

BETWEEN

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF / APPELLANT

AND

DAVID MORRISSEY

DEFENDANT / RESPONDENT

JUDGMENT of Mr. Justice Michael MacGrath delivered on the 31st day of May, 2019.

1. On 24th October, 2017 by order of the Circuit Court the plaintiff was granted possession of premises comprised in Folio 6565L of the register of leaseholders, County Kildare. This is the plaintiff's family home. A stay of execution of six months was placed on the order. The defendant sought to appeal this order but was out of time. By notice of motion dated 15th February, 2018, he made application to the Master of the High Court who on the 27th April, 2018 extended the time within which to appeal. On 1st May, 2018 Mr. Morrissey served a notice of appeal. This is the plaintiff's appeal from the order of the Master made on 27th April, 2018.

2. Prior to making the application to the Master of the High Court for an extension of time within which to appeal, however, Mr. Morrissey made an application for leave to apply for judicial review in which he sought a number of reliefs including an order of *certiorari* quashing the decision of the Circuit Court judge. This application was refused by Noonan J. on 22nd January, 2018.

Grounds of Appeal

3. A number of affidavits were sworn for the purposes of the application before the Master. The first affidavit was sworn by Mr. Morrissey on 15th February, 2018. It was replied to by affidavit sworn by Ms Helen Dorris, a legal case manager employed by the plaintiff, on 8th March, 2018. Finally, Mr. Morrissey swore an affidavit in reply to Ms. Dorris' affidavit on 16th April, 2018. As matters evolved an issue arose as to the grounds of appeal being relied upon by Mr. Morrissey and whether he was relying on matters referred to in his first or second affidavit. The notice of appeal served on 1st May, 2018, pursuant to the order of the Master extending the time within which to appeal, is in short form.

4. In the affidavit sworn by Mr. Morrissey on 16th April, 2018 grounding the application to the Master, he specified the reasons for seeking the appeal as being the following:-

(a) None of my arguments were heard

(b) My affidavits were not permitted to be opened to the court

(c) Fair procedures and due process were ignored and denied

(d) A motion for discovery was never ruled on

(e) The barristers and solicitors repeatedly misled the court and were caught doing so, yet were allowed to continue with the case

(f) Judges instructions had been repeatedly ignored."

5. He also alleges bias on the part of the judge. As stated in that affidavit, Mr. Morrissey's grounds of appeal relate to the manner in which the trial was conducted. In a further affidavit sworn on 1st June, 2018 for the purpose of this appeal, Mr. Morrissey confirms that the reasons for his appeal are clearly stated in his affidavit of 16th April, 2018. This matter will be further addressed below.

Grounds relied upon in the application for leave to apply for judicial review

6. In the statement required to ground his application for judicial review dated 22nd January, 2018, and in an affidavit sworn on the same day in support of the application, Mr. Morrissey alleged that the Circuit Court judge declined to read his affidavit or to permit arguments and that he failed to permit inspection of original documents. He alleged that the judge displayed bias and that he was denied due process and natural justice. He contended that the plaintiff had failed to establish *locus standi* and proof of ownership of the debt. He raised jurisdictional issues, particularly relating to the rateable valuation of the property. It was also alleged that the various judges who heard applications in the case had failed to examine the contract for proportionality pursuant to the Unfair Terms in Consumer Contracts Regulations 1995.

Grounds of Appeal as outlined in the defendant's affidavit sworn on 15th February, 2018 in support of the application before the Master

7. Following the refusal of his application for leave to apply for judicial review, Mr. Morrissey made the application to the Master by way of notice of motion dated the 15th February, 2018. In his first affidavit sworn, grounding that application he averred that the Circuit Court judge displayed bias against him by his comments and by ignoring an application to inspect original documents. The case had been before the Circuit Court on a number of occasions. Mr. Morrissey states that on 26th January, 2016 a judge directed that the plaintiff produce the original documents and that the case should not proceed until that was done. Mr. Morrissey contended that this order was ignored. He also alleged that the plaintiff breached his Constitutional and Convention rights to due process and fair procedures and that there was a breach of the Rules of the Circuit Court in the manner in which the motion came before the court. He raised jurisdictional issue concerning the nature of the dwelling and the rateable valuation thereof. He highlighted the obligation of the court pursuant to Unfair Terms in Consumer Contracts Regulations 1995 and to the decision of Barrett J. in *Allied Irish Banks Plc v. Coughlin* [2016] IEHC 752, and the failure of the judges in the circuit court who heard various applications therein to discharge their obligations in this regard.

