THE SUPREME COURT

[Supreme Court Appeal No: 102/2018]

O'Donnell J.
McKechnie J.
MacMenamin J.
Dunne J.
O'Malley J.

BETWEEN:

SENIORS MONEY MORTGAGES (IRELAND) DAC

PLAINTIFF/RESPONDENT

-AND-

DEREK GATELY

DEFENDANT

-AND-

JACQUELINE MCGOVERN

NOTICE PARTY/APPELLANT

JUDGMENT of Ms. Justice O'Malley delivered on the 4th day of February 2020

Introduction

1. This appeal is against the dismissal by the Court of Appeal of an application to extend the time within which to appeal an order of the High Court. The order in question granted possession of certain mortgaged premises, in which the appellant and her husband live, to the plaintiff (hereafter "the respondent" or "the lender").

2. The exercise of an appellate court's discretion to extend, or to refuse to extend, time within which to appeal, has for decades been informed by the judgment of this Court in *Éire Continental Trading Co. Ltd. v. Clonmel Foods Ltd.* [1955] I.R. 170. However, it may be that the very familiarity with the judgment on the part of judges and practitioners can on occasion lead to the assumption that it confines the discretion by reference to a set of mandatory conditions, and that failure on the part of a would-be appellant to comply with one or more conditions must lead to a refusal of an extension. It may therefore be helpful to commence with a short examination of the judgment and of some of the more recent decisions of the Court.

3. In *Éire Continental*, counsel resisting an application for an extension of time made submissions to the effect that there were "rigid rules" prescribing the conditions in which time should be extended. In so doing, counsel was, according to Lavery J., following the lines of a dissenting judgment by Fitzgibbon J. (in *Moore v. Attorney General (No.4)* [1930] I.R. 560). Fitzgibbon J. had considered that it was necessary that an applicant should give some good reason to support the contention that the judgment to be appealed was wrong, and also show that a *bona fide* intention to appeal had been formed before the time expired. However, Kennedy C.J. and Murnaghan J. had taken the view that the older line of authority had been superseded by a new, simplified version of the relevant Rule, and that the power was within the discretion of the court, to be exercised

in the light of the facts and circumstances of the particular case. It is clear that Lavery J. and the other members of the Court in *Éire Continental* preferred the approach of the majority.

4. In a well-known passage, Lavery J. referred at p. 173 of the report to a submission by counsel for the respondent that there were three conditions that "must" be satisfied before the court would allow an extension.

> *"These conditions were:-*
>
> *1, The applicant must show that he had a bona fide intention to appeal formed within the permitted time.*
>
> *2, 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 a rule was not sufficient.*
>
> *3, He must establish that an arguable ground of appeal exists."*

5. Lavery J. then stated that in his opinion these were "proper matters for the consideration of the Court" in determining whether time should be extended. However, it is important to note that the judgment continues:

> *"…[b]ut they must be considered in relation to all the circumstances of the case. In the words of Sir Wilfred Greene M.R., in Gatti v. Shoosmith (a case resembling the present in many ways): - 'The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised.'"*

6. At p. 174 Lavery J. stated that he was satisfied that the applicant in the case either had the intention of appealing "or at least the intention to consider whether an appeal would be justified" and that this was sufficient in the circumstances of the particular case. He then referred to authorities demonstrating that in a proper case the mistake of solicitor or counsel as to the rules about time might, even under the old practice, have been a sufficient ground. It seems clear that in so doing he was indicating that he did not fully accept counsel's proposition on this aspect either. On the final question, as to whether it was necessary to show the existence of an arguable ground of appeal, Lavery J. expressed the view that what needed to be shown was that the proposed appeal had "substance" and was not merely intended to gain time and to postpone the day of reckoning.

7. There is no doubt but that over the years there has been a tendency to take the passage quoted above, which simply summarised counsel's submission, as encapsulating the ruling of the Court. However, while the three factors have been endorsed in innumerable judgments, from time to time there has been a reminder that the Court did not, in fact, lay down the "rigid rules" that the respondent in *Éire Continental* advocated. Thus, in *Brewer v. Commissioners of Public Works* [2003] 3 I.R. 539 Geoghegan J. emphasised

that it did not necessarily follow in all circumstances that a court would either grant the extension if all three conditions were fulfilled, or refuse it if they were not. The court still had to consider all the surrounding circumstances. In *Brewer*, the Court concluded that the defendant had at all times intended to appeal. It was accepted that there had been a mistake, but it was an "irrational" mistake that could not be seen as operative. Finally, the Court considered that there was no basis on the facts of the case for an appeal on the issue of liability. If absolute compliance with Éire Continental had been necessary, an extension could not have been given. However, having regard to all the circumstances of the case, the Court gave an extension for a limited appeal in relation to damages only.

