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SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	S: AP: LE: 2018: 000162
Subject matter for indexing	

Leave is sought to appeal from	
<input type="checkbox"/> The Court of Appeal	<input checked="" type="checkbox"/> The High Court

[Title and record number as per the High Court proceedings]

David Van Dessel	V	Pat Carty
High Court Record Nr	2016/8209p	Court of Appeal Record Nr
Date of filing	13 th of November 2018	
Name(s) of Applicant(s)/Appellant(s)	Pat Carty	
Solicitors for Applicant(s)/Appellant(s)	Litigant in Person	
Name of Respondent(s)	David Van Dessel	
Respondent's solicitors	Amoss Solicitors	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
		No
If yes, give [Supreme Court] record number(s)		

Are you applying for an extension of time to apply for leave to appeal?				No
If Yes, please explain why				

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Mr. Justice Allen
Date of order/Judgment	12 th of November 2018

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Pat Carty
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Original status

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input checked="" type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party

Solicitor			
Name of firm			
Email			
Postcode		Ref.	

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	N/A		
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	Newtown Killoughrim, Enniscorthy, Co. Wexford
e-mail address	pcarty66@gmail.com
Telephone no.	087/2784826

How would you prefer us to communicate with you?			
	Document Exchange	X	E-mail
X	Post		Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	David Van Dessel
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Original status	X	Plaintiff		Defendant	Is this party being served with this Notice of Application for leave?		
		Applicant		Respondent			
		Prosecutor		Notice Party			
		Petitioner					
					Yes	X	

Solicitor	Sarah Coughlan		
Name of firm	Amoss Solicitors		
Email	scoughlan@amoss.ie		
Address	Warrington House, Mount Street Crescent, Dublin2	Telephone no.	01 2120401
		Document Exchange no.	
		Ref.	
Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

	Document Exchange	X	E-mail
X	Post		Other (please specify)

Counsel			
Name			
Email			
Address		Telephone no.	
		Document	

		Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

4. Information about the decision that it is sought to appeal

Please set out below:

- Whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned:
- (a) A concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested)
- The relevant orders and findings made in the High Court and/or the Court of Appeal

Scope of the Appeal

It is sought to appeal from the entire decision.

The Learned Trial judge granted the reliefs in the Respondents Motion for the attachment and committal of the Appellant.

The Facts Found by the Trial Court

The Appellant was served with proceedings by the Respondent. The proceedings were grounded upon a Notice of Motion issued on the 13th of September 2016 and made returnable for the 7th of November 2106. Nine orders were sought in the Notice of Motion. The Notice of Motion was grounded upon the Affidavit of Jonathan Hanly

of Ennis Property Finance DAC. The Respondents case in seeking the Motion reliefs was that the Deed of Appointment was issued in September 2013. The Appellant did not accept the Deed of Appointment.

2. As can be observed in the Pleadings and in the High Court determination at paragraphs 11 to 14 difficulties arose in relation to service of the Motion the subject of this Appeal. Paragraphs 15 to 17 outline the events before Mr. Justice Gilligan who adjourned the matter on the 16th of December 2016, the 16th of January 2017, and the 16th of February 2017. The primary reason for those adjournments being the non-appearance of the Appellant. On the 16th day of March 2017 Mr. Justice Gilligan heard the matter in the absence of the Appellant and granted the reliefs sought by the Respondent.

3. Subsequent events of resistance and non-compliance as to the reliefs granted by Mr. Justice Gilligan led the Respondent to seek the Order for the Attachment and Committal of the Appellant. These attachment proceedings were held over a two day period and the adjourned to allow the Court prepare a written determination. The presiding Judge, Mr. Justice Allen delivered his determination on the 12th of November 2018. The Learned Judge afforded the Appellant opportunities to comply with the reliefs granted by Mr. Justice Gilligan to the Respondent on the 16th of March 2017. The Appellant refused to comply on the basis of the principles of Article 40.1 of the Constitution.