The Plaintiff's response to the application to extend time

8. The application for the extension of time is opposed by the plaintiff. In an affidavit sworn on 8th March, 2018, Ms. Dorris refers to the various loan agreements which gave rise to the indebtedness and what is contended to be the plaintiff's entitlement to seek possession of the property. She avers that the defendant was present in person when the matter was before the Circuit Court on

24th October, 2017. Counsel retained by the plaintiff in the Circuit Court advised her that the Circuit Court judge informed the defendant that he had a right of appeal and that the defendant then declared his intention to do so. On 29th November, 2017, solicitors acting for the plaintiff wrote to the defendant and called upon him to surrender vacant possession of the property. The order for possession was served on 9th January, 2018. She avers that the defendant does not raise any new factual matters nor does he contest his receipt of the loan, the registration of the mortgage and his failure, despite demand, to repay in time. She avers that the defendant repeats arguments, assertions and submissions of a legal nature which have already been canvassed in several affidavits in the Circuit Court and that there is nothing in the defendant's affidavit to explain why, having formed and announced his intention to appeal, he chose to take no steps to appeal within the ten day time limit as provided for by the Rules of the Circuit Court. She does not accept that there was any mistake made by the defendant.

9. Mr. Morrissey confirms that he informed the Circuit Court of his intention to appeal. Nevertheless, on reflection, he decided to apply for leave to bring judicial review as he felt that his case had not been properly dealt with in an impartial or fair manner. He has informed this court that the judge in refusing him leave to apply for judicial review said that the matter would have been better served by an appeal.

10. Mr. Brendan Moriarty, solicitor for the plaintiff swore an affidavit on 1st May, 2018 in relation to this appeal. He also avers that the affidavit of Mr. Morrissey which grounded the application for an extension of time does not address the conditions which must be satisfied on an application such as this. He states that Mr. Morrissey failed to disclose that he had informed the Circuit Court judge that he would appeal. Mr. Moriarty contends that Mr. Morrissey made a conscious and deliberate choice not to appeal but to pursue a different legal strategy, namely to seek an order for judicial review. The bank was unaware of the application for judicial review until certain comments were made by the defendant to the Master of the High Court. The plaintiff then obtained copies of the judicial review proceedings.

11. Mr. Morrissey in a further affidavit, sworn on 1st June, 2018 refers to exchanges which occurred in the Master's Court where the Master had expressed the view that there had been a continuing series of misadventures in the case. As stated previously, it was in this affidavit that Mr. Morrissey confirmed that the application before the Master proceeded solely on the basis of the affidavit of 16th April, 2018, rather than his affidavit of the 15th February, 2018.

12. Mr. Moriarty disputes that the defendant may disown the contents of his first affidavit in which, he contends, the allegations made were the same as those raised in the judicial review proceedings.

13. Mr. Morrissey denies that he has attempted to disown any affidavit sworn by him but disputes its importance in the context of this application.

14. It is clear from a perusal of the affidavits of the 22nd January, 2019 and 15th February, 2019, that with the exception of minor title changes, they are essentially the same. Whatever may have been the position before the Master, the grounds relied upon at this stage are those referred to at para. 3 above.

The plaintiff's submissions

15. The plaintiff submits that the rule in *Henderson v. Henderson* applies. A judgment of a court of competent jurisdiction is conclusive and binding on the parties and a party to such judgment is precluded from litigating a decided issue. It is submitted that the affidavit used by the defendant, Mr. Morrissey, in his application to the Master, contained the same allegations and averments as in the affidavit sworn for the purpose of grounding his application for judicial review. Therefore, it is submitted that all of the issues which Mr. Morrissey seeks to ventilate on appeal have already been raised by him and considered by Noonan J. who refused the application.

16. It is further submitted that Mr. Morrissey does not satisfy the criteria outlined in *Éire Continental Trading Co. Limited v. Clonmel Foods Limited* [1955] I.R. 170 as he has failed to show an operative mistake. It is submitted that the decision of Geoghegan J. in *Brewer v Commissioners of Public Works* [2003] 3 I.R. 539 confirms the *Éire Continental* test, although it makes it clear that it is not absolute and the court retains a discretion. The plaintiff also maintains that it is not credible that the defendant was unaware of the time limit.

17. The plaintiff relies on the decision of Meenan J. in *ACC Loan Management Ltd. v. Fagan* [2018] IEHC 140 as authority for the proposition that no legal or operative mistake is made by a person who elects to proceed by way of judicial review and when that fails to attempt to appeal.

The defendant's submissions

18. Mr. Morrissey submits that the criteria outlined in *Éire Continental* have been satisfied by him. He submits that he has demonstrated a bona-fide intention to appeal and that he made a mistake in seeking a judicial review when, as Noonan J. informed him, matters would have been better served by an appeal. Mr. Morrissey submits that reliance on *Fagan* is misplaced and that *Fagan* is distinguishable on the facts. This is considered in more detail below. He also made a mistake as to the applicable time and he did not have the benefit of legal advice. He also submits that he has arguable grounds of appeal. In the alternative he submits that the court should exercise its discretion as referred to by Geoghegan J. in *Brewer* and by the Supreme Court in *Goode Concrete v. CRH Plc & Ors* [2013] IESC 39, in favour of extending the time.

