



SUPREME COURT
Respondent's Notice

Supreme Court record number	102-18
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[Title and record number as per the High Court proceedings]

Seniors Money Mortgages (Ireland) DAC 2015 No. 336SP	V	Derek Gately (Defendant) Jacqueline McGovern (Notice Party)
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Date of filing	
Name of respondent	Seniors Money (Ireland) DAC
Respondent's solicitors	Beauchamps Solicitors, Riverside 2, Sir John Rogerson's Quay, Grand Canal Dock, Dublin 2, D02 KV60
Name of appellant	Jacqueline McGovern
Appellant's solicitors	Damian Sheridan Solicitors

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	Seniors Money Mortgages (Ireland) DAC
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The respondent was served with the application for leave to appeal and notice of appeal on date	
6 July 2018	

The respondent intends :

<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
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<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
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<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
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<input type="checkbox"/>	not to oppose the application for leave to appeal
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<input type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
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<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
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<input type="checkbox"/>	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	x
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Respondent's Representation

Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode		Ref.	
How would you prefer us to communicate with you?			
<input checked="" type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Helen O'Connor BL		
Email	Helen.oconnorbl@gmail.com		
Address	10 Washington St., Cork	Telephone no.	0876617958
		Document Exchange no.	2086
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

3. Information about the decision that it is sought to appeal

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

The Respondent disputes several matters set out in Section 4 of the applicant's Notice of Appeal:

1. At **Paragraph 3** of Section 4 of the applicant's Notice, it is asserted that

"the order for possession was made by the High Court exercising its jurisdiction in respect of registered land under Section 62(7) of the Registration of Title Act, 1964. It is an acknowledged fact that the land concerned is unregistered land as a result whereof the aforesaid jurisdiction is not and was never exercisable in relation to it"

The Respondent notes that the Order in question is correct on its face and is patently exercisable. References to the 1964 Act by the Court were as a result of a drafting error. The High Court's awareness of the error is evidenced both by the Digital Audio Recording of the proceedings of the 9th day of March, 2017, and by the correct format of the perfected Order, as noted by McGovern J. at Paragraph 4 of his judgment in the Court of Appeal. The Respondent points out that the High Court acted within its jurisdiction in granting the Order as issued.

2. At **Paragraph 5** of Section 4 of the applicant's Notice, she claims that in the High Court:

"The intended appellant also indicated that 'if an Order for Possession has already been made in this case, we do not know whether [the Court] can now change or vacate that Order or whether an appeal is now required'"

It is not the case that the applicant herein made any such indication to the High Court. Such a representation was not made orally, or in writing. The Respondent believes that the source of the quotation cited by the applicant is a document that was exhibited to her Replying Affidavit in the context of the application to extend time before the Court of Appeal. That document was not submitted to the High Court, notwithstanding the clear opportunity given by the High Court to the applicant herein to make submissions, and submit documentation. The High Court even took the unusual step of reviewing an Opinion of Counsel obtained by the applicant herein through the Volunteer Advisory Scheme. (As evidenced in the Digital Audio Recording Transcript of the hearing). The document exhibited is undated, unsubmitted, unverifiable, and was exhibited to the applicant's Replying Affidavit only after her original averment in her Grounding Affidavit (to the effect that she had expressed an intent to appeal within the permitted time limit) was established to be erroneous, following the production of the DAR transcript. McGovern J., at Paragraph 8 of his judgment in the Court of Appeal notes that the DAR transcript does not support the applicant's submission that she had formed or expressed an intent to appeal at the date of the High Court hearing on March 9th, 2017.

3. At **Paragraphs 6-8** (incl.) of Section 4 of the applicant's notice, it is asserted that the delay in bringing an appeal is attributable to (i) difficulty in accessing legal representation, (ii) health difficulties, and (iii) an 'issue' in respect of her application to extract a Grant of Probate.

The Respondent points out that

- (i) The Estate was ably and thoroughly represented by the Administrator *ad Litem*, which representation included a thorough argument, both at oral hearing, and in the form of extensive written legal submissions on a Statute of Limitations issue associated with the applicability of s.9(2) of the Civil Liability Act, 1961. The applicant herein had the benefit of legal advice through the VAS Scheme, and the High Court facilitated the applicant in allowing Counsel's opinion, obtained through the aforesaid Scheme, to be considered by the Court. McGovern J. noted at Paragraph 8 of his judgment in the Court of Appeal that the applicant

herein did not offer any evidence as to how her limited financial means would have affected her ability to file a notice of appeal on time.