4. It is fully accepted by the Appellant that he ought to have been in attendance, he respectfully submits that he did place before the Mr Justice Gilligan an Affidavit in which he challenged the Deed of Appointment of the Respondent. This is confirmed in the Committal Proceedings Judgement of Mr. Justice Allen at Paragraphs 18 to 22. In particular the Appellant had relied upon the Judgement of Mr. Justice Gilligan in *The Merrow v Bank of Scotland* (2013) IEHC 130 which emphasised the necessity for strict compliance with the relevant mortgage deed. The Appellant respectfully submits that Merrow determination made by Mr. Justice Gilligan was not consistent with the Learned Judges determination of his proceedings where there was clear evidence of such non-compliance. It is accepted that the non-attendance of the Appellant may well have been a crucial factor, however with great respect there was sufficient evidence in the Affidavit of the Appellant, accompanied by the Mortgage Deed, and the Deed of Appointment of the Respondent to clearly show the referred non-compliance with the security document. There were also in the alternative circumstances to consider where the Respondent had not reached the threshold for the granting of a mandatory interlocutory order laid down in the Supreme Court in *Maha Lingham v Health Service Executive* (2005) IESC 89.

5. The Judgement of Mr. Justice Allen deals comprehensively with the events post the granting of the reliefs by Mr. Justice Gilligan at paragraphs 23 to 32. It is not denied that confrontation between the Appellant and agents of the Respondent took place.

6. At paragraph 37 Mr. Justice Allen refers to the Appellants challenge regarding the Deed of Appointment of the Respondent specifically where Clause 9 of the Mortgage Deed permitted the appointment of a receiver and manager but where in this case a receiver had been appointed. The Learned Judge also confirms this argument was

advanced by the Appellant on Affidavit to Mr. Justice Gilligan on the 16th of March 2017 at the interlocutory hearing. At paragraph 70 of the Judgement Mr. Justice Allen

referred to the decision in *Lismore Homes v Bank of Ireland Finance Ltd.* (2006) IEHC 212 which addressed the possibility to vary an earlier order of the Court “in the event of change of circumstances or where the interests of the parties or the administration of justice might require” He referred to Quirke J who adopted the observations of;

Brook L.C. in *Woodhouse v Consignia plc* (2002) 1 W.L.R. 2558 at p. 2575

“There is a public interest in discouraging a party who makes an unsuccessful application from making a subsequent application for the same relief, based on material which was not, but could have been, deployed in the support of the first application”

It is respectfully submitted that application of the above quote by Mr. Justice Allen was not an appropriate appraisal of the facts in this case, where as acknowledged by the Learned Judge previously at paragraph 37, the Appellant had raised the Merrow determination and its application as a defence to the reliefs sought by the Respondent. The attempts by the Appellant to continue to rely on his original pleadings which were placed before Mr. Justice Gilligan as referred by Mr. Justice Allen does not suggest that “*material which was not, but could have been deployed in the supported of the first application*” was a strategy which was applied by the Appellant. It is respectfully submitted that throughout the matters before Mr. Justice Gilligan in which the Motion reliefs were granted and in the Committal proceedings before Mr. Justice Allen the Respondents prime defences were the applications made in the Merrow case in 2013 which grounded the subsequent determination made in *McCarthy v Moroney* (2018) IEHC 379. As can be further observed at paragraph 71 Mr. Justice Allen stated; “*Although not present in court, the defendant has put the case he wished to make on Affidavit, which was before the court. The defendants answer to the injunction was to the injunction application was as far as material for present purposes precisely the same argument he now offers as to why the injunction should not be enforced*”.

6. At paragraph 56 Mr. Justice Allen referred to the Appellants pleadings, in particular his reliance on the decision of Mr. Justice McDonald in *Moroney v McCarthy* where the Learned Judge fully adopted the applications of the Merrow and was further guided by the principles in *Maha Lingham v Health Service Executive* (2005) IEHC 89.