8. In *Lough Swilly Shellfish Growers Co-Op Society Ltd. v. Bradley* [2013] 1 I.R. 227 it was accepted by the Court that the criteria were guidelines and that the court retained a residual discretion. In *Goode Concrete v. CRH plc* [2013] IESC 39, which will be referred to further below, Clarke J. agreed that the specific three criteria discussed in *Éire Continental* would suffice in the "vast majority" of cases. However, there could be cases where different considerations applied.

9. In this appeal the central issue to be determined by this Court is whether it should extend time if it is satisfied that there are arguable grounds of appeal, even if not satisfied either that there was a *bona fide* intention to appeal formed within the prescribed period or that there was something in the form of a mistake to excuse delay in bringing forward the appeal.

The High Court

10. The lender's claim was for an order for possession of certain property in Co. Leitrim, on foot of a deed of mortgage entered into by the owner, the late Mrs. Noelle McGovern, in September 2007. The property had previously been a licensed premises, and before that a small hotel, but in 2007 it seems that it was in use only as a private residence. At that time Mrs. McGovern was 76 years old and lived in the premises with her daughter (the appellant) and son-in-law. The property is not described in the loan agreement or the deed other than by reference to the address.

11. The lender had been approached with a view to obtaining a loan secured on the property which, according to a valuation obtained by the lender, was worth €1.2m. The letter of offer advanced an initial sum of €100,000 under the terms of a "Seniors Money 60plus loan", with a maximum loan amount set at €432,000. It was an express term of the offer that the lender was not obliged to concern itself with the purpose of the borrowings. It was also stated that any request for a further loan amount beyond the initial sum would be assessed according to lending criteria including the value of the property and the total amount owing.

12. In general, the terms of the loan differed noticeably from those of standard loan agreements or mortgages. Interest, of course, ran from the date of the loan but no instalment payments were required (although it was possible to "prepay" the loan in whole or in part). Under clause 8.2, the amount owing would be repayable only on either the sale of the property or the making of a demand. The same clause provided (insofar as

is relevant to this case) that in the absence of default on the part of Mrs. McGovern, or sale of the property by her, demand could be made only after the expiry of 12 months after her death. At that point it would be open to her personal representative (being a person nominated to the lender by Mrs. McGovern – in this case, the appellant) to request an extension for a further 12 months. It was a term of the agreement that the personal representative should inform the plaintiff of her death as soon as practicable. The lender also undertook that if the property was sold on the death of the borrower, and the amount realised was less than the amount owing, the difference would not be payable.

13. Separately, clause 11 of the agreement stipulated that the borrower would be in default if an event of default "as defined in the Security" occurred.

14. The appellant and her husband wrote to the lender in July 2007 to confirm that they understood the contract being entered into by Mrs. Noelle McGovern; that they did not intend to reside permanently in the property and that they further understood that on the death of Noelle McGovern they would not have a right to continue to reside there unless the loan was paid in full. Mrs. McGovern signed the loan offer and deed of mortgage by making her mark in the presence of a solicitor in September 2007. The deed was registered on the 9th December 2009.

15. Of note, clause 11 in the mortgage deed, like clause 11 in the loan agreement, provided, under the heading "Events of Default", that the lender was not to exercise any of its powers to enforce the security unless one of a list of events of default occurred. In that case it could decide to enforce "in accordance with both the deed and the loan agreement". One of the specified events was the death of the mortgagor.

16. A total of €300,000 was drawn down under the terms of the loan, in three tranches of €100,000 paid over in September, October and December 2007. Mrs. McGovern died on the 19th November 2009. The death certificate gives the cause of death as renal failure but also records that she had had a previous cerebrovascular accident and dementia. She left a will under which the appellant inherited her entire estate.

