

**THE HIGH COURT**

**[2008 No. 184 CA]**

**IN THE MATTER OF AN APPLICATION CONCERNING CIRCUIT COURT PROCEEDINGS BEARING RECORD NUMBER AND TITLE:  
Record No. E33/06**

**THE CIRCUIT COURT**

**SOUTH EASTERN CIRCUIT COUNTY OF KILKENNY**

**BETWEEN**

**GERARD O'CONNOR**

**PLAINTIFF**

**AND**

**NOEL O'CONNOR, ISOBEL LEVISON (ALSO KNOWN AS ISOBEL O'CONNOR) AND MARY O'CONNOR**

**DEFENDANTS**

**Judgment of Miss Justice Laffoy delivered on the 29<sup>th</sup> day of October, 2010.**

**1. The application**

1.1 On this application the first named defendant (Noel O'Connor) seeks an order extending the time for serving a notice of appeal in respect of the order made in the Circuit Court at Carlow on 19<sup>th</sup> July, 2010 by His Honour Judge Teehan in this matter. The application, which has been resisted by the plaintiff (the executor), was brought on foot of a notice of motion dated 19<sup>th</sup> August, 2010, which was returnable at the vacation sitting on 8<sup>th</sup> September, 2010. On that day the matter was adjourned to the Chancery List, because related proceedings are pending in the Chancery List.

**2. The related proceedings**

2.1 The related proceedings, which were initiated by special summons which issued on 18th January, 2006, are brought in the matter of the estate of Eugene O'Connor (the testator). They are proceedings in which Catherine (Kay) Kwaak (nee O'Connor) (Mrs. Kwaak) is plaintiff and the executor is defendant (Record No. 2006 No. 22SP). In the related proceedings the primary relief claimed by Mrs. Kwaak is an order directing that the estate of the testator be administered in accordance with the terms of his will and in accordance with law.

2.2 The testator was the father of Noel O'Connor, the executor, Mrs. Kwaak, Mary O'Connor, the third named defendant in the Circuit Court proceedings, and Pamela O'Connor. He made his last will and testament on 20<sup>th</sup> December, 1995. In it, he appointed the executor to be his executor. He directed that his farm, including livestock and bungalow, be sold within one year of the date of his death. He directed that from the net sale proceeds thereof Noel O'Connor receive the sum of £20,000 as a repayment for a loan given to the testator by him in 1983 to enable him to purchase the farm. The balance of the proceeds of sale would have fallen into the residue, which he devised and bequeathed in equal shares to Mrs. Kwaak, Mary O'Connor, the executor, Noel O'Connor and Jenina Kwaak, his granddaughter. The testator died on 25<sup>th</sup> March, 2000. Probate of his said will was granted to the executor on 17<sup>th</sup> November, 2004.

2.3 The related proceedings have not been progressed in this Court because the executor has been constrained to bring equity proceedings in the Circuit Court to recover possession of the farm and bungalow, being the lands registered on Folio 17870, County Kilkenny, from Noel O'Connor, his wife Isobel O'Connor who is the second named defendant in the Circuit Court proceedings, and Mary O'Connor. As the record number of the Circuit Court proceedings indicates, those proceedings have been in being since 2006.

**3. The Circuit Court proceedings**

3.1 While the pleadings in the Circuit Court proceedings are not before this Court, as I understand it, in those proceedings the executor claims possession of the lands registered on Folio 17870 on the basis that they form part of the estate of the testator. The defence of Noel O'Connor in the Circuit Court, as I understand it, was that the testator and his wife, Kathleen O'Connor, who were then entitled to be registered as joint owners thereof, transferred the lands registered on Folio 17870 to Noel O'Connor in 1985 subject to a power of revocation. The contention of Noel O'Connor, accordingly, was and is that he acquired title to the lands registered on Folio 17870 in 1985 and he did not lose title thereafter because the transfer to him was not revoked in accordance with the power of revocation reserved in the transfer. Therefore, his case was and is that he is the owner of the lands and they do not form part of the estate of the testator. Apparently, all that is available is a copy of a transfer signed by the testator and Kathleen O'Connor the date of which is blank save that 1985 is typed at its commencement. The position of the executor is that a transfer in the form of the copy never took effect. Accordingly, there is a major factual controversy between the executor and Noel O'Connor.

3.2 As regards the claim for possession of the lands, the order of the Circuit Court made on 19<sup>th</sup> July, 2010 provides as follows:

(a) that Noel O'Connor and Mary O'Connor give possession of the lands and the house to the executor by 1<sup>st</sup> October, 2010;

(b) that €25,000 was the measure of loss of profits for eight and a half years and that there should be a decree for €20,000 in favour of the executor against Noel O'Connor; and

(c) that the claim against Isobel O'Connor, the second named defendant, be struck out on foot of her undertaking to the Court not to enter onto the lands, the house or property save by express invitation by the executor.

3.3 As I understand it, the factual controversy in relation to the deed of 1985 was not addressed at the hearing in the Circuit Court. On this application, the executor has averred that the trial of the proceedings was stopped prior to the calling of the solicitor for the testator, who attended the hearing and was due to give evidence, the Court having heard certain evidence on the issues in the case and legal submissions on the operation of the limitation period provided for in s. 9 of the Civil Liability Act 1961 (the Act of 1961) and its implications for the defence being advanced by Noel O'Connor. As I understand it, it was held that the claim of Noel O'Connor to be the owner of the land was dismissed on the basis that it was statute-barred by virtue of s. 9 of the Act of 1961.