7. Mr. Justice Allen rejected the failure of the Respondent to submit the statement of claim which was part of the construct of the Order of Mr. Justice Gilligan as being an argument of merit submitted by the Appellant. With respect the Respondent had every opportunity to comply with the directions of Mr. Justice Gilligan, did not do so and offered no reasonable excuse for non-compliance or indeed was asked to provide

a reason by the Court. The failure to inquire as to why the statement of claim was not provided was unfair, moreover where the party seeking the reliefs had disobeyed the order.

8. At paragraph 73 of his determination Mr. Justice Allen took the view that the *McCarthy v Moroney* decision is not conclusive and noted the views of Mr. Justice McDonald who contemplated that at the trial of the action the court might come to a contrary view. This assertion by Mr. Justice Allen was correct, however it should be noted that Mr. Justice McDonald had also taken the view that Mr. McCarthy would face an “*uphill struggle*” at paragraph 169 of his judgement in proving to the Court that his Deed of Appointment was valid in the making of his determination. It is noteworthy that in making this finding Mr. Justice McDonald did not require to look at the balance of convenience in the matter. Mr. Justice Allen had the option to take that view into consideration rather than relying on the possible option of the Mr. McCarthy being successful at the trial. Further at paragraph 73, Mr Justice Allen distinguishes that there was a fundamental difference between this case and the *McCarthy v Moroney* decision in that the Defendant in *Moroney* appeared while the Appellant herein did not appear in order to argue the case. With respect the main contentions of the Appellant was addressed in the Affidavit he provided to Mr. Justice Gilligan who had four years earlier delivered his determination in the *Merrow* to which as referred the had Appellant relied upon. Mr. Justice Allen accepted that Mr. Justice Gilligan and Mr. Justice McDonald had “*reached different provisional conclusions on the strength of the same argument based on the same document but it does not necessarily follow that either was wrong*”. It is respectfully submitted that both Learned Judges can not be correct. To suggest this to be the case can not be rational. It would leave the Law in regards to receiverships in no mans land through uncertainty resulting in difficulties for the courts such as in this matter where one party, the Appellant, now faces a committal to prison while the other party has succeeded in the removal of the receiver similar to the status of the Respondent in this case. It is respectfully submitted that while the Courts are settling the issue of the conflicting judgements the Appellant is entitled to the principle of Equality before the Law. In the concluding sentences of paragraph 73 Mr. Justice Allen stated “*Even if, for the sake of argument, one of the other decisions were said to be wrong, I see no warrant for concluding that it was the earlier rather than the later*”. With respect to adopt this line of reasoning was not appropriate, moreover where dire consequences faces the Appellant in relation to his property rights and freedom predominately caused by legal uncertainty.

8. At paragraph 64 of his Judgement Mr. Justice Allen referred to the case of *Rouske v Sweden* (Application No. 27183/04 from the European Court of Human Rights. This case had been presented by the Appellant in his submissions. It application to the matter was rejected by the Learned Judge on the basis of the Appellant not having appealed or stayed the Order of Mr. Justice Gilligan. The Learned Judge while correct in his assertions did not take cognizance of the Order of Mr. Justice Gilligan being of interlocutory status; therefore a full hearing is yet to take place. Further in *Rouske* at paragraph 139 the Court was emphatic in its demands where it stated; “*the eviction should have been postponed until all underlying contentious issues had been resolved*” This authority presented to the Learned Judge outlined an emphasis on the principles of fair balance, the prevention of an unfair and excessive burden through

the application of proportionality. The sanction imposed upon the Appellant in the surrounding circumstances of conflicting legal principles were not proportionate, are not within the confines of fair balance and are about to place an unfair and excessive upon him and his family.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—

Please list (as 1, 2, 3, etc) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court

In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)—

Please list (as 1, 2, 3, etc) concisely the reasons in law:

why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court,

1. The Appellant had relied on the reasoning on the Merrow case as a defense to the reliefs sought by the Respondent before Mr. Justice Gilligan in March 2017. His defense was rejected, while subsequently the decision was applied in the identical case of *McCarthy v Moroney (2018)1EHC 379*.

