

THE HIGH COURT

2009 30 IA

DUBLIN CIRCUIT

COUNTY OF THE CITY OF DUBLIN

BETWEEN:

MARIE WINTERS

PLAINTIFF/RESPONDENT

AND

DARREN FARRELLY

DEFENDANT/APPELLANT

JUDGMENT of Mr Justice Michael Peart delivered on the 17th day of July 2009:

On this application by way of Notice of Motion issued herein on the 10th June, 2009, the defendant/appellant seeks an enlargement of time for serving a Notice of Appeal against the whole of the order of the Circuit Court (Her Honour Judge Linnane) made on the 12th March, 2009, whereby it was ordered that the plaintiff/respondent do recover possession of a house owned by the late Laurence Winters, the plaintiff/appellant's husband, and that she recover against the defendant/appellant the sum of €12600. By the said order the defendant/appellant's Counterclaim was dismissed. In that Counterclaim he had sought, *inter alia*, certain declaratory reliefs including that the plaintiff/respondent's title in the said premises had been extinguished, that the defendant/appellant has acquired full and unencumbered title to the said premises, and/or a declaration that the plaintiff/respondent holds the said premises in trust for the defendant/appellant.

By way of general background, it appears that the plaintiff/respondent and her late husband had been separated for many years prior to his death. However that separation had never been formalised in any way. It appears from the evidence before me by way of affidavit that the defendant whose father had been a close friend of the late Mr Winters, moved into the house about twelve years ago, and that at some later date his partner also lived there, as did their young son after he was born. To the defendant and his siblings, the late Mr Winters was known as "Uncle Larry". The defendant/appellant states that following the separation referred to the late Mr Winters was living in the house alone, and that in 1993 he invited the defendant/respondent and his brother to move into the house to live with him, and he states that he has lived in the house ever since 1993. No rent was paid to the late Mr Winters, but the Counterclaim pleaded that the defendant/appellant had performed many services for Mr Winters and provided him with affection, loyalty and companionship, and that the relationship was a close one. In addition it was pleaded that the defendant/appellant had paid for a number of improvements to the house over the years. The Counterclaim went on to plead that it was the wish and intention of Mr Winters that the defendant/appellant and his partner should become full owners of the house and remain in exclusive possession thereof, and that in fact Mr Winters had attended a solicitor prior to his death in relation to an annulment of his marriage and what is described as "ancillary proceedings". An affidavit sworn by the defendant/appellant's current solicitor, Timothy McEniry in support of the present application for an enlargement of time confirms that at some point the late Mr Winters had consulted him in relation to a separation, and that a letter was written to the plaintiff/respondent in relation to these matters, and that no reply was received. Nothing further occurred in relation to the matter.

I should add that the late Mr Winters appears to have died intestate and that the plaintiff/appellant extracted a Grant of Administration, Intestate in which she is named as the administratrix of her late husband's estate.

The order of the Circuit Court which the defendant/appellant wishes to appeal against was made on the 12th March, 2009. He was at that time represented by the firm of O'Donohue Hackett (formerly Wm. Hackett & Co), whose address is stated in the Amended Defence and Counterclaim filed on the 9th March, 2009, and on all prior documents filed, as being Newmarket House, Newmarket Square, Dublin 8, though I notice that at the time the Appearance was entered by that firm in September 2007, the address of Mr Hackett's firm was 64, Dame Street, Dublin 2. The change of address seems to have occurred at least by February 2008, since the Newmarket House address appears on a Notice for Particulars filed on the 18th February 2008. The address of Mr Hackett assumes some relevance given one of the reasons put forward to entitle the defendant/appellant to the order sought on this application. I will come to that.

At the hearing in the Circuit Court in March 2009, the defendant/appellant was represented by Counsel, Seán O'Siocháin BL, instructed by O'Donohue Hackett, solicitors. On the present application before me, Mr O'Siocháin appears instructed by Timothy McEniry, solicitor. It has been accepted by Mr O'Siocháin that the claim by reference to adverse possession was not pursued in the Circuit Court, and that the sole ground of appeal, should the application for enlargement of time be granted is that the plaintiff holds the property in trust for the defendant/appellant/estoppel.

It has been accepted also that in order to be found entitled to an order enlarging the time for appeal the defendant/appellant must satisfy the Court that a bona fide intention to appeal was formed within the period of ten days from the date of the Circuit Court order, there exists an element of mistake, and finally that there is an arguable ground of appeal, as enunciated by Lavery J. in *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] I.R. 170. The Court has been referred also to the more recent judgment of Geoghegan J. in *Brewer v. Commissioners of Public Works* [2003] 3 I.R. 539, in which it was confirmed that while the criteria set forth in *Eire Continental Trading Company v. Clonmel Foods Limited* are the correct principles, 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, and that the Court still had to consider all the surrounding circumstances in deciding how to exercise its discretion, and that prejudice of the

other party was a relevant factor.