17. The appellant does not appear to have informed the lender of Mrs. McGovern's death and, according to the grounding affidavit sworn on its behalf, the lender did not become aware of it until October 2014. Its solicitors wrote to the appellant on the 6th November 2014. It was indicated that, in the circumstances, the loan had fallen due for repayment on the 20th November 2010. The appellant was reminded of the waiver letter signed in July 2007, and was asked to confirm either that the loan would be repaid, or that the property would be voluntarily surrendered. The total due at that point was €422,190.45.

18. It appears that there was no response to this letter. In September 2015 the plaintiff's solicitors notified the appellant that if she had not yet extracted a grant of probate to the estate they would seek the appointment of an administrator *ad litem*, and would issue proceedings for possession if the amount due was not repaid. Again, there was no response.

19. On the 2nd November 2015 the plaintiff obtained a High Court order appointing a practicing solicitor, Mr. Gately, as administrator *ad litem* without the will annexed, for the limited purpose of defending these proceedings. The appellant, who had been informed of the application, was again advised that proceedings for possession would issue if the sum due was not repaid.

20. A special summons was issued on the 17th November 2015, two days short of the expiry of six years from the date of death. Mr. Gately was sued in his representative capacity. The appellant and her husband were served with the proceedings, as the occupants of the property, and she was subsequently joined as a notice party. It appears that they sought legal aid, and that the matter was adjourned on a number of occasions to facilitate this.

21. The first relief sought in the summons was an order for possession of the property currently known as "Jak's Casino", pursuant to s.67(2) of the Registration of Title Act 1964. The second, alternative, claim was for an order providing for the sale of the property and the distribution of the proceeds of such sale. The third (which does not appear to have been pursued) was for accounts and enquiries. The fourth was the standard claim for "such further or other order as to this Honourable Court shall seem just and appropriate".

22. It should be noted that it is nowhere stated in the summons that the land was registered. The grounding affidavit sworn on behalf of the respondent described it as unregistered. There is, in fact, no reference to either registration or to the Registration of Title Act 1964 other than in paragraph 1 of the reliefs claimed in the summons.

23. In accordance with the obligations imposed upon him by virtue of his appointment, the administrator *ad litem* opposed the claim. The case he made was that the respondent's claim was statute-barred by virtue of s.9 of the Civil Liability Act 1961. That section provides that no proceedings are maintainable in respect of a cause of action "*which has survived against the estate of a deceased person"*, unless they were either pending as of the date of death or were commenced within the period of two years after that date. The administrator contended that the death of Mrs. McGovern constituted an event of default under both the loan agreement and the deed of mortgage, with the consequence that the respondent's claim accrued immediately upon the death, and that proceedings should therefore have been commenced within two years of that date.

24. The lender's position was that the section was inapplicable, in that the cause of action did not *"survive against the estate"* but rather arose either at the point of, or subsequent to, the death. The relevant limitation period was, therefore, six years. Having regard to the terms of the loan agreement, it contended that in this particular case the claim did not in fact accrue until 12 months after the date of death. This was because the loan was not repayable until demand was made, and a valid demand could not be made during that 12-month period.

25. The appellant was ultimately unable to get legal aid and appeared as a litigant in person in the High Court. According to her affidavit evidence, she was the person who had made

contact with the respondent with a view to her mother taking out an equity loan. The purpose was to develop a casino in the premises. She said that the lender's representative advised them to draw the money down in stages, to save on interest, but in early 2008 they were told that the last tranche would not be forthcoming due to the downturn in the economy. The appellant averred that the resulting shortfall adversely affected the development of the business, and threatened them with the loss of their family home. She sought an explanation as to how the lender could "renege" on the agreed amount. She also queried the respondent's calculations in respect of the total amount claimed.

26. In response the lender relied on the terms of the loan agreement and the letter of waiver signed by the appellant. It was asserted that in any event its representatives had been unaware of the business plan for the premises. An explanation was provided in respect of the figures.

The decision of the High Court

27. By agreement between counsel, the issue as to the limitation period was dealt with on the basis of written and oral submissions. An *ex tempore* judgment was delivered by the trial judge (Baker J.) on the 26th January 2017. She referred at the start of her ruling to the fact, as she believed it to be, that what was before her was a claim for relief under s.62(7) of the Act of 1964, and described the respondent as having the benefit of a registered charge against the land in question and therefore having, on the face of it, an entitlement to possession under the Act.

