

**THE HIGH COURT**  
**MIDLAND CIRCUIT**  
**COUNTY OF WESTMEATH**

[2017 238 CA]

**BETWEEN****ACC LOAN MANAGEMENT LIMITED****PLAINTIFF****AND****DECLAN FAGAN AND BERNADETTE FAGAN****DEFENDANTS****JUDGMENT of Mr. Justice Meenan delivered on the 7th day of March, 2018****Background:**

1. On 13th July, 2004 the plaintiff, previously ACC Bank plc., advanced two loan facilities to Temple Spa Limited. The security provisions of the facility letters required the company's directors, the defendants, to provide a personal guarantee supported by a full legal charge over Temple House on 14.5 acres of land at Horseleap, County Westmeath. The charge was duly registered as a burden on the said property on 17th May, 2007. The plaintiff was the registered owner of the charge.
2. The company defaulted on the loan and by a letter of demand dated 1st November, 2010 payment was sought from the defendants for the monies due to the plaintiff. These monies were not discharged and on 16th November, 2010 a receiver was appointed in respect of the said property.
3. The plaintiff initiated proceedings against the defendants and judgment was granted against them in the sum of €5,780,460.28 on 9th May, 2011. This sum was not discharged and on 21st May, 2012 the defendants were adjudicated bankrupt.
4. High Court proceedings were initiated seeking possession of Temple House, the defendants' private dwelling house and approximately 14.5 acres at Temple, Horseleap, County Westmeath (*ACC Bank v. Declan Fagan (A Bankrupt) and Bernadette Fagan (A Bankrupt)*) [2013] IEHC 346). In these proceedings, the defendants sought to challenge the validity of the charge over the said property.
5. In her judgment, Finlay Geoghegan J. rejected the defendants' challenge to the charge but permitted them to make submissions in defence of the application for possession, but only on the basis that the plaintiff was the registered owner of a charge over the said property.
6. For reasons which it is not necessary to outline here, Finlay Geoghegan J. concluded that the plaintiff was not entitled to an order for possession of the said property. Subsequently, on 18th March, 2014, the plaintiff (then ACC Bank plc.) issued a Civil Bill for possession.
7. The Civil Bill came on for hearing before the Circuit Court and by order of the Circuit Court dated 28th July, 2015 an order for possession of the property was made in favour of the plaintiff.
8. On 7th September, 2015 the defendants made an *ex parte* application for leave to apply for judicial review seeking *inter alia* an order of *certiorari* quashing the order of the Circuit Court granting possession of the said property. At a "telescoped" hearing, *Fagan v. ACC Loan Management Ltd.* [2016] IEHC 233, the application for leave was heard on notice to the plaintiffs.
9. In a written judgment, McDermott J. refused the reliefs sought by the defendants.
10. The decision of McDermott J. was appealed to the Court of Appeal and, in an *ex tempore* judgment delivered on 17th July, 2017, the Court of Appeal dismissed the defendants appeal.
11. Following the dismissal of the appeal, the second named defendant issued a notice of motion returnable before the Master of the High Court seeking an order extending time for the lodgement of a notice of appeal against the order of the Circuit Court made 28th July, 2015. The application was grounded on an affidavit of the second named defendant. A replying affidavit was filed by Mr. Paul Shaw, on behalf of the plaintiff.
12. There were further affidavits filled by the second named defendant and Mr. Shaw.
13. The notice of motion was heard by the Master on 7th December, 2017. The Master acceded to the application of the second named defendant and extended time within which to appeal the order of the Circuit Court dated 28th July, 2015.
14. The matter that is before this Court is an appeal by the plaintiff against the order of the Master of the High Court extending time within which to appeal the said order of the Circuit Court.
15. The second named defendant appeared in person at the hearing of the matter.

**Test To Be Applied:**

16. The test that a court should apply when considering an extension of time for the purposes of an appeal is set down in *Éire Continental Trading Co. Ltd. v. Clonmel Foods Ltd.* [1955] IR 170, which states:-

- (i.) "The applicant must show that he had a *bona fide* intention to appeal formed within the permitted time.
- (ii.) 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 was not sufficient.

