



COURT OF APPEAL

Neutral Citation Number: [2015] IECA 368

Appeal No. 2014/1371

[High Court 2012/2353S]

[High Court 2011/4178S]

[Article 64 transfer]

**Peart J.
Irvine J.
Hogan J.**

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF/RESPONDENT

AND

ANNE DALY

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 15th day of May 2015

1. By notice of motion dated 29th August, 2014, the defendant/appellant applied to the Supreme Court for an order extending the time within which she might appeal two decisions made in the High Court in 2012. That application was heard by this Court on the 13th April, 2015, having been previously transferred to this Court by order of the Supreme Court made on 28th October 2014 in accordance with Article 64 of the Constitution following the establishment of this Court on that day,

2. The first order which the appellant sought to appeal was that made by the Master of the High Court on 15th March, 2012, whereby he granted Bank of Ireland ("the bank"), in proceedings *The Governor and Company of Bank of Ireland v. Patrick J. Daly, James B. McDonnell and Malachy Stephens*, [High Court Record 2011 No. 4178S], liberty to enter final judgment against Mr. Patrick Daly, the appellant's husband; Mr. James B McDonnell; and Mr. Malachy Stephens in the sum of €4,182,471.37. The second order which she sought to appeal was that which was made by the High Court (Kelly J.) on 30th July, 2012, in proceedings *The Governor and Company of Bank of Ireland v. Patrick J. Daly and Anne Daly*, [High Court Record 2012 No. 235S] whereby he granted judgment against the appellant and Mr. Patrick Daly for the sum of €4,435,278.61, on consent,

3. The appellant's application was grounded upon an affidavit sworn by her on 26th August, 2014. The bank's position in respect of the application was as advised by Ms. Eimear Deegan in her affidavit of 28th October, 2014, and to which affidavit the appellant responded by way of replying affidavit sworn on 5th November, 2014.

The High Court Proceedings. [Record number: High Court 2011 No. 4178S]

4. As appears from the documents exhibited in the appellant's grounding affidavit, the order of the Master of the High Court whereby the bank obtained judgment against Mr. Patrick J. Daly, Mr. James E. McDonnell and Mr. Malachy Stephens was entered against those defendants on 3rd July, 2012, for the sum of €4,182,471.37. While the Court sympathises with the appellant's evidence that the entry of this judgment adversely affected her ability to deal with the bank and to negotiate a settlement of the liability that became the subject matter of the High Court order of the 30th July, 2012, bearing the record number *The Governor and Company of Bank of Ireland v. Patrick J. Daly and Anne Daly*, [High Court Record 2012 No. 235S], it is clear that the appellant was not a party to those proceedings; hence, she has no *locus standi* to seek to appeal the order underlying that judgment. In this regard her application for an extension of time to appeal that particular order is misconceived.

5. Accordingly, all references in the appellant's affidavit, in so far as they relate to those proceedings, i.e. *The Governor and Company of Bank of Ireland v. Patrick J. Daly, James B. McDonnell and Malachy Stephens*, [High Court Record 2011 No. 4178S], are not material to the only application which she may validly pursue before this Court, namely that which seeks an extension of time to appeal the order of the High Court of 30th July, 2012. Thus, insofar as she complains that undue influence was brought to bear on her for the purpose of getting her to provide a guarantee to secure the loan facility of €3,500,000.00 granted to Mr. Patrick Daly, Mr. James B. McDonnell and Mr. Malachy Stephens, neither that issue nor the extent of any liability that she may have on foot of that guarantee are material to the present application as her liability under the guarantee never formed any part of the bank's claim in either set of proceedings. For similar reasons, her knowledge as to the extent of the indebtedness of those parties at the time she signed that guarantee is also irrelevant.

6. While the Court is, of course, sensitive to the complaints made by the appellant as to the possibility that those with whom she was dealing at the time she executed that guarantee may not have guided her in a manner which she now feels, with the benefit of hindsight, would have been appropriate, this Court is not in a position to express a valid view on those complaints which are, in any event, not material to the application.

