does not grant leave to the Defendant / Applicant to appeal to this Court directly from the High Court.

REASONS GIVEN:

ORDER SOUGHT TO BE APPEALED

COURT: High Court
DATE OF JUDGMENT OR RULING: 28th April, 2020
DATE OF ORDER: 2nd July, 2020
DATE OF PERFECTION OF ORDER: 13th October, 2020
THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 3rd November, 2020 AND WAS IN TIME.

Considerations

1. This determination relates to an application for leave to appeal directly from the High Court, wherein that court allowed the respondent's appeal against an order of the Master of the High Court, extending the time for the applicant to appeal against an order of the Circuit Court.

2. The general principles applicable by this Court in determining whether to grant or refuse leave to appeal, having regard to the criteria incorporated into the Constitution, as a result of the 33rd Amendment, have now been considered in a large number of determinations, and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *B.S. v. Director of Public Prosecutions* [2017] IESC DET 134, and in a unanimous judgment of a full Court delivered by O'Donnell J. in *Price Waterhouse Coopers (A Firm) v. Quinn Insurance Ltd. (Under Administration)* [2017] IESC 73. The additional criteria required to be met in order that a so-called "leapfrog appeal", direct from the High Court to this Court, can be permitted were addressed by a full panel of this Court in *Wansboro v. Director of Public Prosecutions* [2017] IESC DET 115. It follows that it is unnecessary to revisit the new constitutional architecture for the purposes of this determination.
3. Furthermore, the application for leave filed, and the respondent's notice, are published, along with this determination, (subject only to any redaction required by law), and it is therefore unnecessary to set out the position of the parties.

Background

4. On the 28th February, 2012, the Circuit Court in Waterford granted the ICS Building Society an order for possession of all of the premises comprised in Folio 34317F County Waterford, situated at Coolbagh, Clashmore, County Waterford. The respondent did not take any action on foot of the order for a very considerable period. In excess of five years later, on the 3rd May, 2017, the applicant issued a notice of motion, returnable before the Master, seeking to extend the time to appeal the order of the Circuit Court. The time permitted by the Rules of the Circuit Court for making such appeal is 10 days. On the 30th May, 2017, the Master extended time for an appeal.
5. As recorded in the judgment of the High Court, now the subject of this application for leave, the applicant and respondent entered into a mortgage loan agreement contained in a mortgage loan offer of 20th March, 2006, whereby the respondent agreed to provide to the applicant a loan facility in the sum of €1 million repayable monthly over 30 years. The applicant agreed to repay on the terms and conditions contained therein. He failed to make the repayments when due. Accordingly, the respondent issued an Ejectment Civil Bill on the title on 27th April, 2009. On the 4th September, 2009, a firm of solicitors entered an appearance on behalf of the applicant.
6. On the 10th November, 2009, a motion for summary judgment was issued by the respondent. This sought an order for possession of the property. The motion

was listed for hearing before the Waterford County Registrar on some six occasions. During this period, the applicant, apparently, made a number of undertakings to make payments to the respondent, including by way of banker's drafts, and the proceeds of the sale of a property in Portugal, to the arrears.

7. On the 6th December, 2010, the motion for summary judgment was transferred to the judge's list for 14th December, 2010. The solicitors then instructed by the applicant, applied to come off record. Thereafter the applicant represented himself in the Circuit Court proceedings. The motion for summary judgment was adjourned to June, 2011 on the basis that the applicant would make a particular payment to the respondent, and would make his best efforts in the intervening period to meet repayments. Those payments were forthcoming from the applicant.
8. When the matter came on for hearing on the 7th June 2011, it was further adjourned to allow for payments that had been received by cheque to clear. The motion was relisted on 13th December, 2011, when the court granted the applicant a final adjournment to sort out his affairs.
9. The matter finally came on for hearing before Waterford Circuit Court on the 28th February, 2012. Then the court was informed that no payments of any sort had been made since June, 2011. Having heard submissions from counsel on behalf of the respondent, and the applicant in person, the court made an order for possession of the property. Since the making of the order, the applicant continued to reside in the property and, it is said in the High Court, made no attempt to deal with the outstanding arrears. The next step which he took was, in fact, the motion in 2017 before the Master to extend time for an appeal.
10. The judgment of the High Court addresses what is contained in the applicant's affidavit, sworn for the motion in the Master's court. The applicant deposed there that he was suffering from stress, anxiety and depression, and was under medical care to alleviate his medical ailments. He stated it had always been his intention to appeal the Circuit Court order, but due to his ailments he had been unable to do so. He deposed that there were a number of issues that the Circuit Court had failed to take into consideration, as a consequence of which he said the court had made an invalid order. He contended that the respondent had not afforded him the protection as provided under the Mortgage Arrears Code of Conduct issued by the Central Bank.
11. The judgment of the High Court also outlines that an affidavit, sworn on behalf of the respondent to this application, included an averment that the applicant had not given any plausible explanation for the 5 year delay since making the

possession order, beyond an unparticularised, and unsupported, allusion to medical ailments. As to the applicant's issue of not being given the benefit of the Mortgage Arrears Code of Conduct, it was said that the code then in force was complied with, in that the respondent had waited in excess of the 6 months moratorium before commencing possession proceedings. In fact, a period of some 14 months had elapsed.

