APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2022/29 and 2022/30

Neutral Citation Number [2023] IECA 113

Faherty J.
Pilkington J.
Allen J.

BETWEEN

CATRIONA CUNNIFFE

PLAINTIFF/APPELLANT

AND

MICHAEL CUNNIFFE

AND

MARTINA WHYTE

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 5th day of May, 2023

1. This judgment is supplemental to a judgment which I delivered on 30th November, 2022 (with which Faherty and Pilkington JJ. agreed) ([2022] IECA 272) in which I dealt with the substance of two appeals by the appellant against the judgment and order of the High Court (Meenan J.) which found that her claims arising out of the administration of her late father's estate were statute barred. For the reasons then given, the conclusion of the court was that the appeals must be dismissed.

2. At para. 102 of my earlier judgment I expressed the provisional view that the respondents, having been entirely successful on the appeal, were entitled to an order for their costs but gave liberty to the appellant, if she wished to contend for any other order, to give notice to the respondents' solicitors and the Court of Appeal office within 21 days of the electronic delivery of that judgment, in which event the panel would reconvene for a brief hearing on the question of costs.

3. The appellant did not ask for a hearing on the question of costs but instead, on 21st December, 2022, filed and served a ten-page document which was described as *"Submissions of Appellant on Final Orders."* Perhaps because the appellant had filed a written submission rather than availing of the opportunity to ask for a further hearing, or perhaps because – as I will briefly explain – she did not address the question of the costs of her appeals, the respondents did not respond to the appellant's written submission. I am satisfied that this is an application that can be dealt with without hearing from the respondents.

4. In this court, as she had in the High Court, the appellant represented herself. In my earlier judgment I observed that there appeared to have been a great deal of input on the appellant's side from a person who, although unqualified, holds himself out as a *"Litigation Consultant"* and a *"Business & Legal Affairs Consultant".*

5. The first five pages of the appellant's written submission comprised an *apologia* for the appellant's *McKenzie* friend. The appellant suggests that the court took a very negative view of her having had a *McKenzie* friend to assist her. That is incorrect. Unrepresented litigants are entitled to be accompanied and assisted by a *McKenzie* friend. My point was that it is undesirable that persons who are not professionally legally qualified should hold themselves out as litigation or legal consultants. I made no criticism of *McKenzie* friends, properly so called, and was not in any way pejorative of the valuable support and assistance

that they can properly provide. The mischief I identified was the arrogation of competence to provide legal advice.

6. The next four pages of the appellant's submission is a rejection of the reasoning and conclusions of the Court of Appeal and of the High Court which any competent advisor could have told the appellant is impermissible.

7. On the last page of her submission, the appellant presages an application to the Supreme Court for leave to appeal and asks for a stay on the order for costs pending her application to the Supreme Court for leave to apply for an order remitting the case to the High Court for adjudication, which I understand to mean for hearing. It is said that the leave application will be *"based on the fact that due to the original High Court judge moving the proceedings from a normal motion on affidavit to an oral hearing that in that instance as regards access to justice and fair procedures that my motions for discovery at the High Court level should be allowed proceed prior to any final plenary hearing taking place."*

8. The issue on the appeal was whether the High Court was correct to dismiss the appellant's action against the respondents on the ground that her claims were statute barred. The applications to the High Court were brought, in the ordinary way, by notice of motion, grounded on affidavits but the focus was on the pleadings. By reference to the pleadings, the High Court judge concluded that the appellant's claims were *prima facie* statute barred but directed the trial on oral evidence of an issue as to whether – by reason of s. 71 of the Statute of Limitations, 1957 – the running of time had been postponed by fraud or fraudulent concealment.

9. The proposition now is that *"... as the initial High Court motions on affidavit were upgraded to a plenary hearing on oral testimony, [the appellant] as plaintiff should have been allowed proceed with [her] motions for discovery prior to any final plenary hearing taking place, particularly where the heavy burden of proving fraud was involved."* The

appellant's argument that the High Court ought to have dealt with her discovery motions before it dealt with the issue as to whether her claims statute barred was addressed at paras. 79 to 81 of the principal judgment. The conclusion, at para. 81, was that:-

> *"If the appellant's claims were statute barred, it would have been at best futile to have allowed it to continue and it was right to bring the action to an end. To have heard the appellant's discovery motions and to have ordered the respondents to make the discovery sought before the motions to dismiss were heard would have been to risk a waste of time and costs."*

10. The principles to be applied on an application for a stay pending appeal were set out in a decision of this court in *Re Lobar Ltd.* [2018] IECA 129 in which Irvine J. said:-

> ***"Principles***
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> *14. The principles to be applied by a court on an application for a stay pending appeal are not in dispute. Some of the better known authorities are the decisions of Clarke J. (as he then was) in Danske Bank t/a National Irish Bank v. McFadden [2010] IEHC 119; Irish Press plc. v. Ingersoll Irish Publications Ltd. [1995] 1 ILRM 117, and most recently, the decision of Clarke J. in Charles v. The Minister for Justice, Equality & Law Reform [2016] IESC 48.*
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> *15. The aforementioned authorities make clear that the court is bound to engage in what is often described as a two-stage test. First, the applicant must demonstrate that they have an arguable ground of appeal and is one which is bona fide rather than tactical.*
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> *16. If the court is not satisfied that the appellant has demonstrated an arguable ground of appeal, that is the end of the stay application. Assuming, however, the appellant demonstrates a bona fide and arguable ground of appeal, then the court must consider where the balance of justice is to be found. As is stated in many of the*

more recent authorities, a stay brings with it potential detriment to both sides. Thus, it is necessary for the court to consider where the greatest risk of injustice may arise. It must consider the likely effect that granting a stay would have on the respondent should the appeal fail, and must also consider the effect that refusing a stay may have on the appellant should it succeed on its appeal. In this context, the court may impose a stay on terms which can ameliorate the potential detriment of granting or refusing a stay."

11. In the case of an application to the Supreme Court for leave to appeal from a decision of this court, the bar is higher. The applicant must persuade the Supreme Court that the decision of this court involves a matter of general public importance or that a further appeal is necessary in the interests of justice.

12. The appellant's written submission is confused. The direction that the issue of whether the running of time had been postponed by fraud or fraudulent concealment should be tried on oral evidence did not *"upgrade"* the motions to dismiss. It was not a direction that the action should go to plenary hearing.

13. The appellant has not identified any arguable ground of appeal from the judgment of the Court of Appeal, still less any matter of general public importance and her application for a stay on the order for costs must be refused.

14. The order of the Court of Appeal will show that the appeals are dismissed; that the appellant must pay the respondent's costs of each of the appeals, to be adjudicated in default of agreement; and that the appellant's application for a stay on the orders for costs pending any application to the Supreme Court for leave to appeal is refused.

15. As this judgment is being delivered electronically, Faherty and Pilkington JJ. have authorised me to say that they agree with it.