7. The Court will accordingly move to consider the merits of the appellant's application to extend the time to appeal the order of the High Court made with her consent on the 30th July, 2012. This application is strenuously resisted by the bank.

Legal principles

8. At the time of the making of the order on 30th July 2012, Ord. 58 r. 3(1) of the Rules of the Superior Courts required that a notice of appeal be served within twenty one days from the passing and perfecting of the judgment or order which was to be appealed against.

9. While the Court enjoys a discretion to enlarge the time for the service of a notice of appeal, the Court's jurisdiction in this regard is one which must be exercised in a judicial manner and in accordance with the prevailing jurisprudence. In this regard the principles to

which the Court is required to have regard are those which were laid down some 63 years ago in the oft recited judgment of the Supreme Court in *Eire Continental Trading Company v. Clonmel Food Limited* [1955] I.R. 170 (decided in 1952). In his judgment, Lavery J. gave guidance ([1955] I.R. 170,173) as to the matters which should properly be considered by the court in determining whether or not the time should be extended. He was satisfied that the court should seek to ascertain if the appellant could meet the following conditions, namely:-

1. Could the appellant demonstrate that he or she had formed a *bona fide* intention to appeal within the permitted time?
2. Could the appellant show the existence of something like a mistake to account for the fact that the appeal had not been lodged within the permitted time? In this regard, he stated that a mistake as to procedure and, in particular, the mistake of counsel or solicitor as to the meaning of the relevant rule, was not sufficient;
3. Could the appellant establish that he or she had an arguable ground of appeal?

Decision

10. Apart from its consideration of the papers filed by the parties on the present application, the Court has taken into account the helpful and thorough written submissions delivered by the appellant. It has also had regard to her comprehensive oral submissions and those made on behalf of the bank in the course of the present hearing.

11. While the Court has great sympathy for the position in which Ms. Daly finds herself as a result of certain borrowings made available by the bank to herself and her husband, which they have been unable to repay, the Court must nonetheless direct its attention to the matters material to this application, namely whether or not the plaintiff can bring herself within the conditions prescribed by Lavery J. in *Eire Continental*. While these conditions are not binding prerequisites, they are matters which are of the greatest significance in the context of the exercise by the Court of its discretion to extend time

12. In so far as the applicant's intention to appeal within the permitted time is concerned, it is perfectly clear that she did not form an intention to appeal within the permitted time frame. Indeed, she does not so contend in either of the affidavits which she has sworn in support of the present application. This is hardly surprising in circumstances where, having engaged in negotiations with the bank, which ultimately proved unsuccessful despite what the appellant referred to as "good and valid offers" to settle their outstanding liabilities, the appellant and her husband both consented to judgment being entered against them, as advised by them in an email to that effect directed to the bank's solicitors on the 28th July, 2012.

13. In these circumstances the appellant has not been able to demonstrate that she can meet the first limb of the decision in *Eire Continental*.

14. Neither has the appellant established that her failure to appeal was as a result of some type of mistake or like event. She does not dispute that she was validly served with all of the legal documents in support of the bank's claim or that, by email dated 28th July, 2012, she consented to the judgment which she now wishes to appeal. She ascribes her delay in pursuing her appeal to the fact that she was not present when the judgment was granted and to the fact that, given the appointment of a receiver over her assets, she did not have the funds to obtain legal advice. Further, she states that she was not aware of court process and was not aware of her right to appeal.