19. He further submits that the Defendant's reliance on *Henderson v Henderson* is misplaced. The Plaintiff's plea of res judicata is not appropriate as he had not been permitted to open his affidavit in the Circuit Court.

Decision

20. This is an application for an extension of time within which to appeal and therefore it is accepted by the parties that the principles outlined by Lavery J. in *Éire Continental* apply. Lavery J stated:-

"(i) the applicant must show that he has a bona fide intention to appeal formed within the permitted time;

(ii) he must show the existence of something like a 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

In my opinion these three conditions are proper matters for the consideration of the Court in determining whether time should be extended but they must be considered in relation to all the circumstances of the particular case".

21. In *Brewer*, Geoghegan J. stated:-

"I would interpret those words of Lavery J. as indicating that while these three conditions were proper matters to be considered, it did not necessarily follow in all circumstances that a court would either grant the extension if all these conditions were fulfilled or refuse the extension if they were not. The court still had to consider all the surrounding circumstances in deciding how to exercise its discretion."

22. It is accepted that the defendant satisfies the first part of the test, namely that he had formed an intention to appeal within the appropriate time. This is evident from his statement in open court on the day on which the Circuit Court judge delivered his ruling.

23. With regard to whether a mistake was made, the plaintiff relies on the decision of Meenan J. in *Fagan*, Meenan J. where he stated at para. 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". (emphasis added)

24. Mr. Morrissey does not suggest that *Fagan* was incorrectly decided, rather he attempts to distinguish it on the basis that in *Fagan* all arguments were heard in the Circuit Court prior to a possession order being granted. There was a telescoped judicial review hearing, a decision was given and was appealed. It was only after the dismissal of the appeal that the defendant sought an extension of time within which to appeal the original order. Further, Mr. Morrissey states that the defendant in *Fagan* was judged to have no satisfactory grounds for appeal.

25. In my view, the decision of Meenan J. governs the circumstances which apply in this case. Meenan J. concluded that there had been a deliberate and conscious decision by the defendant to challenge the order of the Circuit Court not by way of an appeal but by initiating judicial review proceedings. I am not satisfied that *Fagan* may be distinguished on the grounds that the application progressed to a more advanced stage. It was open to Mr. Morrissey to appeal the refusal by Noonan J. It also seems to me to be unarguable that had his judicial review proceedings been successful, this application would not have been made. It would not have been required. I am therefore not satisfied that a mistake occurred as that term is understood. In addition, it is clear from the decisions in *Éire Continental and Brewer*, that a mistake in relation to an applicable time period is not operative.

26. The grounds of appeal relied on and as discussed above relate to the conduct of the trial by the Circuit Court judge. It is not at all clear that they could be said to be distinguishable from those advanced in the application for judicial review or that the principle in *Henderson v Henderson* does not apply. I am willing to accept for the purposes of this judgment that these principles do not apply, nevertheless, it is clear that the defendant does not satisfy all of the necessary conditions specified in *Éire Continental*.

27. Therefore, even if one were to consider that Mr. Morrissey has arguable grounds of appeal, then the court must address whether it should exercise its discretion to grant the extension of time.

28. It seems to me that while the court may enjoy a discretion, it is one which much be exercised in accordance with established principle. In *Brewer*, an extension of time was permitted on a limited basis and for a limited reason. While Geoghegan J. was satisfied that the applicant had formed a *bona fide* intention to appeal within the permitted time, he was by no means satisfied that a mistake of the kind that Lavery J. had in mind in *Éire Continental* existed. He did not believe that the failure on the part of a potential appellant to address its mind to the question of the perfection of the order, would in the ordinary way be regarded as an operative mistake. It was on a limited issue of aggravated damages that the court allowed the appeal to proceed. The respondent would not be prejudiced in the legal sense and to allow it on this basis was *"in the interests of overall consistency in the handling of the cases by this Court"*.

29. The manner in which the court ought to exercise its discretion has been further expanded upon in *Goode*. The court considered an application for an extension of time within which to appeal, on the grounds of the perception of bias on the part of the trial judge, who had certain shares in one of the companies, the full extent of which did not emerge until some time following the conclusion of the hearing. The appeals were out of time by a very significant margin. However, the plaintiff/appellant argued that there were unusual circumstances which ought to persuade the court to extend the time for appeal.

