

No. 2

O. 58, r. 18(1)



SUPREME COURT

Respondent's Notice

Supreme Court record number 2017/000126

High Court Record No. 2015/506 JR

The Court of Appeal Record No. 2016/356

Declan Fagan and Bernadette Fagan v ACC Loan Management Limited

Date of filing:

9/10/2017

Name of respondent:

ACC Loan Management Limited.

Respondent's solicitors:

McCann FitzGerald, Riverside One, Sir John Rogerson's Quay, Dublin 2.

Name of appellant:

Declan Fagan

Appellant's solicitors:

The Appellant appears in person.

1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name: ACC Loan Management Limited.

The respondent was served with the application for leave to appeal and notice of appeal on date: 17 August 2017.

The respondent intends:

to oppose the application for an extension of time to apply for leave to appeal

not to oppose the application for an extension of time to apply for leave to appeal

to oppose the application for leave to appeal

not to oppose the application for leave to appeal

to ask the Supreme Court to dismiss the appeal

to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court

Other (*please specify*)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:

Respondent's Representation:

Solicitor: Michael Murphy, Solicitor.

Name of firm: McCann FitzGerald Solicitors, Solicitors for the Respondent, Riverside One, Sir John Rogerson's Quay, Dublin 2.

Email: michael.murphy@mccannfitzgerald.com

Address: Riverside One, Sir John Rogerson's Quay, Dublin 2

Telephone: 01-829 0000

DX: DX 31.

Ref.: 010390.0122 (MOM/KPJC)

How would you prefer us to communicate with you?

Document Exchange

E-mail

Post

Other (*please specify*)

Counsel

Name: Andrew Fitzpatrick SC.

Email: andrew@andrewfitzpatrick.ie

Address: Suite 3.48.2, Distillery Building, 145/151 Church Street, Dublin 7.

Telephone: 01 817 5526.

Document

Exchange no.: DX 816 314.

Postcode: Dublin 7.

Counsel

Name

Email

Address

Telephone no.

Document

Exchange no.

Postcode

If the Respondent is not legally represented please complete the following
Current postal address

Telephone no.

e-mail address

How would you prefer us to communicate with you?

Document Exchange

E-mail

Post

Other (please specify)

2. Respondent's reasons for opposing extension of time

If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused

N/A

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

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

- (a.) Unfortunately, the description which the Appellant provides in section 4 of the Notice of Appeal is misleading in that it omits to give any description of the proceedings, which comprise an application seeking leave to apply for judicial review, or of the previous judgments of the High Court in cases involving the parties which led the High Court to refuse to grant the Appellant (and his wife, Mrs Bernadette Fagan) leave to apply for judicial review and the Court of Appeal hearing which affirmed the High Court's decision.
- (b.) In the High Court, the Appellant (and his wife, Mrs Bernadette Fagan) sought leave to apply for judicial review for an Order of Certiorari for the purpose of quashing an Order of the Circuit Court (Her Honour Judge Flanagan ("*the Circuit Court Judge*") dated the 28 July 2015, in proceedings brought against them by the Respondent ("ACCLM") under Record No 120/2014 ("*the Circuit Court Proceedings*"), by which ACCLM was granted an order for possession ("*the Order for Possession*") in respect of all that and those the property comprised in Folio 7758 County Westmeath ("*the Property*"). The Appellant and Mrs Fagan sought leave to apply for judicial review by way of *ex parte* application to this Honourable Court (The Hon. Mr. Justice White) on 7 September 2015, but the court ordered that the said application should be made on notice to ACCLM.
- (c.) The Appellant and Mrs Fagan contended that the Order for Possession should be quashed because the requirements of natural and constitutional justice were not adhered to in the course of the Circuit Court Proceedings. In their Statement of Grounds, the Appellant and Mrs Fagan set out four grounds upon which the order of certiorari was sought, however their principal complaint was their claim that they were denied the right to challenge the validity of the Deed of Charge dated the 19 November 2004, ("*the Charge*") upon which ACCLM's application for possession of the Property was based. The Appellant and Mrs Fagan were previously declared bankrupt and their interest in the Property passed to the Official Assignee. The Official Assignee did not agree with the Appellant's and Mrs Fagan's belief that the Charge was invalid and consequently, did not object to ACCLM's application for possession of the Property. The Appellant and Mrs Fagan have consistently refused to accept this view and have challenged it in separate decisions both before the Commercial List (Finlay Geoghegan J. – [2013] IEHC 346) and the Bankruptcy List (Costello J. – 3rd December, 2014). On both occasions, their application seeking liberty to challenge the validity of the Charge was rejected.
- (d.) In their application seeking judicial review, the Appellant and Mrs Fagan claimed that the Circuit Court Judge ought to have allowed them the opportunity to challenge the validity of the Charge and that she breached the requirements of natural and constitutional justice when she held that she was bound by the previous High Court decision of Finlay Geoghegan J., (which held that by virtue of their interest in the Property having vested in the Official Assignee upon their respective adjudications as bankrupts, they were precluded from raising issues with respect to the validity of the Charge, and were only entitled to make submissions to the High Court on the basis that ACCLM was the registered owner of the Charge over the Property) and the Appellant and Mrs Fagan could not therefore raise arguments before the Circuit Court for the purpose of claiming that the Charge was invalid. The Appellant and Mrs Fagan also claimed that the Circuit Court Judge erred in law in granting the Order for Possession without first establishing that all persons aged over 18 years

who were in occupation of the Property had been served with notice of the proceedings.