Intention to appeal/genuine mistake:

The defendant/appellant has sworn in his grounding affidavit that as soon as the Circuit Court order was made he immediately formed an intention to appeal. However he goes on to say that at the same time he decided to change his solicitor, and that on the 18th March, 2009 he instructed Mr McEniry to act for him and to appeal the decision. He states that he believes that Mr McEniry experienced some difficulties in tracing the address for O'Donohue Hackett, solicitors "because it was a new partnership with new premises and was not in the current Law Directory, and that Mr McEniry "eventually located a Waterford office which in turn referred him to their Dublin offices". This he believes is the reason why the Notice of Appeal was not filed in time. He states that it was when he received a notice from the Dublin City Sheriff giving notice of eviction for the 19th May 2009 that he became alarmed and contacted Mr McEniry to find out what was happening. I should add that there was a stay placed on the order for possession for a period of six weeks from the date of the said order, but no stay pending any appeal which might be lodged.

An affidavit sworn by Mr McEniry has confirmed that he had difficulty in locating Mr Hackett's office, and that when he made contact with the Waterford office for O'Donohue Hackett they referred him to the Dublin office. He states also that he failed to find Mr Hackett's current address in the Law Directory. He also says that the defendant/appellant had contacted him at a time when he was extremely busy and that he did not put the deadline for appeal in his diary.

However, the plaintiff/appellant's solicitor, Mark Nixon has sworn a replying affidavit in which, inter alia, he refers to the fact that at the date of the hearing in the Circuit Court on 12th March, 2009 the defendant/appellant was in touch with Mr Hackett who was then acting for him, and at a time when Mr Hackett was practising from the new address in Dublin at Newmarket House and that there should have been no difficulty in making contact him in relation to the file. However, he makes the point also that the file was not necessary for Mr McEniry before filing a simple Notice of Appeal in the Circuit Court Office within time, given that the defendant/appellant had instructed him within time. He refers also to the fact that the current Law Directory in fact contains the details of the new address for Mr Hackett, and that there should not have been any problem in making contact with him, even if it was felt that the file was necessary.

I would not be prepared to conclude that there was a genuine mistake in relation to this matter by reference to the difficulty in contacting Mr Hackett. It is not credible that the defendant/appellant did not know from where his solicitor practised, or that there was any real difficulty in locating him. That is not credible. It is more likely that even though the defendant/appellant may have contacted Mr McEniry at short notice and at a time when the latter was under pressure of work, nevertheless the time-limit was either not appreciated or that it was simply overlooked. That is not something which in my view should be held in his favour against the interests of the plaintiff/respondent, especially in the light of the prejudice which an appeal would cause if time was extended. I will come to the question of prejudice in due course. Having said that I would be prepared to conclude that the defendant/appellant himself probably formed an intention to appeal at the conclusion of the case on the 12th March, 2009. But on balance, the element of mistake is not convincing.

Arguable ground of appeal:

No discrete or clearly identifiable ground of appeal appears from the affidavits grounding this application. All that is said is that the defendant/appellant wished to appeal the decision as soon as it was made against him, and then the affidavit simply restates the claim, namely that there was a close relationship between the defendant/appellant and the late Mr Winters. It is stated again that services were performed by the defendant/appellant, and that he and his partner cared for the deceased, and that it had been his wish that he would become full owners of the house. That is the case that was fully heard in the Circuit Court. There is no identifiable issue of law or fact which can be seen as constituting an arguable ground of appeal. I cannot see any possibility that the result would be any different following any appeal which might be allowed, and the onus is upon the defendant/appellant at this stage, when seeking an extension of time, to satisfy this Court in that regard. He has failed to discharge that onus.

As I have already referred to, Geoghegan J. has stated in *Brewer* that even where the appellant has failed to satisfy the Court as to intention to appeal, an element of mistake and arguable grounds, it does not necessarily follow that the Court would not extend time in all circumstances, and that the Court still would consider all the circumstances in deciding how to exercise its discretion, and that prejudice to the other party was a relevant factor. In the present case the plaintiff/respondent has demonstrated prejudice, which in my view is significant. She is the administratrix of the deceased's estate. She extracted a Grant of Administration, intestate on the 29th May 2007, some six months after the date of death. She was keen to sell the house and distribute the deceased's estate thereafter. The Equity Civil Bill was issued on the 30th August, 2007 in order to recover possession of the premises. While an appearance was entered by the defendant on the 3rd September, 2007, no Defence/Counterclaim was delivered until March 2008, it having been necessary to bring two applications to the Circuit Court to compel its delivery. Two further motions had to be brought to compel replies to particulars. The fact is that the plaintiff/respondent has been delayed in selling the house in question for more than two years since the Grant of Administration issued to her. It is of course the case that during that time the value of the property in question has reduced in the current economic climate. There has been a loss to the estate of the deceased resulting from the defendant/respondent's continued occupation of the house. That is a significant prejudice which will be exacerbated by any further delay which would necessarily result from the granting of an extension of time to appeal.

I am satisfied that there are no circumstances which should cause this Court to exercise its discretion in favour of granting an enlargement of time to appeal in this case, especially where there have been no arguable grounds identifiable, and where the element of mistake is weak as I have found to be the case. The mere fact that the defendant/appellant may in all probability have formed an intention to appeal within the period of ten days cannot of itself outweigh the countervailing matters and circumstances. I should perhaps just add that if a clearly identifiable and weighty ground of appeal existed, it may be the case that the balance of justice would lie in favour of allowing the extension of time even in the face of weakness in relation to intention and mistake, and prejudice. But this case is far from being such a case.

I therefore refuse the application for an enlargement of time to appeal.