



THE COURT OF APPEAL

**Finlay Geoghegan J.
Irvine J.
Hogan J.**

Danske Bank A/S Danske Bank

- and -

Barry Kirwan

Record No. 2015/391

Plaintiff/Respondent

Defendant/Applicant

Judgment of Ms. Justice Irvine delivered on the 18th day of February 2016

1. This is the defendant's application to extend time to appeal a number of High Court orders. These may be summarised as follows:-
 - (i) The order of Mr. Justice Peart made on 23rd June 2014 whereby he granted the plaintiff an order for substituted service of a summary summons on Mr. Kirwan at "Glenville Road, Wexford, Co. Wexford",
 - (ii) The order of Mr. Justice Cross dated 2nd March 2015 whereby he deemed service of the proceedings, allegedly effected by the plaintiff, pursuant to the Order of the 23rd June 2014, to be good and sufficient service, and
 - (iii) The order of Mr. Justice Cross dated 23rd March 2015 whereby he ruled that a conditional appearance entered by Mr. Kirwan on 3rd October 2013 be deemed to be an unconditional appearance for the purposes of the Rules of the Superior Courts.
2. By way of background, the plaintiff issued a summary summons on 15th November 2013 wherein it claims payment from the defendant of a sum of in excess of €430,000 in respect of various loan facilities which are detailed in an affidavit sworn by Mr. John Carron on 29th May 2015.
3. The plaintiff maintains that it effected good service of the proceedings on the defendant on 7th July 2014. This assertion is fully contested by Mr. Kirwan who entered a conditional appearance to the proceedings on 3rd October 2014 in order to contest the validity of the order for substituted service. Further, he maintains that he did not receive the documents which the plaintiff contends were posted to him on foot of the order for substituted service, but rather that a friend furnished him with a printout of the relevant documentation. Mr. Kirwan insists that it was the receipt of this documentation that led him to enter his conditional appearance.
4. Of further marginal relevance to the matters under consideration is the fact that by order of Cross J. dated 14th July 2015 he refused Mr Kirwan certain relief which he had sought in a notice of motion initially returnable before the court on 23rd March 2015. That order was perfected on 20th July 2015 and Mr. Kirwan has, within the permitted ten day time limit which applies to expedited appeals, filed a notice of appeal to this Court. This he did on 28th July 2015.
5. Accordingly, Mr Kirwan's present application is confined to an application in respect of those orders referred to at par. 1 above.
6. The principles to be applied by the court on an application such as the present one were established over fifty years ago and are to be found in the oft recited judgment of the Supreme Court in *Eire Continental Trading Company Ltd. v. Clonmel Foods Ltd.* [1955] I.R. 170 where Lavery J. observed that the following were "proper matters for the consideration of the Court when determining whether time should be extended", namely:-
 - (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.
7. The aforementioned matters are, however, not essential pre-requisites for an applicant who seeks an extension of time to appeal and, of course, the judgment of Lavery J. should not be read as if it were a statute. While criteria outlined by Lavery J. have been consistently applied so far as appeals to the Supreme Court and, more recently, to this Court are concerned, this Court nonetheless retains a discretion, in an appropriate case, to extend the time regardless of an applicant's inability to bring their application within the *Eire Continental* parameters.
8. I have considered all of the documentation lodged by Mr. Kirwan in support of his application including the written and oral submissions of the both parties. I propose now to deal separately with Mr. Kirwan's application for an extension of time in relation to each of the three orders. While I have paid special attention to the factors specifically identified by Lavery J. in *Eire Continental*, I have also considered whether Mr Kirwan has identified the existence of any other meritorious circumstances which might influence the court in favour of exercising its discretion in his favour.

Order of Peart J. dated 23rd June 2014

9. It is not at all clear as to when Mr. Kirwan first formed his intention to challenge or appeal this order for substituted service. What is apparent, however, is that he entered a conditional appearance to the proceedings on 3rd October 2014. The only reason for entering a conditional appearance is to allow a defendant challenge the validity of a prior order of the court. Thus, it must be assumed that Mr. Kirwan was at that stage aware of the order which had been made by Mr. Justice Peart on 23rd June 2014 and that he was intent on challenging its validity. Accordingly, once he became aware of that order he ought to have moved with immediate

effect either to appeal it or to seek to have it set aside. For some reason he did not do so and, indeed, took no step to challenge that order until such time as he issued a motion to set it aside on 17th February 2015.