28. Baker J. went on to determine that the claim against the defendant was not statute barred. She stated that it was necessary to construe the charge document and the loan agreement "in their totality". Looking at clauses 8 and 11 of the agreement, and clause 11 of the charge, she agreed that the death of the mortgagor was an event of default. However, she considered that s.9(2) of the Civil Liability Act 1961 applied to claims *subsisting* at the time of death, and not to a claim that was created by the death.

29. Accordingly, the relevant limitation period was found to be six years rather than the two-year period under the Act of 1961. Having so ruled, the trial judge found that the defendant had no other defence (as, indeed, was conceded by counsel on his behalf), and that there was no reason not to make an order for possession under s.62(7) of the Registration of Title Act 1964 as against him. However, Baker J. made it clear that her ruling did not deal with the position of the appellant, and indicated that she would stay the taking of possession until she heard what the appellant had to say. She had not read the appellant's affidavits before dealing with Mr. Gately's argument, since if the claim had been statute barred there would have been no need to consider any other point. It might be that the appellant had a defence, but "for the moment" she was not making her a defendant. The matter was accordingly put back to the 9th March 2017 in order to hear submissions.

30. The court registrar inquired what the form of the order should be, and Baker J. requested counsel for the lender and Mr. Gately to attempt to draw it up together, and then send it to the registrar “and I’ll see if it’s what I think it should be”.

31. On the 9th March the appellant was still unrepresented, but had obtained an opinion of counsel through the Bar Council Voluntary Assistance Scheme. Baker J. read and considered the content of the opinion, but felt that it could not avail the appellant. There was an argument outlined that the appellant might have a right of residence. Baker J. said that even if that were so, it would be subject to the mortgage. Essentially, her reasoning was that the appellant could not inherit that which her mother did not have, and therefore she had inherited the property subject to the mortgage. She could see no defence that could have been mounted by the late Mrs. McGovern. Counsel’s opinion had also referred to undue influence, but that had not been raised in the case.

32. Baker J. then inquired as to whether the land was registered and was told by counsel for the lender that it was not. She pointed out that in that case the claim in the summons for an order pursuant to s.62(7) of the Registration of Title Act 1964 was incorrect, to which counsel responded that there was also a claim for an order for possession and sale. Counsel further accepted that she did not need an order for sale, just possession. She intimated to the judge that this order had been made on the last occasion.

33. The trial judge then considered whether there was any defence that could be made on behalf of the appellant and found that there was not. She confirmed the order for possession but gave a stay until the 15th January 2018. The trial judge indicated to the appellant that she might be able to use that time to take financial advice and come to an arrangement with the lender.

34. The order of the 26th January 2017 was not perfected until the 16th March, after the second hearing, and simply directed the defendant, Mr. Gately, to deliver up possession in the premises and recorded that the matter had been adjourned to the 9th March. There is no reference to the Registration of Title Act. The second order was perfected on the 21st March 2017, and put a stay on the earlier order until the 15th January 2018.

The Court of Appeal

35. The stay imposed on the order duly expired on the 15th January 2018. On the 23rd January 2018 the appellant, now legally represented, requested consent from the plaintiff to the late filing of an appeal. This request not being acceded to, a motion was issued on the 13th April 2018 in the Court of Appeal, seeking an extension of time within which to lodge a notice of appeal against the orders made on the 26th January and the 9th March 2017. It will be remembered that the order for possession was perfected on the 16th March 2017, and the time for lodging an appeal therefore expired on the 13th April 2017, exactly one year before the motion was issued.

36. In her grounding affidavit the appellant averred that she had intended to appeal since the time the orders were made in the High Court. The delay was explained by reference to a number of matters. She said that she had sought to extract a grant of probate, so that

she could act on behalf of the estate, but had been delayed by some confusion in the Probate Office as to whether Mr. Gately had or had not obtained a grant of representation. Although the appellant received a grant of probate on the 20th February 2018, she said that the issue was not finally resolved until the 26th March 2018 when the solicitors for the plaintiff forwarded a copy of the limited grant issued to Mr. Gately. She was substituted as defendant in these proceedings in her capacity as executrix of her mother's estate by order of the Master of the High Court on the 16th March 2018.