(iii.) He must establish that an arguable ground of appeal exists.”

Both the plaintiff and the second named defendant were in agreement that this is the appropriate test which a court should apply in an application such as this.

**Application of the Test:**

17. It is to be noted that the application to extend time for the purposes of appealing the order of the Circuit Court is brought by the second named defendant only.

18. The second named defendant relied upon a letter dated 6th August, 2015 to the plaintiff to establish that there had been a *bona fide* intention to appeal within the permitted time. This letter was sent by both defendants. This letter was responded to by a letter dated 25th August, 2015 from the plaintiff wherein the plaintiff acknowledged receipt of the letter of 6th August, 2015 and stated that the decision to appeal was entirely a matter for the defendants.

19. In a further letter dated 7th September, 2015 from the defendants to the plaintiffs, the defendants stated:-

“I wrote to you on 6th August indicating our intention to appeal the Circuit Court order for possession granted to the bank on 28th July, 2015.

Can you please confirm the bank’s consent to our seeking an extension of time for lodging a notice of appeal?”

20. Arising from this correspondence, I conclude that the second named defendant had formed a *bona fide* intention to appeal within the time allowed, was aware that the time had expired and that an extension of time was required.

21. In the event, no such extension was sought until the issue of a motion dated 31st July, 2017, by the second named defendant, nearly two years later.

22. On the same day as the letter seeking the plaintiff’s consent to extend time for the lodging of a notice of appeal was issued, the defendants made an *ex parte* application to the High Court seeking leave for judicial review proceedings.

23. As the second named defendant has established she had a *bona fide* intention to appeal within the permitted time it is necessary for her to “show the existence of something like mistake” as to why the appeal was not lodged within the time permitted.

24. In her affidavit grounding the application before the Master of the High Court to extend time, the second named defendant states:-

“7. I say that the allowed time for appeal has expired in circumstances where the first named defendant pursued an alternative process, and the title proceedings were drafted to include my name. On becoming aware of this I did request that I be removed from those proceedings and be allowed to pursue my own appeal.

8. I say that I was suffering from acute stress and anxiety and not capable of creating further conflict between myself and the first named defendant. I’ve been attending a doctor in this regard and have been off work on sick leave since August, 2015”

In the course of submissions made to this Court, the second named defendant stated that she was under considerable stress at the time and referred to medical reports, as exhibited. Essentially, the second named defendant maintained that the reason she did not lodge an appeal was owing to incapacity or illness.

25. In rejecting the second named defendant’s submission as to her incapacity or illness, the plaintiff made the following points:-

(i.) The second named defendant was named in the judicial review proceedings, signed the statement of grounds and swore an affidavit in support of the application.

(ii.) The second named defendant took full part in the judicial review proceedings at the hearing before McDermott J.

(iii.) An affidavit of Ms. Suzanne Chew, sworn 13th October, 2015, in the judicial review proceedings states the following:-

“46. I further say and am advised that the applicants have an adequate alternative remedy available to them in that they may bring an appeal to this Honourable Court in the ordinary manner pursuant to Order 61 of the Circuit Court Rules, which I say and am advised is more appropriate in the circumstances, or that they may bring an application for an extension of time in which to do so...”

26. In reaching a conclusion as to whether there was a “mistake”. I have read in detail the medical reports exhibited by the second named defendant in her affidavit. There are four reports from Dr. John J. McDermott, specialist in occupational medicine dated 1st February, 2016, 30th August, 2016, 3rd April, 2017 and 11th July, 2017. There is also a report from Ms. Fiona McAuley, counsellor and psychotherapist. These reports set out the stress that the second named defendant was experiencing at the time. The reports from Dr. McDermott give the opinion that the second named defendant was medically unfit for work and states in his report of July, 2017, that:-

“Bernadette is experiencing persistent, mental health related symptoms and these are unlikely to be resolved until her personal circumstances (i.e. personal stress) is reduced/eliminated”

27. Given the financial disaster and its consequences that were engulfing the second named defendant and her family at the time I have no hesitation in accepting that the second named defendant was under considerable stress. However, I do not believe that such was her medical condition that she was unable to prosecute an appeal of the Circuit Court order or make an application to extend time in a timely way. This view is consistent with the fact that, even though under stress, the second named defendant actively participated in the judicial review proceedings.

