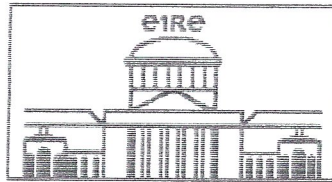


Order 58, rule 15



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## SUPREME COURT

### Application for Leave and Notice of Appeal

For Office use -

Supreme Court record number of this appeal

Subject matter for indexing



Leave is sought to appeal from The Court of Appeal

**Declan Fagan & Bernadette Fagan v. ACC Loan Management Ltd**

**2016 356 IECA**

Date of filing:

**Name of Appellant:** Declan Fagan

**Solicitors for Appellant** – Litigant in Person

**Name of Respondent:** ACC Loan Management Ltd

**Respondent's solicitors:** McCann Fitzgerald

Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings? No

Are you applying for an extension of time to apply for leave to appeal? No

#### 1. Decision that it is sought to appeal

Names of Judges: The President, Ms Justice Irvine, Ms Justice Whelan

Date of Order / Judgment: 17 July 2017

## 2. Appellant Details

Appellant's full name: Declan Fagan

Original status: Applicant / Defendant

Litigant in Person

Current postal address: Temple, Horseleap, Moate, Co Westmeath

e-mail address: templecountryhouse@gmail.com

Telephone no.: 086 033 1536

How would you prefer us to communicate with you? By e-mail or post

## 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: ACC Loan Management Ltd

Original status: Respondent / Plaintiff

Solicitor: McCann Fitzgerald

Name of solicitor responsible for this appeal:

Mr Michael Murphy

Email: Michael.Murphy@mccannfitzgerald.com

Address: Riverside 1, Sir John Rogerson's Quay, D2

Telephone no.: 01 6119103

Document Exchange no.: DX31

Postcode: D02X576

Applicant

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

1. (a) The Appellant begs leave to appeal from the entire decision.
2. (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)

#### BACKGROUND

The Appellant respectfully puts it to the Court that the facts pertaining to the legal determinations in dispute are largely agreed by the parties.

- The Appellant is a director and joint shareholder, with the second Applicant, of a family business, Temple Spa Ltd.
- The Appellant, along with the second Applicant, gave Personal Guarantees to the Plaintiff / Respondent, ACCLM Ltd, in respect of the borrowings of the limited company.
- The Respondent holds a legal charge over the Property of the Appellant (& the second Applicant), in respect of the guaranteed liabilities. (The National Tourism Development Authority took a second charge, in respect of grant funding advanced.)
- The Property comprises the contents of Folio 7758, County Westmeath, which folio, at the time of the instigation of the disputed possession proceedings, comprised c 96 acres of land whereon the Appellant and the second Applicant reside.
- The limited company became insolvent.
- The personal guarantees were relied on by the Respondent.
- The Respondent obtained a Judgment against the Appellant (& the second Applicant), on foot of the personal guarantees, for €5.8m.
- The Respondent subsequently petitioned the bankruptcies of the Appellant (& the second Applicant).
- Attempted negotiations between the parties were unsuccessful. The Respondent would not countenance any offer that would involve the surrender

of the lands and business premises and leave the Appellant and the second Applicant in possession of their home.

- After successfully petitioning their bankruptcies, the Respondent has then sought to enforce its legal charge over the Appellant's and second Applicant's Property.

### **3. The relevant orders and findings made in the High Court and/or in the Court of Appeal**

- In 2013, the Respondent brought proceedings for possession of the Appellant's and second Applicant's Property in the Commercial Division of the High Court. The Respondent's application was dismissed by the High Court for want of jurisdiction, in the interim between the coming into force of the 2009 and 2013 Land & Conveyancing Law Reform Acts. [2013] IEHC 235
- In 2014, the Respondent brought new proceedings for possession of the Appellant's and second Applicant's Property in the Circuit Court, Midlands Circuit, sitting in Athlone (Record No: 2014/120).
- On 28 July 2015, on hearing the matter, Ms Justice Flanagan, in the Circuit Court, gave an Order for Possession in the Respondent's favour.
- On 7 September 2015, the Appellant along with the second Applicant, sought leave to have the proceedings and process which lead to the issuing of the Order judicially reviewed.
- Following a telescoped hearing in April 2016, leave was refused in a reserved judgment delivered by Mr Justice McDermott on 10 May 2016. The learned Judge ruled that the court was "not satisfied that the applicants have demonstrated any arguable case on which to grant leave to apply for judicial review in respect of the order for possession". [2016] IEHC 233
- The Appellant, along with the second Applicant, appealed the refusal.
- The appeal was heard in the Court of Appeal on 17 July 2017 by the President of the Appeal Court, Mr Justice Ryan, along with justices Ms Justice Irvine and Ms Justice Whelan. The Court of Appeal affirmed the High Court judgment of Mr Justice McDermott and dismissed the appeal.[2016] 356 IECA
- The Appellant now respectfully begs leave to appeal the decision of the Court of Appeal to the Supreme Court.