37. The appellant explained that both she and her husband suffered from debilitating medical conditions which caused considerable pain and required ongoing treatment. Reference was also made to their reduced financial circumstances and to the time and effort required to obtain legal representation.

38. The primary ground proposed to be put forward on appeal was that the order of the High Court had been made without jurisdiction, in circumstances where the trial judge had been acting under a mistaken belief that the property was registered land and therefore that the court had jurisdiction to grant relief under the Registration of Title Act 1964. It was averred that this error did not appear to have been corrected by the respondent. Further grounds were mooted in respect of the limitation period issue, as well as a general argument that the loan documentation should be construed *contra proferentum*.

39. In a replying affidavit, the plaintiff exhibited the DAR transcripts from the 26th January and 9th March 2017. It was averred that the appellant had acquiesced in the orders, having written to the plaintiff in June 2017 inquiring about the possibility of renting the premises after the expiry of the stay. It was contended that the difficulties in respect of the grant of probate were immaterial in that an appeal could have been lodged without it. The health difficulties experienced by the appellant were, similarly, not accepted as bringing the case within the *Éire Continental* criteria.

40. The respondent accepted that in the *ex tempore* judgment (the reference here is to the ruling delivered on the 26th January 2017) the trial judge had granted relief under s.62(7) of the Registration of Title Act 1964. It was conceded that this had been the result of a drafting error in the summons, but pointed out that the error had later come to the attention of the court.

41. The application for the extension of time was refused by the Court of Appeal in *ex tempore* judgments delivered by each of the three members sitting (McGovern, Hogan and Irvine JJ.). All three referred to the judgment in *Éire Continental* and concluded that the appellant had not established that she had formed a *bona fide* intention to appeal within the permitted time or that there was any mistake which might justify the delay.

42. McGovern J. did not accept that the appellant's financial and medical problems had prevented her from filing a notice of appeal, in the absence of evidence to that effect. He also considered that there was no satisfactory evidence that she had formed an intention to appeal at the relevant time, as required by *Éire Continental*. In his concluding remarks, he said:

"There may well be an arguable ground of appeal, certainly on the issue as to the Statute of Limitations point. I am not so sure there is an arguable ground of appeal on the registration of title point. It is perhaps arguable, I would question that, but certainly there may be an arguable appeal on the other point. But I have to weigh that up against the other two tests set out in the Éire Continental case. In my view having regard to the substantial delay in moving this application and the absence of any mistake I would dismiss the application…"

43. Hogan J. commenced by stating that normally the critical question would be whether the third limb of *Éire Continental* had been satisfied.

"In this case certainly at least one arguable case has been disclosed, namely the issue relating to the Statute and, I think, if pressed I would agree that the issue relating to s.62(7) of the Registration of Title Act 1964 is also at least an arguable ground."

44. However, Hogan J. felt that the first two limbs of *Éire Continental* had not been satisfied. In particular, there was no "really cogent or convincing" evidence that an intention to appeal had been formed within the requisite time, and there was nothing in the nature of a mistake that might justify the delay. He remarked that the delay in the case had been very lengthy, in the context of an application of this kind.

45. Irvine J. agreed with the judgments of McGovern and Hogan JJ. However, she stressed that the three factors identified in *Éire Continental* were not "binding pre-requisites".

"They are matters for the proper consideration of the court and the court's discretion remains a perfectly free one regardless of whether all or any of those criteria are established. However, they do guide the court and I agree with my colleagues that the applicant has not met the first leg of that test. She has not demonstrated an intention to appeal within the time or indeed within a period of one year of the decision of the High Court judge. I also think she has not established any mistake and indeed it might be said that she acquiesced in the court order when she wrote asking whether at the expiry of the stay she could, in fact, rent the property.

It has to be said that there is a public interest in having closure to litigation – that is an interest that is shared obviously by the parties to litigation. In my view, the delay in this case is untenable to the point that the Court should not exercise its discretion and should refuse the application".