- (ii) Although the Respondent sympathises with the applicant in respect of her health issues, it is noteworthy that the applicant made oral submissions, filed two Replying Affidavits, and attended each substantive hearing of the matter in the High Court. McGovern J., in his judgment in the Court of Appeal noted that:
“Although the notice party refers to ill health suffered by her and her husband, there is nothing to suggest that it was of a kind that would have impeded her ability as such to file a notice of appeal within the time allowed by the rules and there is no satisfactory medical evidence before the court to the effect that she could not have filed notice of appeal due to reasons of ill health.”
- (iii) The ‘issue’ in respect of Probate did not prevent the applicant from extracting a grant, and her grant was extracted prior to the resolution of the ‘issue’ mentioned. In addition, any difficulties experienced in this regard could have been, and ultimately were promptly resolved through a simple communication with the Respondent’s solicitors, as noted at Paragraphs 5-6 of McGovern J.’s judgment in the Court of Appeal.

4. Respondent’s reasons for opposing leave to appeal

If leave to appeal is being contested, set out concisely here the respondent’s reasons why:

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)-

- * the decision in respect of which leave to appeal is sought does not involve a matter of general public importance
- * it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court

General Public Importance

1. The principles applicable to the determination of whether a Court should extend time to appeal a decision are more than 53 years old, having been set out by this Court in *Eire Continental Trading Co. Ltd. v Clonmel Foods* [1955] IR 170. Those principles, and the accompanying principle that the Court retains a discretion to grant an extension of time in circumstances where all three requirements have not been met, but the totality of the circumstances of the case justify such an extension, represent settled law, having been confirmed and applied in a multiplicity of cases before the High Court, Court of Appeal, and before this Court. There is no issue, ambiguity, or uncertainty surrounding their status. There is no general public need for clarification of the applicable rules.
2. The argument put forward by the applicant herein falls squarely within the *Eire Continental* criteria – in that it is based upon her contention that she has a strong arguable case (which contention is heavily contested by the Respondent). It is not a novel issue of law, but rather a particular factual matrix, to which the Court of Appeal has already applied settled principles. It has determined that although the Applicant may indeed have an arguable ground of appeal, she is thoroughly beyond the time limit allowed by the Rules of the Superior Courts for bringing such an appeal (by more than 1 year), and she has failed entirely to satisfy the first two principles set out in the case above (that is to say that she has failed to show the formation of an intent to appeal within the requisite time, and she has failed to show the existence of something like mistake). The Court of Appeal determined that, given the totality of the circumstances of the case, it would not be appropriate to exercise its discretion to extend the time for appeal. It did not consider that the applicant’s ‘arguable case’ was sufficiently strong, or sufficiently unusual to justify departure from the *Eire Continental* requirements.
3. A determination that an applicant for an extension of time to appeal may be refused,

notwithstanding a finding that they may have established an arguable ground of appeal, in circumstances where they have not satisfied the first two *Eire Continental* requirements is not novel. In *Griffiths v Collins* [2017] IEHC 110, the Court made an analogous determination.

4. The applicant's disagreement with the Court of Appeal's unanimous refusal to exercise its discretion to extend the time for the bringing of an appeal in these circumstances is not a matter of general public importance.

5. This Court has set out in *BS v Director of Public Prosecutions* [2017] IESCDET 134 that

"As is clear from a range of determinations made by this Court since the 33rd Amendment to the Constitution came into force, the constitutional function of this Court is no longer that of an appeal court designed to correct alleged errors by the trial court."

and

"...it can rarely be the case that the application of well established principles to the particular facts of the relevant proceedings can give rise to an issue of general public importance."

Similarly, in *Price Waterhouse Cooper (A Firm) v Quinn Insurance Ltd. (Under Administration)* [2017] IESC 73, this Court commented that

"...where an appeal seeks to challenge the application of the High Court or Court of Appeal of well established principles of law which are not themselves the subject of challenge, as this appeal does, it will also be rare that this Court could be persuaded to grant leave to appeal."

6. The matter herein represents the precise circumstances outlined in the *dicta* above. The Court of Appeal applied well-established principles to the facts before it.
7. The Respondent points out that the High Court had jurisdiction to make an order for possession of the property herein, and as such, the applicant's constitutional rights in respect of the property, and in respect of the inviolability of her dwelling are not affected. It further points out that the Order herein is not, as a matter of fact "*bad on its face*", but is in the appropriate form.
8. The Respondent further submits that time limits in respect of appeals are of fundamental importance to the proper administration of justice, as noted in *Lough Swilly Shellfish Growers Co-Op Society Ltd v Bradley* [2013] 3 JIC 1303;

"...in litigation... parties are entitled to believe, and conduct their affairs, on the belief that at some stage the matter has come to an end."

This sentiment was echoed by Irvine J. in the Court of Appeal, in the closing paragraph of her comments on the matter herein.

9. The applicant's submission that the Order herein is so fundamentally flawed that '*requirement[s] as to time for the lodging of an appeal*' should not apply is unsustainable as a rule of law. The respondent disagrees with the applicant's characterisation of the Order herein, and the Court of Appeal also disagreed with such a characterisation. The respondent submits that any order which could theoretically be successfully appealed might be described as 'flawed', and even if the Order herein is 'flawed' (which, again, the Respondent argues it is not), it is inconceivable to reason that time limits should be effectively be held to be inapplicable in principle to any order that might be successfully appealed.