10. Not only did Mr. Kirwan not move to challenge the order of Peart J. within ten days of entering his conditional appearance of the 3rd October 2014, but he has furnished no reasonable explanation as to why it took him four months to issue a motion to seek to set aside that order. Nor has he explained why he waited until the 28th July 2015 to file a notice of appeal against it. His failure to move with expedition was all the more culpable in circumstances where he well knew that the order which he wished to challenge had been made against as far back as 23rd June 2014. For these reasons I am satisfied that Mr. Kirwan has failed to meet the second leg of the test in *Eire Continental*.

11. As to whether Mr. Kirwan has demonstrated any potential *bona fide* grounds of appeal in respect of the order of Peart J., it is clear that he wishes to argue that the order for substituted service is invalid, because it was obtained in fraudulent and malicious circumstances. He asserts that the plaintiff well knew that he had been residing at Evergreen Cottage, Newcastle, Crossabeg, Co. Wexford for many years and that there was no reason why he was not served in the normal way at that address. He maintains that the plaintiff misrepresented his circumstances to the court when it obtained the order for substituted service upon him at Glenville Road, Wexford. He further appears intent on arguing for the invalidity of the substituted service order based upon the fact that the affidavit of Tauna O'Connell of 3rd June 2014, upon which the order was obtained, was defective in a number of respects. He maintains that the order for substituted service was thereby defective and invalid. He complains that her affidavit did not give her home address as required by Ord. 40, r. 9 and that the commissioner who witnessed her signature did not insert the time upon which he did so as required by Ord. 40, r. 6.

12. For my part I am not satisfied that Mr. Kirwan has demonstrated any *bona fide* grounds of appeal in relation to the order for substituted service. Briefly stated, my reasons for this conclusion are as follows:-

(i) The affidavit of Mr. John Carron dated 29th May 2015 sworn for the purposes of grounding the application for summary judgment makes clear that the loan offers of December 2005 and February 2007, those being the loans at issue in the proceedings, were entered into by Mr. Kirwan whose address is recorded therein as being at Glenville Road, Wexford. The same address is on the letters of loan offer. Further, the agreements themselves provide that any notices to be served in relation thereto are to be sent to the borrower at the aforementioned address. Mr Carron also exhibits correspondence dated 1st October 2013 and bank statements dated 1st November 2013, addressed to Mr. Kirwan at Glenville Road, Wexford. In addition to these matters, Ms O'Connell in her affidavit of 3 June 2014, in support of the application for substituted service, deposed to the fact that the bank believed that Mr Kirwan resided at the aforementioned address, an averment that would appear entirely reasonable in the context of the aforementioned documentation. In addition, she referred to the fact that:-

(i) three attempts had been made to serve the summons on the defendant at that address, all of which had been unsuccessful

(ii) that a neighbour had confirmed to the summons server that Mr Kirwan resided at that address and

(iii) that the defendant had confirmed to a tracing agent that he was residing at that address.

Even accepting that Mr Kirwan was not, as he maintains, residing at the aforementioned address at the time the order was obtained, I am satisfied that any argument that he might wish to advance based upon the existence of a conspiracy or malicious intent on the part of the plaintiff when it obtained an order for substituted service is unstatable, irrespective of whether that argument were to be advanced on an appeal against the making of the order for substituted service or on an appeal against the refusal of the High Court judge on second of March 2015 to set aside the order providing for substituted service.

(ii) I do not read Ord. 40, r. 6 of the Rules of the Superior Courts as requiring a commissioner who witnesses the signature of a deponent to insert the time of day upon which they did so. Indeed, I find it hard to recollect any occasion upon which I have ever seen such information included in an affidavit. I am satisfied that the requirement of the rule has been properly met insofar as the commissioner has inserted in the affidavit the date upon which he witnessed the deponent's signature. However, even if I am incorrect in this regard, the court has power under Ord. 40, r. 15 to receive an affidavit notwithstanding any irregularity in the form thereof. The failure to state the time on an affidavit is a defect of form only and can safely be regarded as a form of harmless error. I do not believe that any court would treat Ms. O'Connell's affidavit as inadmissible by reason of the absence of this information as no prejudice is visited upon Mr. Kirwan as a result of its omission.