15. The fact that the appellant may not have been present in court when the judgment was granted is of no particular assistance to her argument, given that she knew judgment was to be awarded against her on the 30th July, 2012. While the Court does not wish to cause further distress to the appellant in these difficult times, it nonetheless does not accept as credible her statement that she was not aware of the court's process, was not aware of her right to appeal, and was not aware of the extent of her liabilities; or her statement that her financial circumstances were the reason why she delayed for some 20 months before seeking to pursuing her appeal. The evidence would suggest to the contrary. Indeed, it appears highly likely that the defendant only first became really concerned about the judgment to which she had consented when the bank moved, in fresh proceedings entitled Governor and Company of the *Bank of Ireland v. Patrick and Anne Daly*, [High Court Record 2013 No. 407SP], to seek a well charging order and an order for sale of certain lands later identified in the course of this judgement. Indeed, it is almost inconceivable that any right minded person, faced with the prospect of losing their family home after what they would doubtless consider to have been a lifetime of hard work, would not feel both aggrieved and distressed at such a prospect.

16. However, that said, if the appellant was not aware of the court's process, or the extent of the judgment to which she consented or as to her rights stemming from that order - a scenario which the Court candidly views as unlikely - she cannot be excused by her lack of knowledge in this regard.

17. The evidence before the Court, on its face, suggests that the appellant was well and truly engaged with the bank and its solicitors in relation to both her outstanding liabilities as well as those of her husband, P.J. Daly, in the months preceding and subsequent to the date upon which the judgment was obtained, regardless of the fact that her finances may well have been as tight as was advised by her in her affidavits.

18. In terms of her access to legal advice, her knowledge of court process and her knowledge as to the extent of her liabilities, the following factors are significant:

- (i) The correspondence exchanged between Carl O'Mahony, a solicitor who represented himself as acting on behalf of the appellant and her husband, and the bank in the months preceding the judgment would suggest that the plaintiff had access to, and did as a matter of fact obtain, legal advice as to her liabilities over the relevant period.
- (ii) Several emails written by the appellant personally to Judith Riordan, a solicitor with Mason Hayes and Curran acting on behalf of the bank, refer to Carl O'Mahony and make it clear that he was indeed acting as her solicitor in the weeks and months leading up to the judgment, regardless of her financial circumstances.
- (iii) On the 26th June, 2012, the appellant, her husband and Carl O'Mahony met with the bank and its solicitors for the purpose of trying to find a solution to their outstanding liabilities. The appellant in her own affidavit refers to offers made to the bank at this time to resolve the outstanding liabilities. In the Court's view, she could not but have been aware of the amounts then outstanding to the bank.

(iv) The appellant in para. 5 of her affidavit refers to the judgment previously obtained against her husband and his two business associates, Mr. McDonnell and Mr. Stephens, which she said coloured the banks view in respect of the liabilities of herself and her husband. She also refers to the fact that the "good and valid offers" were made to resolve the outstanding liabilities in advance of the judgment of the 30th July, 2012, thus demonstrating an intimate knowledge of the overall ongoing situation in relation to the bank's claims at a time prior to her agreement to consent to the judgement which she now wishes to appeal.

(v) In a letter dated 18th September, 2012, Mr. Tom Casey, another solicitor, wrote on behalf of the appellant and her husband, to Deloitte and Touche. The contents of the letter concerned the Receiver and the upshot of the proceedings in which judgment had been granted. This, again, demonstrates that the appellant had, in the immediate aftermath of the judgment, access to legal advice.

(vi) In an email written by the appellant to Ms. Deegan on 6th August, 2013, she referred to having spoken with her solicitor, Mr. Patrick O'Sullivan of O'Sullivan O'Dowd solicitors, with a view to meeting with the bank that month; once again, this demonstrates that at all relevant times the appellant had access to legal advice and was fully engaged with the bank and its solicitors.

(vii) The appellant did not seek to apply for Legal Aid until January 2014, from which it may reasonably be inferred that up until that point in time she had received the benefit of legal advice.

(viii) The appellant, according to her own affidavit, worked full time for 20 years as a "working director" in Star Alliance Ltd, the family business, which she states was a "successful manufacturing company which funded our asset base"; this fact lends further support to her likely knowledge of liabilities outstanding to the bank at any given time.