Submissions in the Appeal

46. It is common case that the starting point for the determination of this application is the analysis by Lavery J. in *Éire Continental*. It is also agreed that the court retains a discretion, having regard to the totality of the circumstances of the particular case before it, to extend or refuse to extend time, and that a court is not precluded from exercising its discretion to grant relief in a case where only some or none of the aspects of the Éire

Continental test are satisfied, if the interests of justice so require. This much would appear to flow from the series of judgments of this Court identified earlier – *Brewer v Commissioners of Public Works* [2003] 3 I.R. 539, *Lough Swilly Shellfish Growers Co-Op Society Ltd v Bradley* [2013] 1 I.R. 227 and *Goode Concrete v CRH plc* [2013] IESC 39.

The appellant

47. In this case, the appellant's notice of application for leave to appeal to this Court contained two statements that were clearly incorrect – that the High Court judge was acting under a mistaken belief that was not corrected by the parties, and that the order was bad on its face. Such misstatements are surprising, given that the transcripts and copy orders had been available since before the Court of Appeal hearing.

48. The foundation of the appellant's argument as developed in submissions is the contention that the order for possession was made in court on the 26th January 2017, and was made pursuant to s.62(7) of the Registration of Title Act 1964. Reference is made to extracts from the transcript of the proceedings, where it was explicitly stated by the trial judge that the land was registered land and that the application was for relief under the Act. The trial judge had then, it is said, engaged in an attempt to do justice on the 9th March 2017, but the order had already been made. She should, upon becoming aware of the error in relation to the status of the land, have invited the defendant administrator *ad litem* to address her on whether the order should be set aside in the circumstances. If this had happened, any necessary amendment to the pleadings would have constituted a new cause of action in respect of which the appellant could have relied upon the relevant limitation period. The appellant could also have made a case in respect of her right of residence.

49. On foot of this analysis, the appellant is described as having a manifestly strong or unanswerable ground of appeal. The order of the High Court is asserted to have been patently and unarguably defective in law, having been made in want of jurisdiction. If the appeal had been lodged within the time permitted, the appellant would have been entitled to have the order overturned *ex debito justitiae*. It is further argued that since the property is the appellant's family home, her rights under the Constitution and the European Convention on Human Rights must be protected by the courts. The core principle considered in, for example, *State (Vozza) v Ó Floinn* [1957] I.R. 227 is that where the Constitutional (or Convention) rights of a person are adversely affected by something done without jurisdiction it is the duty of the Court not to withhold such relief as is required to undo the wrong. There having been a manifest violation of her constitutional rights, the discretion to extend time must be exercised so that the wrong can be corrected.

50. Further authority is cited for the uncontroversial proposition that the Constitution obliges the State, by its laws, to respect and insofar as practicable defend and vindicate the personal rights of the citizen.

51. In the alternative it is submitted that, at least, the court should "lean heavily" in favour of granting the extension subject to consideration of the interests of justice. In turn, that analysis will, it is said, concern an assessment of relative prejudice. It may be that this process will require the court to balance competing constitutional rights. In this case, the competing rights are identified as being, on the one hand, the appellant's property rights and right to protection against unlawful interference with her dwelling and, on the other, the respondent's right to a fair and speedy determination of its proceedings pursuant to Article 6 of the Convention. In the circumstances it is submitted that the appellant's rights are superior, and that there is the prospect of a "major injustice" should the appeal not proceed.

52. Counsel for the respondent relies upon the fact that it was made clear to the High Court judge in the hearing on the 9th March 2017 that the land was unregistered, and that the January order was perfected following this second hearing and does not mention s.62 of the Registration of Title Act 1964. While such relief was sought in the special summons, this was in addition to "[s]uch further or other order as to this Honourable Court shall seem just and appropriate".

53. The respondent submits that the rights of the appellant have been amply vindicated through an extensive hearing in the High Court, as well as a substantial hearing in the Court of Appeal. Moreover, it is contended that the appellant entirely overlooks the constitutionally protected property rights enjoyed by the respondent by virtue of its mortgage over the lands in question, pursuant to which significant sums (now exceeding the value of the property itself) were advanced to the deceased.

54. It is noted that in *Goode Concrete* Clarke J. held that in certain unusual and exceptional cases conditions other than those enumerated in *Éire Continental* may apply. He considered that one such case would be where the basis of the appeal stems from factual circumstances outside of the materials which were before the High Court. While the presence of an arguable ground of appeal was still paramount in such a situation, the other two specific criteria required modification. He considered that the following factors were of relevance:-

    (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 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.