## 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*

The Appellant is seeking clarity from the Supreme Court in respect of the interpretation of the legislation (i) impacting on the entitlement of an adjudicated Bankrupt to defend Court Proceedings taken for possession of his / her home, and (ii) with regards to the proper conduct of such proceedings.

Specifically **s.61(3)d, s.61(4)** and **s.136** of the **Bankruptcy Act, 1988**.

Given the increased prevalence of bankruptcy in this jurisdiction in recent years, and the impact that bankruptcy, and the circumstances surrounding bankruptcy, are having on personal and family life, the Appellant respectfully submits to the Court that the legal issues that have arisen in his particular instance have wider public significance and merit consideration by the Supreme Court.

The background to the application herein is as outlined at section 4 above.

1. The first issue that has arisen, in the course of the legal proceedings in the courts below, is the inhibition deemed to be imposed by virtue of their bankruptcies on the Appellant, and on the second Applicant, that has disentitled them from the right they would otherwise have enjoyed to challenge the validity or enforceability of the Legal Charge grounding the Respondent / Plaintiff's claim in those proceedings taken by the Respondent / Plaintiff to secure their eviction from their home.

The consequence of the inhibition, as deemed by Ms Justice Finlay Geoghegan in the High Court ([2013] IEHC 235) and followed by Ms Justice Flanagan in the Circuit Court, in the proceedings in this instance, is the inevitability of the success of the claim for possession of the Appellants' home

in those court proceedings, barring the intervention of a procedural or jurisdictional infirmity that might delay, but not overcome, the claim.

As experienced by the Appellant in both of the above mentioned proceedings, the claim, on the grounds before the court, namely an entitlement deriving from a legal charge, for the Appellant's eviction from his home was not open to challenge from him.

The Appellant will say that he has, unfairly and unwarrantedly, been disenfranchised of fundamental personal rights afforded to him in natural justice, by **Article 40.5** of the nation's Constitution and by **Article 8** of the European Convention on Human Rights (as incorporated in Irish law) in respect of the inviolability of the home and respect for private and family life.

The Appellant will say that the interference with his, and the second Applicant's, right to respect for their home has not been proportionate to the requirements of a democratic society.

The Appellant will say that there is scope within the existing legislation to liberate those personal rights.

2. The second issue that has emerged is the proper conduct of proceedings to determine a bankrupt's eviction from his / her home.

The Respondent claims to be entitled to realise its security 'outside the bankruptcy process without reference to the Official Assignee', pursuant to s.136 of the Bankruptcy Act. The Appellant will respectfully say that this is a misconception on the part of the Respondent.

The Appellant will say, on reading the remarks of Mr Justice Charlton in *A.A. v B.A.*, [2015] IESC 50 pertaining to the 'Effect of adjudication in bankruptcy', at paragraphs 4 & seq of that judgment, that the import of s.136(2), whilst liberating the chargeholder from the constraints of s.136(1) in respect of making a claim in respect of the bankrupt's property (which claim, should it arise, will properly (in the Appellant's view) be taken against, and defended by, the Official Assignee) does not liberate the chargeholder to

commence proceedings against the bankrupt personally on foot of the charge. The learned Supreme Court Judge references, at paragraph 13 of the judgment, the case of *Collins v Shirley* (1 Russell and Myl, 638)[1830] by way of illustration, where the bankrupted mortgagor, Shirley, was awarded costs in foreclosure proceedings deemed to have been improperly taken against him.

The Appellant will argue therefore that the proceedings taken against him, and the second Applicant, for possession of their prior Property were improperly and illegally constituted, in that they held no title in respect of the property, that the Respondent's claim to title was in the first instance against the Official Assignee as holder of all their prior rights (or 'powers') in respect of the property, and any claim by the Respondent against them, as occupants, only arise on the Official Assignee having relinquished his rights in respect of the property, which he may not do without the 'prior sanction of the Court' (s.61(4)), which in this instance the Official Assignee had not sought.

The Appellant will further say that there is no suggestion in s.136, or implication, that the holder of a security should retain the right to enforce it against a bankrupt mortgagor and the bankrupt mortgagor be disentitled, or in any way inhibited, from defending the claim, as is asserted by the Respondent in these proceedings. Or that the Oireachtas would have intended that there be such disparity of arms.

The Appellant will respectfully say, therefore, that issues of both justice and public importance has been raised in the courts below – and in the Appellant's humble view not been satisfactorily resolved – that beg determination by the Supreme Court.

