



THE COURT OF APPEAL

Record No. 2018 147

Irvine J.
Hogan J.
McGovern J.

BETWEEN/

SENIORS MONEY

RESPONDENT

- AND -

DEREK GATELY AND JACQUELINE O'BRIEN

APPELLANTS

JUDGMENT (*ex tempore*) of the Court delivered on the 29th day of June 2018 by Mr. Justice McGovern

1. This is an application to extend the time for an appeal against an order of Ms. Justice Baker made on the 26th January, 2017. The learned judge held that the proceedings were not statute barred as the cause of action arose on the death of Noelle McGovern, deceased, who died on the 19th November, 2009, aged 78.
2. Possession was granted in favour of the plaintiff in respect of the lands which are described in the summary summons and are at Sligo Road, Manorhamilton, Dromahair, Co. Leitrim. The notice party and her husband resides on the premises.
3. The notice party was joined in the proceedings by Ms. Justice Baker on the 7th November 2016. In the course of the proceedings she filed affidavits and made submissions on her own behalf and participated in the proceedings as a litigant in person.
4. The interests of the deceased's estate were represented by Mr. Derek Gately who had been granted letters of administration *ad litem* without the will annexed by order of Kelly J. (as he then was) on the 2nd November 2015. An issue arose as to whether the land was registered land. It appears clear now that it was not although the *ex tempore* judgment

referred to s. 67(7) the Registration of Title Act 1964. However the orders made on the 26 January and 9 March 2017 made no reference to the Act. The transcript of a hearing on 9 March establishes that the judge was informed that the lands were unregistered.

5. Subsequent to the High Court judge's order, the notice party obtained legal representation and her solicitor attended the Probate Office on two occasions where there appears to have been some confusion in the mind of the notice parties as to whether or not a grant of representation had been extracted although it is clear that the defendant in the proceedings, Mr. Derek Gately, had been granted liberty to apply for letters of administration *ad litem* and appeared at a hearing before Baker J. in that capacity at which time the notice party also appeared.

6. On the 26th March, 2018, the notice party's solicitor received a response from the plaintiff's solicitors enclosing a copy of the grant of letters of administration. But it is clear, as I said, at the hearing of the application before the learned trial judge the defendant had appeared in that capacity and submissions were made on his behalf. The notice party also attended and made her own submissions and filed affidavits. There is nothing, in my view, since the date of the hearing that constitutes new evidence.

7. The delay in this case in bringing the application for leave for an extension of time to appeal is very substantial as it is over a year. 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.

8. She also makes reference to her limited financial means but does not offer any evidence as to how this would have affected her ability to file a notice of appeal on time. The notice party says that she wanted to bring an appeal against the High Court order since

the time it was made and she also suggests that the DAR recording would support her in this submission. But in my view, having read a DAR recording transcript, it does not support her submission on this point. Also, her subsequent conduct in seeking to enquire whether she would be able to lease the property after a stay which was granted will expire, suggests to me that she had not made up her mind to appeal when she claims to have done so. I am satisfied there is no satisfactory evidence to show that she made up her mind to appeal at the time shortly after the hearing.

9. The replying affidavit of Ms. Ciara Murphy, solicitor on behalf of the plaintiff, establishes quite clearly that the notice party was advised that she could take out a grant of probate prior to the commencement of these proceedings. The solicitor says she wrote to the notice party on the 6th November 2014 advising her that if the amount due and owing was not repaid or the property voluntarily surrendered that proceedings would be issued. She said that on the 10th September, 2015, she wrote to the notice party enquiring whether she intended to extract a grant of probate to her late mother's estate.

10. It seems to me clear that if she had taken steps to do so she could have been appointed administrator. The *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] 1 I.R. 170 test that applies here, and is accepted by everybody, that that is the criterion by which this court should measure the application. That test requires that the appellant had a *bona fide* intention to appeal within the permitted time. I am against the appellant on that point. And that there existed something by way of a mistake to explain the failure to appeal within time. I am also satisfied that there is no merit in that point and I would dismiss the application on that ground.

11. There may well be an arguable ground of appeal, certainly on the issue as to the Statue 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. But I have to weight that up against the other two tests set out in the *Eire Continental* case. In my view having regard to the substantial delay in moving this application and the absence of any mistake I would dismiss the application for a stay.

Approved B. J. McGovern
5-07-18.

Hogan J.:

Normally in an application of this type the critical question is whether the third limb of *Éire Continental* has been satisfied namely, whether arguable grounds have been disclosed. 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.

So therefore to start in reverse order, so to speak, I agree with Mr. Justice McGovern that the third limb of *Eire Continental* has been satisfied.

But where I also agree with Mr. Justice McGovern, and this is the difficulty insofar as the future of the appellants are concerned, is in relation to the first two limbs of *Éire Continental*. In particular, there is really no cogent or convincing evidence that an intention to appeal had been formed with the requisite time period. And, secondly, there was nothing in the nature of mistake that might justify the delay.

And in that regard I would also observe, as Mr. Justice McGovern has just observed that the delay here is a very lengthy one in the context of an application for an extension of time to file an appeal.

So for those reasons - essentially, because the first two limbs of *Eire Continental* have not been satisfied, and clearly not been satisfied - I would therefore not exercise my discretion in favour of extending the time and I agree with the order and reasoning proposed by Mr. Justice McGovern.

Approved
General Hogan
5th July 2018

Irvine J.

I have listened carefully to the judgment which has just been delivered by Mr. Justice McGovern, and also the observations of Mr. Justice Hogan.

I just have one matter to add and that the three factors which are identified in the decision of Lavery J. in *Eire Continental*, they are not binding pre requisites. They are matters for the proper consideration of the court and the court's discretion remains a perfectly free one regardless of whether all or any of those criteria are established. However, they do guide the court and I agree with my colleagues that the applicant has not met the first leg of that test. She has not demonstrated an intention to appeal within the time or indeed within a period of one year of the decision of the High Court judge. I also think she has not established any mistake and indeed it might be said that she acquiesced in the court order when she wrote asking whether at the expiry of the stay she could, in fact, rent the property.

It has to be said that there is a public interest in having closure to litigation - that is an interest that is shared obviously by the parties to litigation. In my view, the delay in this case is untenable to the point that the court should not exercise its discretion and should refuse the application.

A COPY WHICH I ATTEST
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FOR REGISTRAR

Approved
Maya Lino
5/07/18