- (e.) In reality, the Circuit Court Judge closely considered each of the Appellant's and Mrs Fagan's objections to ACCLM's application for possession of the Property. The Appellant and Mrs Fagan swore two comprehensive affidavits in the Circuit Court Proceedings, each of which were considered in detail by the Circuit Court Judge and were given the opportunity to make comprehensive legal submissions. At the first hearing of the application, on the 27 January 2015, the Circuit Court Judge listened carefully to the Appellant's and Mrs Fagan's complaints regarding the position of the Official Assignee and adjourned the hearing so that the Official Assignee could be contacted and asked whether he wished to be joined as a notice party to the proceedings. The Official Assignee subsequently made it known that he saw no reason to be joined to the Circuit Court Proceedings because he accepted the validity of the Charge and had no submissions to make on the application.
- (f.) The adjourned hearing of the application for possession took place on the 28 July 2015, and proceeded over a considerable period of time. The Circuit Court Judge considered each of the Appellant's and Mrs Fagan's affidavits and their submissions, but held that she was bound by the previous decision of the High Court which was to the effect that because they had been declared bankrupt, their respective interests in the Property had vested in the Official Assignee, and it was he rather than they who had the entitlement to challenge the validity of ACCLM's charge. The Circuit Court Judge also held that the alleged occupant of the Property whom the Appellant and Mrs Fagan claimed had not been served with notice of ACCLM's application for possession (their daughter), did not in fact reside at the Property on a permanent basis so as to be considered an occupant of the Property, and in any event there was no requirement to serve her with notice of the application.
- (g.) In the High Court, ACCLM submitted that the Fagans' application for leave to apply for judicial review was wholly inappropriate and had no legal basis. An order of certiorari will generally only be granted on the basis of a complaint that the decision maker failed to adhere to the requirements of natural or constitutional justice where it can be shown that the decision maker was biased or that the principle of *audi alter partem* was breached in that the persons the subject of the decision were not given an adequate opportunity to be heard. In this case, both the Appellant and Mrs Fagan were the subject of court proceedings where there is no question of bias and in which they filed comprehensive affidavits each of which were reviewed in detail by the Circuit Court Judge. The Circuit Court Judge closely considered each of their arguments and dismissed them. The fact that it was considered that the arguments had no merit does not mean that the requirements of natural and constitutional justice were not adhered to. Instead, it means that the Appellant and Mrs Fagan are aggrieved by the decision of the Circuit Court and their proper remedy, if indeed they are entitled to any remedy at all, would have been to serve a notice of appeal against the Order for Possession pursuant to Order 61 of the Circuit Court Rules. Mrs Fagan has since embarked on this course of action and has issued an application seeking an extension of time within which to appeal the decision of the Circuit Court, which application is being made more than two years' after the timeframe permitted by the Circuit Court Rules.

- (h.) In the judgment of the High Court (the Honourable Ms. Justice McDermott) (*“the Learned High Court Judge”*) dated the 10 May 2016, [2016] IEHC 233, the Learned High Court Judge agreed with ACCLM’s submissions and held that the Appellant and Mrs Fagan had been given a full hearing by the Circuit Court Judge and that there was no evidence to support the contention that the Circuit Court Judge had breached the norms of natural justice. The Learned High Court Judge also held that the determination by the Circuit Court Judge in respect of the *locus standi* of the Appellant and Mrs Fagan to challenge the Charge was a decision made within jurisdiction and was therefore not amenable to judicial review. Finally, the Learned High Court Judge held that the decision by the Official Assignee not to challenge the validity of the Charge did not amount to a disposition of the asset in question, nor did it vest any new right in ACCLM in respect of the Charge. Moreover, as the Learned High Court Judge found, *“every opportunity was given to the Applicants to make that claim in the Circuit Court.”*
- (i.) The Court of Appeal dismissed the Appellants’ appeal in the judgment of the court delivered *ex tempore* on the 17th July, 2017, the Ryan P. held: (i.) there could be no complaint about the hearing before the Circuit Court Judge (para. 4); (ii.) the decision that the consequence of the Appellants having been adjudicated as bankrupts was that they were not entitled to challenge the validity of the Charge had already been made by Finlay Geoghegan J. in a judgment delivered in a previous case on 23 July 2013, [2013] IEHC 346 and that decision had been *“in accordance with well established case law”*; and (iii.) The Circuit Court judge applied procedures which were fair in law and the proper remedy which the Appellants ought to have pursued, if they wanted to pursue any remedy, was an appeal from the decision of the Circuit Court.
- (j.) As can be seen from the above, the matters which are at issue between the parties in these proceedings are specific to the parties themselves and do not engage in the wider public interest.