12. In the course of the High Court judgment, Meenan J. referred 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, and the recent judgment of this Court in *Seniors Money Mortgages (Ireland) DAC v. Derek Gately and Anor.* [2020] IESC 3, wherein O'Malley J. stated that the *Eire Continental* guidelines were not a check-list, but that the rationale that underpins them will apply in the great majority of cases. As stated in *Seniors Money Mortgages*, when there is a significant delay before seeking an extension, an appellant would need to show a correspondingly strong case.
13. The judgment of the High Court sets out that the applicant had sought to adduce medical evidence explaining the delay in filing a notice of appeal. The only medical report was one exhibited in the applicant's grounding affidavit, which averred that the applicant had been a patient of a clinic, but it transpired he had attended the clinic only on one occasion. The High Court judge held that the evidence fell well short of establishing that the applicant had had an inability to look at his financial affairs. He concluded that the applicant had advanced a number of grounds to warrant the extension of time, but these were not sufficient. Accordingly, he reversed the order of the Master.

The Applicant's Case

14. The applicant submits that, notwithstanding the respondent's proof not being in order, the Circuit Court had granted the relief sought. It is submitted that the High Court judge erred, in that Meenan J. had not considered "all the relevant circumstances", as set out in *Seniors Money Mortgages*. It is said that the judge considered two of the three original grounds before the Master, but did not have regard to the injustice caused by alleged flaws in the Circuit Court proceedings, which are not particularised. It is claimed that the High Court judgment contained a material error of fact, to the effect that, before the Master, the applicant had relied on the proposition that the respondent had not complied with the Mortgage Arrears Code of Conduct. It is said that the applicant relied on additional grounds before the Master. It is claimed the High Court judge erred when referring to the applicant's assertion that there was flawed serving of the

Circuit Court proceedings on his partner. It is said the High Court judge was dismissive of the contents of the applicant's affidavit, and appeared to think there was only one such affidavit before the Master, when there were two.

15. The High Court judge is criticised also for taking into account affidavit evidence which the respondent put before him regarding the applicant's substantive appeal, which evidence was not before the Circuit Court. It is said this amounted to substantive unfairness, as it enabled the respondent to mend the procedural flaws in the Circuit Court proceedings.

The Respondent's Case

16. The respondent states that the motion was part heard in the High Court on the 10th December, 2009, and adjourned to allow further medical evidence to be presented. When this was not forthcoming, the hearing of the motion resumed on the 3rd February, 2020, following which judgment was reserved. The judgment was delivered on the 28th April, 2020. That order discharged the order of the Master. The respondent's case is that the High Court judge properly applied the principles in the case law, that there was no explanation as to why he had failed to appeal within time, and that he had not established arguable grounds on appeal. The respondent submits that, between the 28th February, 2012, and the 25th January, 2019, the applicant made three payments, in May, June and August, 2017, totalling €7,500, in respect of the loan. On 25th January, 2019, judgment was obtained against the applicant in the sum of €1,220,882.74, which remains undischarged. The respondent states that, in effect, the applicant has been residing in the property rent-free since June, 2011. It is pointed out that the Circuit Court proceedings came before the County Registrar on six occasions, and the Circuit judge on three occasions, over a period of 26 months.
17. On behalf of the respondent, it is pointed out that the applicant omitted to mention that there were three further substantive affidavits delivered by the respondent in the Circuit Court proceedings. It is said that the question of service on his partner was dealt with in an affidavit of service of Bernadette Rafferty on the 2nd February, 2010, and no evidence was tendered by the applicant's partner that she had not been served with the Circuit Court proceedings either in the Circuit Court, or the High Court. Finally, it is said that, insofar as the applicant informed an intention to appeal in February, 2017, (seeking consent to an extension of time on the 6th February, 2017), he waited a further 3 months to issue his motion to extend time.

Decision

18. This is an application for leave to appeal directly to this Court. The general policy of the legislature that Circuit Court litigation should not be appealed beyond the High Court, although there may be rare exceptions, if an issue of law of general public importance arises, or when it is in the interests of justice. There is nothing in the application to show that an issue of general public importance arises. Rather, the issues raised on behalf of the applicant are entirely confined to certain aspects of his individual case.
19. Second, it cannot be said that it is in the interests of justice that this Court should grant leave. The High Court judge delivered a considered reserved judgment. He referred to the relevant case law. This Court is not a court of error. The judgment of the High Court held the applicant had not explained the very substantial elapse of time which occurred since the time of the Circuit Court order, nor was it indicated that there was any substantive ground of appeal which would warrant an extension of time. This is as much a factor in *Seniors Money Mortgages* as in *Eire Continental*. The five-year delay required a full explanation, which was not provided. A delay of that nature required that the applicant had a strong case on appeal. The High Court judge held that these conditions had not been satisfied. In the view of this Court, the High Court judge was entitled to reach the conclusion he did, basing his conclusions on the legal authorities which he cited and applied in the judgment. He identified factors which he considered to be determinative, especially the factors referred to. He was entitled to do this. There was no absence of fair procedure or constitutional compliance. The application for leave is, therefore, denied.

AND IT IS HEREBY SO ORDERED ACCORDINGLY.