

THE HIGH COURT

[2016 No. 149 CA]

BETWEEN

KBC BANK IRELAND PLC

PLAINTIFF

– AND –

JOHN CRONIN AND NICOLA COFFEY CRONIN

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 10th December, 2019.

1. The within application comprises an 'appeal' from an Order of the Master of 28.06.2017 whereby the Master dismissed KBC's application to extend the time within which KBC may serve and file a notice of appeal against the Circuit Court Order of 14.06.2016 considered hereafter. *Sensu stricto*, it is an application to the court to make an order that was refused by the Master. The key facts underlying the within application are as follows: -

- (1) these proceedings commenced by Civil Bill for Possession dated 30.06.2014 seeking, *inter alia*, an order for possession of the defendants' principal private residence;
- (2) when the application came on for hearing before the Circuit Court on 14.06.2016, counsel for the defendants opposed the application primarily on the ground that KBC had previously (and, in the defendants' view, unreasonably) refused to consent to a voluntary sale of the subject property and a perceived general want of constructive engagement with the defendants over previous years;
- (3) the Circuit Court appears to have viewed KBC's desire for an order for possession to be somehow unreasonable when there was an existing order for sale granted in family proceedings to which KBC was not party, whereas in truth KBC was proceeding on the premise that when it came to selling the defendants' property (security for a loan on which there have been longtime repayment defaults) any potential purchaser would not proceed with the purchase absent sight of an order for possession;
- (4) general and genuine confusion appears to have arisen on the part of KBC as to what order was eventually given by the Circuit Court, which confusion was compounded by the Circuit Court when a perfected copy of the court order was received. In this regard, a solicitor for KBC has averred, *inter alia*, as follows:

"7. I am advised by my counsel and believe that whilst the exact nature of the...ultimate order made in court was not clear at the time, it was clear that an order for possession was not granted. In the circumstances, I am advised and believe that counsel for the defendants sought their costs of the application and the...Circuit Court...made an order reserving the costs of the application.

8. *I say that upon receipt of my counsel's report of the hearing I immediately informed my client of same. I say that my client immediately formed the opinion that if the proceedings were struck out or dismissed by the judge then they wished to appeal the said order to the High Court and instructed me to do so.*
9. *I say that I was not in a position to confirm that the proceedings had been struck out or dismissed as, if they were, I advised my client that it would have been impossible or inappropriate for the judge to reserve the costs of the application...to another hearing date. Accordingly, and in light of the judge's costs which was explicit, I had to suggest my belief to my client that the Judge did not strike out or dismiss the proceedings. I advised my client that it would be most appropriate to await receipt of the drawn order from the Circuit Court...prior to issuing a Notice of Appeal. [Court Note: Given the notably tight ten-day timeframe for the bringing of such an appeal, a question perhaps arises whether it would not have been preferable to return to court and seek clarification from the judge as to the nature of his order.]*
10. *I say that this office only received the drawn order from the Circuit Court...on 28 June 2016. As at this date, the time prescribed by the Rules within which my client was permitted simply to file and serve a notice of appeal which had already expired.*
11. *....Regrettably the Order as drawn failed to shine any more light on the outcome of the hearing. It appears that the...Circuit Court...refused the plaintiff's application for possession and did reserve the costs of the application with liberty to re-enter 'should this matter come before this Honourable Court again'. Accordingly, on the one hand it seems that the sole relief sought by the Plaintiff was refused bringing the substantive proceedings to an end yet on the other hand the Order clearly suggests that the proceedings could appear before the Circuit Court on another date"; and*

(5) following application to the Master, he, on 28.06.2017, dismissed KBC's application to extend the time within which KBC may serve and file a notice of appeal against the whole of the Circuit Court order.

2. A few points might usefully be made at this juncture:

The court accepts that genuine confusion arose on the part of KBC as to what precise order the Circuit Court made, or intended to make, on 14.06.2016, in circumstances where it was ordered that costs be reserved, notwithstanding that the order for possession was declined, which confusion is ultimately attributable to the court.

- . The court respectfully does not understand why KBC did not simply appear before the Circuit Court judge before the ten-day limitation period for appeal of the order expired and ask what exact order had been given.
 - . Be that as it may, the court also accepts that a decision to bring an appeal was made sometime before the perfected order was received.
 - . The court does not accept the contention that KBC has somehow acted unreasonably in seeking the order for possession.
 - . There is no evidence to support Mr Cronin's assertion that KBC has been frustrating a sale of the property, the subject of the proposed possession order, so as to enjoy the benefit of increased interest. (If monies go unpaid and continue to go unpaid and a bank has to sue for same and likely will not recover them all, there is no benefit to a bank in running up interest that it seems unlikely ever to recover).
 - . When counsel for KBC contended in court that the possession order process could be short-cut if the Cronins would but consent to same, counsel for the Cronins indicated that such consent could be forthcoming if the balance of the debt remaining, once a sale of the secured property is effected, were to be forgiven; this may have been an 'off the cuff' response; if not, the Cronins, with respect, cannot complain of the costs of the within proceedings while at the same time allowing them to proceed in a bid to obtain a concession as regards the scale of debt owing by them.
 - . If the court were to refuse to accede to the within application, a consequence would be that KBC would (a) have lost the ability to appeal an order about which real and understandable confusion arose thanks ultimately to the Circuit Court, (b) thereby lost the possibility to win an order of possession in respect of secured lending in respect of which there has been long-term non-repayment of monies duly loaned.
3. The best starting-point when it comes to the enlargement of time to appeal is the judgment of Lavery J. in *Éire Continental Trading Co. Ltd. v. Clonmel Foods Ltd.* [1955] IR 170, at p. 173, which pointed to the following as proper matters for consideration: -
- (1) that an applicant had a *bona fide* intention to appeal formed within the relevant time;
 - (2) that an applicant shows the existence of something like mistake, with mistake as to procedure, in particular the mistake of counsel or solicitor as to the meaning of the relevant rule, being insufficient; and
 - (3) that an arguable ground of appeal exists.
4. Here, as the court has indicated above: -
- it considers item (1) to be satisfied;

- as to item (2), this is satisfied by the genuine and understandable confusion of KBC as to precisely what the Circuit Court had ordered and intended to order, which confusion is ultimately attributable to the Circuit Court itself. (Although the court has noted that KBC might have reverted to the Circuit Court judge before the perfected order was received so as to clarify what was ordered, it does not consider this to be fatal to KBC’s succeeding in the within application); and
 - as to item (3), an arguable line of appeal presents to the court from the papers before it, specifically as to whether, in light of the affidavit evidence placed before the Circuit Court, the court could have refused the application for the possession order.
5. In considering how best to proceed, the court is also mindful of:
- (a) the extent of its discretion, recalling in this regard the observation of Greene MR in *Gatti v. Shoosmith* [1939] 1 Ch. 841 (referenced in *Éire Continental*, at p. 173), “[t]he discretion of the Court being...a perfectly free one”, and
 - (b) Irvine J.’s observation in *Danske Bank v. Kirwan* [2016] IECA 99, at para. 7, that “*the judgment of Lavery J. should not be read as if it were a statute*”, *i.e.* Lavery J. does not posit a ‘tick the box’ exercise, with three ticks necessarily yielding one result in terms of how the court exercises its discretion, and fewer ticks necessarily yielding another.
6. Having regard to all of the foregoing, the court will make the order that was refused by the Master, being an order extending the time within which KBC may serve and file a notice of appeal against the whole of the above-mentioned Circuit Court order of 14.06.2016.