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

The grounds of appeal advanced are essentially those advanced in the Court of Appeal application, firstly

- 1.1 The Appellant, and the second Applicant, were denied *locus standi* to challenge the validity of the charge that grounded the Respondent's

application in the Circuit Court proceedings that resulted in the order for their eviction from their home.

1.2 The Appellant, and the second Applicant, were denied *locus standi* to challenge the Official Assignee's prior acceptance of the validity of the charge (despite having made strong representations to him in this regard).

1.3 The Appellant respectfully submits therefore that **the determination process, in aggregate**, from the initial deliberations of the Official Assignee in response to the Appellant's, and the second Applicant's, challenge to the Respondent's entitlement to enforce its security in their bankruptcy, to the process' conclusion in the granting of the order for possession of their home by the Circuit Court that will bring about the Appellant's eviction –

- i. has not liberated his fundamental personal rights deriving from **articles 40.3 & 40.5 of Bunreacht na hEireann**, and
- ii. constitutes an unjustifiable interference with his rights under **articles 6 & 8 of the Convention**, contrary to the obligations imposed on the courts by **s.2(1) of the European Convention on Human Rights Act, 2003**, which states as follows –

“2.—(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.”

1.4 The Appellant further submits that the making of a determination by the Official Assignee, acting as an Officer of the Court / Insolvency Service, that has been deemed not to be open to challenge by the Appellant, by virtue of his adjudication as a bankrupt, in subsequent



proceedings taken for his, and the second Applicant's, eviction from their home, constitutes an unjustifiable interference with the Appellant's rights under **articles 6 & 8** of the **Convention**, contrary to the obligations imposed on every organ of the state by **s.3(1)** of the **European Convention on Human Rights Act, 2003**, which states as follows –

“3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.”

- 1.5 The Appellant further submits that the Official Assignee, in making a determination that has effectively determined his eviction from his home, has disenfranchised the Appellant of his fundamental personal rights deriving from **articles 40.3 & 40.5** of **Bunreacht na hEireann**.

And, secondly,

- 2.1 The Appellant submits that the Circuit Court order was predicated on a disposition by the Official Assignee of his proprietary interests / legal title in property comprising the Appellants' home in favour of the Respondent, which disposition was void in law (pursuant to **s.61(4)** of the **Bankruptcy Act, 1988**) and, furthermore,
- 2.2 that the Circuit Court proceedings, grounded as they were in a security claim of the Respondent sought to be enforced pursuant to **s.136(2)** of the **Bankruptcy Act, 1988**, were improperly taken against the Appellant, a bankrupt.

In either instance, the Appellant respectfully submits that the ensuing court order for his eviction is void in law.

The issues of law before the courts below, relevant to this appeal, are these issues pertaining to s.61(3)d, s.61(4) and s.136 of the Bankruptcy Act, 1988, articles 40.3 &

40.5 of Bunreacht na hEireann, articles 6 & 8 of the Convention as incorporated in Irish law in the European Convention on Human Rights Act, 2003, and s.2(1) and s.3(1) of the European Convention on Human Rights Act, 2003.

Declan Fagan, Appellant in Person

## **7. Other relevant information**

Neutral citation of the judgment appealed against: Court of Appeal [2016] 356 IECA

References to Law Report in which any relevant judgment is reported:

A.A. v B.A. [2015] 11 JIC 0908

Collins v Shirley (1 Russell and Myl, 638)[1830] - “An insolvent mortgagor, even where his assignees disclaim all interest in the equity of redemption, ought not to be made a party to a suit for foreclosing the mortgage.”

Donegan v Dublin City Council & ors, DCC V Gallagher [2012] IESC 18

The Appellant also begs to reference the Official Assignee’s own 2013 publication ‘Secured Creditors in Bankruptcy’ (prepared for FLAC) wherein he states at s.6(3), on p 18, with reference to s.61(4), that he “has full authority to sell or surrender to a mortgagee any property of a bankrupt, other than his family home”.

## **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:*

What order are you seeking if successful?

Order being appealed: set aside

Original order: set aside

The Appellant respectfully seeks the following orders:

1. An Order setting aside the Circuit Court Order for Possession of “all that and those the property comprised in Folio 7758 County Westmeath” granted to the Respondent by Her Honour Judge Flanagan on 28 July 2015,
2. Such further or other Orders as this Honourable Court shall deem appropriate
3. An Order providing for the costs of this application

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: None sought.

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: None sought

Are you asking the Supreme Court to:

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

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

Will you request a priority hearing? No

Signed,

 14/8/17

Declan Fagan, Appellant in Person

*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.*