Interests of Justice

1. In *Price Waterhouse Cooper (A Firm) v Quinn Insurance Ltd. (Under Administration)* [2017] IESC 73, this Court commented that;

“The fact that a court might make a decision which a further court might consider to be an error, does not itself establish injustice. Indeed, if there were no limit to the appeals which could be taken, that in itself might be considered an injustice.”

and

“It will rarely be necessary in the interest of justice to permit an appeal to this Court simply because it is said that the lower court was in error. An appeal to the Court of Appeal provides the appropriate remedy for any error made by the High Court. “

2. As noted above, the learned trial judge’s references to the Registration of Title Act, 1964 were based on a drafting error. The Order of the High Court makes no reference to the Act, and it can clearly be seen from the transcript of the Digital Audio Recording of March 9th, 2017, that the Court was aware of the drafting error. The error in and of itself caused no prejudice to the applicant, insofar as there was no defence available to the estate to the granting of an order for possession that was not also available to them in circumstances where the land was mistakenly referred to as registered land.
3. The Court of Appeal reviewed the circumstances of this case, and heard submissions on behalf of the applicant on this particular issue. The Court of Appeal then unanimously determined not to extend the time limit for an appeal. The court noted that although the point might satisfy the low bar of an ‘arguable ground of appeal’ in the context of *Eire Continental*, it was a weak ground of appeal. (The Court commented that the argument advanced in the High Court on the Statute of Limitations point on the applicability of s.9(2) of the Civil Liability Act, 1962 was a stronger ‘arguable case’ for appeal.). The view of the Court of Appeal on this issue may be discerned from the comments of McGovern J. at Paragraph 11 of his judgment:

“There may well be an arguable ground of appeal, certainly on the issue as to the Statute of Limitations point. I am not so sure there is an arguable ground of appeal on the registration of title point. It is perhaps arguable, I would question that, but certainly there may be an arguable appeal under the other point.”

Hogan J. also opined that the Registration of Title point represented the weaker of two potential arguable grounds for appeal, in the opening paragraph of his comments on the matter:

“In this case certainly at least one arguable case has been disclosed, namely the issue relating to the Statute and, I think if pressed I would agree that the issue relating to s.62(7) of the Registration of Title Act 1964 is also at least an arguable ground.” (emphasis added)

4. A refusal of leave to appeal the matter herein will give rise to no injustice accruing in the general sense, to the public/to a class of the public, or in the specific sense, to the applicant.

5. Respondent’s reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc. in sequence) concisely the Respondent’s grounds of opposition to the ground(s) of appeal set out in the Appellant’s notice of appeal (Section 6 of the notice of appeal):

1. The Court of Appeal fairly applied the principles established in *Eire Continental* and concluded that the applicant had not established that she had formed an intention to appeal the Order of

the High Court within the requisite time, and that she had not established the existence of something like mistake. The Court of Appeal explicitly acknowledged that it is within the Court's jurisdiction to extend time, even in circumstances where all three principles in *Eire Continental* are not fulfilled, but fairly and appropriately declined to exercise that jurisdiction in all the circumstances.

2. The Court of Appeal fairly and appropriately afforded due weight to the arguments put forward by the applicant that she would suffer prejudice if an extension of time were refused, having considered the evidence on Affidavit, and the oral submissions of Counsel, and unanimously determined to decline the application.
3. The Court of Appeal explicitly considered its broad discretion to extend time, and fairly and appropriately determined not to exercise that discretion in the applicant's favour.
4. The Applicant's constitutional property rights have been vindicated through an extensive series of hearings before the High Court, and a comprehensive hearing before the Court of Appeal.
5. The Applicant's constitutional rights, pursuant to Article 40.5 of the Constitution and Article 8 of the European Convention on Human Rights, have been vindicated through an extensive series of hearings before the High Court, and a comprehensive hearing before the Court of Appeal.
6. The Order of the High Court is correct on its face. The Court of Appeal appropriately determined not to exercise its discretion to extend time in the circumstances.
7. The Court of Appeal was correct in its unanimous finding that the applicant had not formed a *bona fide* intention to appeal the Order of the High Court within the requisite period.
8. The Court of Appeal afforded appropriate weight to the personal circumstances of the applicant in determining not to exercise its discretion to extend time.
9. The Court of Appeal placed appropriate degree of emphasis on the first and second limbs of the *Eire Continental* test. The Honourable Court did not treat those limbs as binding prerequisites to the exercise of its discretion, but rather explicitly acknowledged that the elements of the aforementioned test are 'matters for the proper consideration of the court', and that it retained broad discretion to extend time, even where each requirement of the aforementioned test had not been satisfied. The Court determined that in all the circumstances of the case, including the length of delay involved, that it was not appropriate to extend time.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

Helen O'Connor BL

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

Yes

No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

Signed: *Cian M. Kelly*, *Beauchamps*
(Solicitor for) the respondent

Please submit your completed form to:

The Office of the Registrar to the Supreme Court
The Four Courts
Inns Quay
Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.