(iii) As to the fact that Ms. O'Connell has not identified her home address in her affidavit as required by O. 40, r. 9, it should be recalled that in *Bank of Ireland Scotland v. Horkan* [2015] IECA 32 Kelly J. concluded that an affidavit was not invalid by reason of the inclusion of the business address of the deponent rather than their own address. However, even if Mr. Kirwan's argument could be sustained as a matter of law, it is difficult to see any judge failing to exercise their jurisdiction under Ord. 40, r. 15 to admit the affidavit regardless of any such defect. The purpose of requiring a deponent to include their address is, for example to ensure that a deponent can be easily located if they are required for any reason to give evidence at a later date. Mr. Kirwan has not alleged any prejudice arising from the inclusion by Ms. O'Connell of her business address.

13. For these reasons I am not satisfied that the defendant has met either the second or third legs of the test set out in *Eire Continental*. However, as already stated, the principles therein advised are no more than proper matters for the consideration of the court and the court ought to engage with any meritorious arguments that may be advanced by a party wishing to seek an extension of time. However, I regret to say I can find no circumstances which would justify this court extending the time to appeal the order of Peart J..

14. The application is out of time by a very long period indeed, even giving Mr. Kirwan the benefit of the doubt in respect of all of the period up to the date upon which he entered his conditional appearance. Further, this is not a case in which Mr. Kirwan, if he is not afforded an extension of time, will be deprived of advancing any ground of defence he may wish to make in the substantive proceedings. The orders which Mr Kirwan wishes to appeal are concerned solely with the manner whereby the bank has sought access to the court for the purpose of proving its claim against Mr Kirwan. Mr. Kirwan, regardless of the outcome of this application, will enjoy the same full panoply of rights as are available to any other defendant summonsed to court to meet a claim brought against

them.

Order of Cross J. dated 2nd March 2015

15. The application before the court on 2nd March 2015 was Mr. Kirwan's application to set aside the order of Mr. Justice Peart, relief that was refused on that date. The reasons that Mr. Kirwan sought to advance in support of his application were those which I have already identified in relation to his application to appeal the order for substituted service.

16. While Mr. Kirwan was obviously unhappy about the order made on 2nd March 2015, it is not clear that he necessarily intended to appeal it. Instead of lodging a Notice of Expedited Appeal he brought another application before the High Court on 23rd March 2015 seeking to re-agitate that order. While it may well be that he was under some misapprehension as to the procedure he should adopt, determined as he clearly was to challenge the order of 2nd March 2015, Mr. Kirwan has not disputed that on 23rd March 2015 he was advised by Cross J. that the proper procedure for him to adopt, if he wished to challenge any order made him, was to appeal that order. Accordingly, to my mind, time began to run against Mr. Kirwan in respect of his right to appeal the order of 2nd March 2015 at the latest as of 23rd March 2015 when he was so advised.

17. As to the second leg of the *Eire Continental* test, I am not satisfied that Mr. Kirwan has explained why he did not file a notice of expedited appeal against the order of 2nd March 2015 at latest within ten days of the hearing of 23rd March 2015. Why he waited until 28th July 2015 is simply not explained.

18. In any event, Mr Kirwan has not, for the reasons which I have already outlined when dealing with his application to extend time to appeal the order of 23rd June 2014, demonstrated any *bona fide* ground upon which he might appeal the order of Mr. Justice Cross deeming the service effected on him to be good service.

Order of 23rd March 2015

19. The order made on this date was confined to an order deeming the conditional appearance allegedly entered by Mr. Kirwan on 3rd October 2014 to be a valid appearance for the purposes of the proceedings.

20. In relation to this order Mr. Kirwan has not demonstrated that he formed an intention to appeal the order within the ten day time limit which governs expedited appeals. Further, he does not identify why he did not appeal until such time as he lodged his notice of appeal on 28th July 2015. Thus, he has not addressed the first two legs of the *Eire Continental* test. Further, he has not advanced any *bona fide* ground upon which he could seek to challenge that order, as the court by that time had already deemed service to have been validly effected on 2nd March 2015. Mr Kirwan's entitlement to maintain a conditional appearance was based upon his right to challenge the order for substituted service. As of 23rd March 2015 he had not successfully challenged that order and neither had he filed a notice of appeal in respect of the order of 2nd March 2015. He had thus no entitlement to maintain a conditional appearance. Accordingly, he has not demonstrated any arguable ground upon which he might appeal this order.

21. For all of the aforementioned reasons I would dismiss the appeal.