2. The effect of the High Court judgment is to create very significant confusion in relation to the Law on Receiverships especially the long standing principles of adherence to the strict compliance with Mortgage Deeds in the Appointment of Receivers.

3. The Learned High Court Judge acknowledged the existence of conflicting judgments based on the same facts, but did not apply the principles under Article 40.1 where existing applications ought to have been applied as in *McMahon v Leahy 1984 IR 525* and subsequently in *The State (Keegan v Stardust Victims Tribunal) 1987 ILRM 202*.

4. In his Judgment the Learned Judge referred to the Public Policy aspect of ensuring Court Orders are obeyed at paragraph 74. This is essentially correct; however with respect the Public Interest also demands compliance with Constitutional Justice and

Equality before the Law. The findings of the High Court through the imposed penal sanction suggest that the Appellant does not hold the Equality status enjoyed by the Defendant in McCarthy v Moroney or the Plaintiff in the Merrow case which grounded the referred McCarthy Decision. The principles laid down in the Authorities referred in the previous paragraph demand Equality where as stated in McMahon v Leahy 1984 I.R. “ essentially the same circumstances should be dealt with in the essentially same manner”

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Please list (as 1, 2, 3, etc) concisely:

1. the specific ground(s) of appeal and the error(s) of law related to each numbered ground
2. the legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn there from
3. The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely
4. The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal

1. The learned trial judge erred in failing to have regard to the legal authorities opened to the Court in relation to the meaning and effect of compliance with Mortgage Deeds in the issue of a Deed of Appointments and the conflicting situation involving the Appellants Defence.

2. The Learned Trial Judge failed to ensure the principles of existing law and precedent was applied to the Appellant thus in failing to so apply those principles the guarantees enshrined under Article 40. 1 were denied to the Appellant.

3. The Learned Trial Judge failed to take cognizance of the principles under Article 1 Protocol 1 of the European Convention, in particular his reasoning in not applying the principles in the Rouske v Sweden Authority. In doing so the Learned Trial Judge did not place appropriate weight on the situation in existence where the matters are still at the interlocutory stage and not completed. In such circumstances the reasoning applied was in conflict the demands of the European Convention on Human Rights as

demanded in Rouske.

4. The Learned Trial Judge erred in his assessment regarding the option to vary the Order of Mr. Justice Gilligan where he applied case law suggesting a party was introducing new evidence to the matter. The Appellants entire defence was grounded on the Merrow and McCarthy decisions which were acknowledged by the Learned Judge therefore the application of case the law at par. 70 of his Judgement was misconceived.

Name of appellant in person:

Pat Carty

7. Other relevant information

Neutral citation of the judgment appealed against *e.g.* Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

Van Dessel v Carty 2016 8209

References to Law Report in which any relevant judgment is reported

The Merrow v Bank of Scotland (2013) IEHC 130

McCarthy v Moroney 2018 IEHC 379.

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

An Order setting aside the High Court Order of Mr. Justice Allen.

An Order for the costs of the application in the High Court in favour of the

Appellants.

An Order for the costs of the Appeal.

What order are you seeking if successful?

Order being Set vary/substitute
appealed: aside

Original Set restore vary/substitute
order: aside

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

N/A

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

Article 1 Protocol 1

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own Yes No
decisions?

If Yes, please give details below:

make a reference to the Court of Justice of the Yes No
European Union?

If Yes, please give details below: Rouske v Sweden Application No.27183/04

Will you request a priority hearing? Yes

If Yes, please give reasons below:

There is a significant risk that these proceedings will come on for hearing before this appeal has been determined, in which case there may have been a significant waste of court time and costs.

Signed: Pat Carty.

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.


PAT CARTY