#### **4. The law relevant to the application**

4.1 The conditions which a litigant who is late in serving notice of appeal must comply with before the Court will grant an extension of time for filing the notice of appeal were laid down by the Supreme Court in *Éire Continental Trading Co. Ltd. v. Clonmel Foods Ltd.* [1955] I.R. 170 and are as follows:

- (a) the applicant must show that he had formed a bona fide intention to appeal within the permitted time;
- (b) 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 the relevant rule is not sufficient, and
- (c) he must establish that an arguable ground of appeal exists.

4.2 As is pointed out in Delany and McGrath on Civil Procedure in the Superior Courts (2<sup>nd</sup> Ed.) at para. 20 – 24, most recent decisions of the Supreme Court have required compliance with those conditions, although in *Brewer v. Commissioners for Public Works* [2003] 3 I.R. 539 the Supreme Court held that in all applications for extension of time prejudice to the other party is a relevant factor.

4.3 Counsel for Noel O'Connor also referred to the decision of the Supreme Court in *G.K. v. Minister for Justice* [2002] 2 I.R. 418. That case related to an application to extend the time for applying for judicial review under a statutory provision which required the application to be made within the period of fourteen days unless the High Court considered that there was good and sufficient reason for extending the period within which the application should be made. In my view, it has little or no relevance to this application, save that Hardiman J. (at p. 422) cited the *Éire Continental* case as an example of a situation in which the merits of the substantive case are considered relevant where the Court is called upon to extend a period of time limited for taking any step.

#### **5. Application of the law to the facts**

5.1 There was no dispute between the parties as to the fact that there had been compliance with the first and second conditions stipulated in the *Éire Continental* case. Noel O'Connor's solicitor averred that he had received instructions to appeal the decision of the Circuit Court on 23<sup>rd</sup> July, 2010, within the ten day period stipulated in the Rules of the Circuit Court and that he had sent the notice of appeal to the office of the County Registrar by pre-paid registered post on 29<sup>th</sup> July, 2010 and had faxed an unstamped copy to the County Registrar on that day. He realised on 29<sup>th</sup> July, 2010 that he should have lodged the stamped copy with the County Registrar on that day. He sought an extension of time in the Circuit Court on 30<sup>th</sup> July, 2010, but the Circuit Court Judge held that it was a matter for the High Court.

5.2 The position adopted by the executor in relation to the third condition was that Noel O'Connor does not have an arguable ground of appeal against the decision that his claim is statute-barred by virtue of s. 9(2) of the Civil Liability Act 1961. As I understand it, and I emphasise that the pleadings are not before the Court, in addition to defending the executor's claim on the basis that he had acquired title by the transfer in 1985 executed in his favour, Noel O'Connor also counterclaimed for a declaration that he has title to the lands registered on Folio 17870. In my view, he does have an arguable case that he is entitled to defend the claim for possession brought by the executor on that basis and that s. 9(2) of the Act of 1961 has no application to his defence of the executor's proceedings against him, as distinct from, and irrespective of, his counter-claim.

5.3 In my view, he has also an arguable case that his situation is distinguishable from that of the plaintiff in the authority relied on by the executor: the decision of O'Keeffe J. in *Prendergast v. McLaughlin* [2009] IEHC 250. In that case, O'Keeffe J. held (at para. 30) that the plaintiff's cause of action was founded in contract or quasi-contract and that he was suing the defendant in his capacity as personal representative of the deceased owner of the land in issue for breach of the deceased's promise to bequeath the lands to the plaintiff, which breach could only have occurred during the lifetime of the deceased, so that the cause of action accrued before the death of the deceased and was subject to s. 9(2) of the Act of 1961. The position being advanced by Noel O'Connor is patently different. He is defending the executor's claim for possession on the basis that he is in possession of the land on foot of the title he acquired by the deed of 1985, which entitles him to stay in possession. That defence may or may not stand up on the facts or in law in due course, but Noel O'Connor certainly has an arguable case that he is not precluded by s. 9(2) of the Act of 1961 from maintaining it.

5.4 The executor contends that there is a potential prejudice to the estate of the testator because, following the order of the Circuit Court, he had hoped to sell the lands in November 2010 and is fearful that, if the sale is deferred to Spring 2011, there is a risk that the lands could be devalued in the intervening period. While one can understand the concern of the executor that he would be subject to criticism from the residuary beneficiaries of the testator, if he were to consent to an extension of time, given that over ten years have elapsed since the date of the death of the testator, and action was not taken to recover possession of the lands until after the related proceedings were instituted, I am not satisfied that the inevitable delay in selling the lands is a factor to which the Court should have regard. In any event, one of the extraordinary features of this application is that the three residuary beneficiaries other than the proposed proponents on the appeal, Mrs. Kwaak, Jenina Kwaak and Mary O'Connor, have consented to Noel O'Connor's application.

#### **6. Decision on the application**

6.1 There will be an order extending the time for service by Noel O'Connor of the notice of appeal against the order of the Circuit Court for ten days from the date of the perfection of the order of this Court.

6.2 The appeal will be by way of re-hearing. I consider that it would be appropriate to link the appeal to the related proceedings in this Court and to give it the earliest hearing possible.