55. The respondent submits that all of the circumstances now relied upon by the appellant were available to her within 28 days of the perfection of the order for possession of the High Court. In those circumstances, it is submitted that something quite exceptional would have to be established by an applicant to be granted an extension of time.

56. It is further submitted by the respondent that it was open to the High Court judge to make an appropriate order for possession on the special summons, to reflect the fact that the mortgaged property was unregistered. That such relief is properly sought by way of special summons is also clear from the provisions of O. 54, r. 3 of the Rules of the Superior Courts: -

> *Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having properties subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out a special summons for relief of the nature or kind specified in Order 3(15).*

57. Order 3 provides that the procedure by special summons may be adopted in the following classes of claims: —:

> *… (15) Sale, delivery of possession by a mortgagor, or redemption; reconveyance, or delivery of possession by a mortgagee."*

Discussion

58. It was clear from the terms of the judgment of Lavery J. in *Éire Continental* that while the Court saw the three matters identified by counsel as "proper matters for the consideration of the court", although even in that respect modifying them to some extent, the essential point was the necessity to consider *all* of the relevant circumstances.

59. The jurisprudence of this Court consistently demonstrates this approach in such cases.

60. The analysis in *Goode Concrete v. CRH* [2013] IESC 39 sets out the purpose behind the obligation to consider all of the circumstances. Firstly, Clarke J. identified the objective of the court when considering an application to extend time (at paragraph3.3):

> *"The underlying obligation of the Court (as identified in many of the relevant judgments) is to balance justice on all sides."*

61. He then went on to identify certain considerations that are likely to arise in all cases.

> *"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 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."

62. The rationale for holding parties to the stipulated time limits for appeals is, as Clarke J. observed, that in most cases a party to litigation will be aware of those limits and should not be allowed an extension unless the decision to appeal was made within the time, and there is some good reason for not filing within the time. Further, in most cases, the parties will be aware of all the evidence called, the submissions made and the reasoning of the judge – they have, therefore, all the information necessary for the purposes of making a decision. Goode Concrete was an exception because the appeal was based on information that had come to the attention of the appellants only after the conclusion of the High Court process. It is notable that in granting an extension of time the Court did not permit the appellants to appeal in respect of any aspect that was known to them in the ordinary course.

63. While bearing in mind, therefore, that the *Éire Continental* guidelines do not purport to constitute a check-list according to which a litigant will pass or fail, it is necessary to emphasise that the rationale that underpins them will apply in the great majority of cases.

64. It should also be borne in mind that, depending on the circumstances, the three criteria referred to are not necessarily of equal importance *inter se*. As Clarke J. pointed out in *Goode Concrete* it is difficult to envisage circumstances where it could be in the interests of justice to allow an appeal to be brought outside the time if the Court is not satisfied that there are arguable grounds, even if the intention was formed and there was a very good reason for the delay. To extend time in the absence of an arguable ground would simply waste the time of the litigants and the court.

65. By the same token it seems to me that, given the importance of bringing an appeal in good time – the desirability of finality in litigation, the avoidance of unfair prejudice to the party in whose favour the original ruling was made, and the orderly administration of justice – that the threshold of arguability may rise in accordance with the length of the delay. It would not seem just to allow a litigant to proceed with an appeal, after an inordinate delay, purely on the basis of an arguable or stateable technical ground. Since the objective is to do justice between the parties, long delays should, in my view, require to be counterbalanced by grounds that go to the justice of the decision sought to be appealed. Not every error causes injustice.

66. There is an analogy here with delay in the context of judicial review. There may, in that context, be cases where a litigant can establish entitlement to relief as of right despite delay or other conduct that might in other circumstances constitute a bar to relief. O'Higgins C.J., discussing the discretionary nature of judicial review in *The State (Abenglen Properties Ltd.) v. Dublin Corporation)* [1984] I.R. 381, acknowledged that in certain cases, where a criminal conviction had been recorded otherwise than in due course of law, the discretion might be exercisable only in favour of quashing. However, he

pointed out that in the vast majority of cases the court retained a discretion to refuse relief if, for example, the conduct of the applicant was such as to disentitle him from it. The fact that it can be established that there was an irregularity or defect in the impugned proceedings does not mean that the court is compelled to grant the remedy as of course. In judicial review proceedings, therefore, delay is a factor that may lead to a court concluding that relief should not be granted, even if there are factors present that could have led to success if the proceedings had been brought promptly.