19. Having regard to all of these factors, the Court is satisfied that the appellant cannot bring herself within the second of the three conditions outlined by Lavery J. in *Eire Continental*.

20. The Court is also satisfied that the appellant has failed to demonstrate that she has any bona fide ground upon which she could appeal the order of the High Court of 30th July, 2012. That order was made with her written consent; and, in such circumstances, it is difficult to see how she could ever seek to go behind that order on an appeal.

21. While the appellant now wishes to question "the duty of care or due diligence" of those who made available such sizeable loans to herself and her husband, she did not seek to deny the bank's entitlement to recover the sums claimed at the time on the grounds of an alleged breach on the part of the bank of any such duty; instead, she consented to judgement in the sum claimed. Further, while she now says that the loan documentation concerning the borrowings, the subject matter of the present proceedings, were signed by her without separate legal advice, she did not seek to defend the proceedings on the basis that she was entitled to obtain such advice and on the basis that, in default, the bank had no legal right to recover the monies outstanding.

22. Likewise, while the appellant claims now that she entered into these agreements under "undue influence", she does not state whose influence was brought to bear upon her; and, once again, she did not seek to defend the proceedings in reliance upon any such conduct. In this regard, it must be remembered that in the weeks and months leading up to the judgement, the subject matter of the present application, the appellant herself had separate dealings with the bank and its solicitors, and she was also represented in respect of the overall liabilities of herself and her husband by Carl O'Mahony, solicitor.

23. Most applications seeking an extension of time to lodge an appeal from an order of the High Court are made in circumstances where the moving party has missed the appeal deadline by a short period of time. These delays are usually measured in days and perhaps even weeks, but far less rarely months and years.

24. In the present case, however, the periods in respect of which the extension of time is sought – over two years in both cases – are, in the experience of this Court, unparalleled. Further, acting on foot of the judgement which it had obtained with the appellant's consent, the bank registered that judgement as a mortgage against certain lands in which the appellant and her husband have an interest. Then, having received no response to letters written on 29th April, 2013, calling upon them to discharge the amount due on foot of the judgement, other than a telephone call from a solicitor acting on the appellant's behalf which was never followed up, the bank commenced further proceedings *Governor and Company of the Bank of Ireland v. Patrick and Anne Daly* [High Court 2013 No. 407SP] for the purposes of seeking to have to have the judgement declared well charged on their in the lands contained in folios 21625F, 17490F and 7232F Co Westmeath. It was for the first time, in the context of these proceedings, that the appellant has sought to challenge the validity of the order made on 30th July, 2012.

25. Prior to the institution of those proceedings, the appellant had never sought to contend that the monies claimed in the within proceedings, *The Governor and Company of Bank of Ireland v. Patrick J. Daly and Anne Daly*, [High Court Record 2012 No. 235S], were not validly owing or that the judgement had been obtained in a manner such that it could be impugned either in the course of an appeal or by seeking to set it aside, notwithstanding her significant ongoing dealings with the bank and its solicitors. This is particularly relevant in circumstances where it has been established on the evidence before this Court that, since the commencement of the High Court proceedings which led to the judgement of 30th July, 2012, the appellant has had professional dealings with three different solicitors.

26. Not only did the appellant not seek to defend the proceedings instituted by the bank on foot of the relevant loan facilities on any of the grounds which she has put forward to this Court, but she formally consented to judgement in the sums claimed. Further, she has not moved to seek to set aside that judgement on the basis that it was entered into without her lawful and valid consent or due to some other type of mistake. In such circumstances it is difficult to see how, on appeal, the order of the High Court judge could be displaced, given that an appellate court has no jurisdiction to engage upon issues or arguments not advanced in a court of first instance. No evidence was led before the High Court which could be considered by this court on appeal if the relief sought was to be granted. The order made in the High Court was of a final, as opposed to of an interlocutory, nature.

27. For all of the aforementioned reasons, I would refuse the relief sought.