28. Further, it is significant that in the course of the judicial review proceedings a bank official, on behalf of the plaintiff, stated in an affidavit that it was more appropriate for the second named defendant to proceed by way of an appeal rather than judicial review proceedings and that an application for extension of time could be made.

29. Therefore, in conclusion, I am satisfied that, although the second named defendant did consider an appeal, she deliberately and consciously decided to challenge the order of the Circuit Court, not by way of an appeal but by initiating judicial review proceedings. It therefore follows there was no "mistake" as is required to extend time.

30. Having reached the conclusion that there was no "mistake" on behalf of the second named defendant in not pursuing an appeal, it follows that time should not to be extended and the order of the Master of the High Court extending time be discharged.

31. However, I would like to express the court's observations on the grounds of appeal put forward by the second named defendant in her affidavit and written submissions.

32. The first ground of appeal referred in the second named defendant's affidavit of 31st July, 2017, was the "invalidity of charge". In the course of the hearing before this Court this ground is not being relied upon. In any event, given the decision of Finlay-Geoghegan J., it could not be.

33. The second ground was referred to as "falsified evidence", this does not appear to have been referred to in the judicial review proceedings notwithstanding the fact that the alleged detail of such must have been known to the defendants at the time. In any event, Folio WH 7758 which was before this Court is neither false nor falsified and does not support the allegation by the defendants that the plaintiff put "falsified evidence" before either this Court or the Circuit Court.

34. The second named defendant alleges that the Circuit Court proceedings were not in compliance with the Circuit Court Rules and refers to a practice direction. It appears that this practice direction did not come into operation until 10th August, 2015, after the determination of the Circuit Court proceedings. Therefore, such cannot be a ground of appeal.

35. The second named defendant claims that there was a "failure to serve all occupants with documents". This was also a complaint made in the judicial review proceedings in which judgment was given against the defendants and such judgment was upheld by the Court of Appeal.

36. The second named defendant puts forward "promissory estoppel" and breach of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995. Apparently, this is the first time that such defences have been put forward. Even if this was not the case, no evidence of representation of facts or the consequent detriment have been put forward by the second named defendant to ground an estoppel. In respect of an alleged infringement of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, no terms have been identified nor has any basis been established upon which the second named defendant could rely on this Regulation. Therefore, these are not grounds of appeal.

37. The alleged ground of "inviolability of the home/respect for private and family life" was referred to in the judicial review proceedings which, as I have said, have been determined.

38. In the course of submission to this Court, the second named defendant questioned the "*locus standi*" of the plaintiff to bring these proceedings. This ground was also dealt with in the course of the judicial review proceedings.

39. In affidavits and written and oral submissions to this Court the second named defendant made a number of allegations against officials of the plaintiff to the effect that they had perjured themselves, or gave false or misleading evidence. In this context reference was made to exhibit 2DBF4 in the affidavit by the defendants sworn 16th July, 2015. This exhibited copies of an ACC Bank internal email in which a page was omitted. Having heard and considered the submissions made by the second named defendant and considered the said exhibit in the context of the proceedings I am satisfied that there is no evidence whatsoever of any perjury or any false or misleading evidence being given by officials of the plaintiff in the course of proceedings. These are serious allegations and should not have been made in the absence of any evidence to support them.

40. I therefore conclude that the grounds of appeal identified by the second named defendant have been determined in the course of the judicial review proceedings or, where not so determined, are not good grounds of appeal.

41. By reasons of the foregoing I will make the following orders:-

- (i) An order discharging the order of the Master of the High Court dated 7th December, 2017, which order extended the time to serve and lodge a notice of appeal against the order of the Circuit Court made 28th July, 2015;
- (ii) An order refusing second named defendant's application to extend time to serve and lodge a notice of appeal against the order of the Circuit Court made 28th July, 2015;
- (iii) An order striking out any notice of appeal served or lodged herein.