30. Clarke J. (as he then was) explained the rationale of *Éire Continental*, as follows at para. 3.3:-

"The reason why the Éire Continental test applies in the vast majority of cases is clear. The underlying obligation of the Court (as identified in many of the relevant judgments) is to balance justice on all sides. Failing to bring finality to proceedings in a timely way is, in itself, a potential and significant injustice. Excluding parties from potentially meritorious appeals also runs the risk of injustice. Prejudice to successful parties who have operated on the basis that, once the time for appeal has expired, the proceedings (or any relevant aspect of the proceedings) are at an end, must also be a significant factor. The proper administration of justice in an orderly fashion is also a factor of high weight. Precisely how all of those matters will interact on the facts of an individual case may well require careful analysis. However, the specific Éire Continental criteria will meet those requirements in the vast majority of cases".

31. One example cited of a situation where it would be contrary to the interests of justice to allow an appeal to be brought outside time, is where the court was not satisfied that there were arguable grounds of appeal.

32. Further, Clarke J. stated that in most straightforward cases, a party will be aware of the time limit within which an appeal should be brought (or if not, ought to be so aware) and should not be allowed an extension of time unless a decision to appeal was made in time and there was good reason for the appeal not having been filed within the time limit. He continued:-

"In the vast majority of cases the only materials which any party will need to consider in deciding whether to appeal will be the materials which were before the judge deciding the case at first instance. A party who has participated in proceedings before the High Court (or who ought to have so participated) will or ought to be aware of all of the evidence called, of the legal submissions made and of the reasoning of the trial judge in coming to whatever conclusion it might now be sought to appeal against. Such a party has available to it all of the information necessary to make its mind up as to whether it wishes to appeal. In that context it is not unreasonable to require the party, in the interests of the overall administration of justice and the balance of justice as and between the parties, to come to a decision within the time specified and to bring the appeal either within that time or such further period as the Court might, exceptionally, allow if there is some excuse for the notice of appeal not being filed in time. Thus the specific Éire Continental criteria will, in the

vast majority of cases, be likely to be the only test applied by the Court”.

33. Clarke J. observed that there may be cases where different considerations apply and *"one such category of case is where, unusually and exceptionally, the basis of the appeal stems from factual circumstances outside of the materials which were before the High Court”.*

34. Significantly, at para 3.8 he observed:-

"However, the other two specific criteria, which are concerned with the time within which the appeal should have been brought, need to be modified in cases where the whole basis of the appeal is dependent on facts not before the trial court. In such circumstances I was satisfied that the Court should consider the following factors:-

(a) The time when the party seeking an extension of time first became aware of the facts on which it wishes to rely;

(b) The extent to which it was reasonable for that party to engage in further inquiry before bringing an application to the Court for an extension of time;

(c) The time which elapsed between information coming to the attention of the relevant party and the application for an extension of time measured by reference to the tight limit of 21 days (in that case) within which a party is expected, in an ordinary case, to appeal to the Supreme Court; and

(d) Any other factors arising in the special circumstances of the case but in particular any prejudice which might be said to have been caused to the successful party in the High Court by reason of the overall lapse of time between the order sought to be appealed against and the application for an extension of time”.

35. Clarke J. observed that such a test is an appropriate adaptation of the specific *Éire Continental* criteria in the circumstances of the type of case which the court was there considering. That the appellant was unaware of the facts on which he wished to rely until some considerable time was a consideration which the court was entitled to take into account.

36. The limited nature of the appeal which was permitted in that case was highlighted by Clarke J. when he stated:-

"6.6 The whole rationale behind allowing Goode to now raise the reasonable apprehension of bias point was precisely because it derived from facts and materials which were not before the High Court and which only came to the attention of Goode at a relatively late stage in the process. None of that rationale has any application to any of the other points which arise entirely out of the facts and materials which were before the High Court and in respect of which no new information or materials have become available. To the extent that the allegation of bias might be said to be a new material item then, if it be established, Goode will have its remedy anyway and if it be not established then it cannot be said to have affected any of the other points”.

37. The court was not persuaded that the appellant should be allowed to raise any points beyond those which were concerned with a reasonable apprehension of bias point. It seems clear from the decision of Clarke J. that in circumstances where the facts and materials about which complaint is sought to be made on appeal were before the court, then the limited basis upon which the court should exercise its jurisdiction to grant an extension of time on a particular point, does not arise.

38. All of the material facts upon which Mr. Morrissey intends to rely on the appeal including allegations concerning the unsatisfactory conduct of the trial and want of fair procedures, but these must have been known to him on the conclusion of the Circuit Court hearing. These are not facts which came to light subsequently and in the circumstances, in line with the principles enunciated in *Goode* upon which this Court should exercise its jurisdiction to extend the time period, I am not satisfied that it is appropriate in which to do so. In my view, it would not be in accordance with the overall administration of justice and the balance of justice as between the parties to permit the appeal to proceed.

39. I must therefore allow the plaintiff's appeal.