Conclusion

67. At the hearing, the appellant has contended that the High Court order was posited on the status of the property as registered land and was therefore made without jurisdiction. The Court of Appeal expressed the view that this might have been arguable, although the members of the Court clearly thought that the limitation issue might have been stronger. However, they considered that the potential arguability of an appeal was outweighed by the absence of both an intention to appeal formed within the time limit and any satisfactory excuse for the delay. The appellant's case is, in effect, that she is entitled to relief as of right because her rights have been violated by an order made in the absence of jurisdiction.

68. I cannot see that this argument is capable of being made out. Certainly, the claim for relief under the Registration of Title Act 1964 was misleading, and did indeed mislead the trial judge on the 26th January 2017. However, it must be said that the grounding affidavit and the exhibited documents were to the contrary effect. The main point, in my view, is that no final order was made on that date. The trial judge stated that she would make an order as against the defendant, but that she had not as yet considered what might be said by the appellant. She was contemplating the possibility of making the appellant a defendant in the case, should it transpire that she had a defence to an order for possession. Finally, she requested counsel for the plaintiff and defendant to liaise with each other and the registrar in respect of the appropriate form of order, to be checked by herself before finalisation. All of this is inconsistent with a final order.

69. Even if this analysis is incorrect, it remains the case that the order as perfected makes no reference to the Registration of Title Act. The jurisdiction to alter an order before perfection is well known. In *Nash v. Director of Public Prosecutions* [2017] IESC 51 O'Donnell J. described the jurisdiction and its rationale in the following terms:

> *"Every judge, particularly a judge in a final court of appeal lives with the possibility, and sometimes the reality, of judicial error. This should not be surprising. If there was no possibility of judicial mistake, either in fact or law, there would be no need for an appellate system. At a more basic level, there is a well established jurisdiction to alter a decision prior to the making and perfection of the order in a case. See e.g.: Millensted v Grosvenor House (Park Lane) Ltd. [1937] 1 KB 717 and in the criminal context Richards & anor v. Judge O'Donoghue and D.P.P. [2016] IESC 74. It is not necessary here to discuss the circumstances in which such jurisdiction may be exercised in civil cases. (See Delany and McGrath, Civil Procedure in the Superior Courts, 3rd ed, paras. 24-32). Judgments and orders*

may also amended by the 'slip rule', Order 28, to which a reasonably generous interpretation is given: see the observations of Lowry LCJ in McNichol v Neely [1983] NI 43 quoted with approval by Murray J in McMullen v Clancy [2002] 3 IR 493. There is also a procedure for speaking to the minutes of a final order with a view to clarifying that order. None of this would be necessary if error, or at least the possibility of error, did not exist."

70. The misapprehension as to the status of the land was rectified on the 9th March 2017, although one might observe that counsel for the plaintiff should not have waited to be asked before bringing it to the attention of the court. The two orders were perfected after that, and I can see no reason for presuming that the original error from the previous date continued to taint either of them. The description of the final order as having been made without jurisdiction seems untenable – the High Court undoubtedly had jurisdiction to make an order for possession simpliciter, and that is what was done.

71. I would therefore find against the appellant on the basis that there is no arguable ground. However, even if the situation was less clear-cut, such that it could be said that the appellant's case was "arguable" or "stateable", I would nonetheless consider that in the circumstances of this case the Court should not exercise its discretion in favour of extending time. As I said earlier, it seems to me that where there is significant delay before seeking an extension, the appellant will need to show a correspondingly strong case. Since the objective is to do what is just in the circumstances as presented on the facts of each individual case, an argument based purely on a technical error by the trial judge, that cannot be described as having brought about an unjust result, may be insufficient. In my opinion, that is the situation in this case. It might be pointed out that the appellant in this case, unlike many of the possession cases that come before the courts, has continued to reside in the property while the debt increases, but with no personal liability for that debt. She had inherited her mother's estate but, as the trial judge pointed out, she could not inherit the property free from the mortgage. The fact that she and her husband reside there does not alter that proposition. The lender was entitled, on the evidence before the court, to an order for possession of the property securing the loan, and such an order in no way violated the constitutional rights of the appellant.

72. In the circumstances I would dismiss the appeal.