4. Respondent’s reasons for opposing leave to appeal

If leave to be appeal is being contested, set out concisely here the respondent’s reasons why:

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)—

* the decision in respect of which leave to appeal is sought does not involve a matter of general public importance

* it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court

- (a.) ACCLM opposes the Appellant’s application for leave to appeal the judgment of the Court of Appeal to the Supreme Court on the basis that: (i.) that decision does not involve a matter of general public importance; and (ii.) it is not otherwise in the interests of justice necessary that there be an appeal to the Supreme Court.

- (b.) The within proceedings concern an application by ACCLM for possession of a property which, by virtue of the Charge, stands as security for the repayment of company loans which were personally guaranteed by the Appellant and Mrs Fagan . By definition, these are matters which arise out of a private commercial contract, and while the issues involved are of great importance to the parties concerned, they are not of wider importance to the general public.
- (c.) Furthermore, the case is concerned with the question of whether a particular Circuit Court Judge applied fair procedures in the manner in which she conducted a particular hearing of ACCLM's application for possession of the Property. Therefore, the case is concerned only with the specific hearing which was conducted by the Circuit Court Judge, and its effect upon the parties to that hearing. The judgment of the Court of Appeal does not affect any person other than the parties to the action and has no wider or systemic implications beyond the case itself.
- (d.) At section 5 of his Notice of Appeal, the Appellant contends that he 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 or her home, and (ii) with regards to the proper conduct of such proceedings.*" This statement is not accurate as the decision on whether the Appellant and Mrs Fagan were entitled to challenge the validity of the Charge (which is the particular defence which they wish to raise) was made in the prior judgment of Finlay Geoghegan J. [2013] IEHC 346 in a separate action and was not appealed. Neither the Learned High Court Judge nor the Court of Appeal made any determination on whether a bankrupt should, as a matter of law, be entitled to challenge bank security and only held that the Circuit Court had not adopted unfair procedures in following the prior High Court judgments that a bankrupt had no such entitlement.
- (e.) The Appellant also argues at section 5 of his Notice of Appeal that "*the second issue that has emerged is the proper conduct of proceedings to determine a bankrupt's eviction from his/ her home.*" Specifically, the Appellant contends that ACCLM's application for possession was wrongful "*in that they held no title in respect of the property.*" There are three points to make about this insofar as the application for leave to appeal is concerned: (i.) the question of the Appellant's and Mrs Fagan's challenge to the validity of the Charge was determined by the prior High Court judgment of Finlay Geoghegan J. - not in this case; (ii.) any decision made by the Circuit Court Judge concerning ACCLM's title to the Property was a decision made within jurisdiction and was not amenable to judicial review (as both the High Court and the Court of Appeal have held); and (iii.) the question of whether in this particular case the Circuit Court Judge erred in her assessment of ACCLM's title (which she did not), is hardly an issue which is of general public importance or which it is in the interests of justice necessary to consider on appeal.
- (f.) In summary, ACCLM objects to the Appellant's application for leave to appeal because: (i.) the Appellant has not actually identified any specific basis upon which his proposed appeal either concerns a matter of general public importance or that it is in the interests of justice necessary that it be heard; and (ii.) in any event and for the reasons set out above, the

proposed appeal is not of general public importance, nor is it in the interests of justice necessary that it be heard by this court.

**delete where inapplicable*

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

- 1.1 The decision that the Appellant and Mrs Fagan were not entitled to challenge the validity of the Charge because it had already been determined before both the Commercial List and the Bankruptcy List of the High Court that they had no such entitlement, was a decision which the Circuit Court Judge made within jurisdiction and therefore is not amenable to judicial review. In any event, the Circuit Court Judge's decision was correct as a matter of law as the Appellant and Mrs Fagan had by their respective adjudications in bankruptcy been divested of all rights in respect of the Property by virtue of the vesting of those rights in the Official Assignee by operation of law upon their respective adjudications. Further, the prior decisions of the High Court confirming this have never been appealed.
- 1.2 The Appellant and Mrs Fagan were not by any decision of the Circuit Court Judge denied *locus standi* to challenge the decision of the Official Assignee's to accept the validity of the Charge. They had already sought to challenge the Official Assignee's decision in an application for directions to the Bankruptcy List which was heard on 3 December 2014, and which was dismissed on that date.
- 1.3 The Appellant has no entitlement in this case to challenge "*the determination process in aggregate, from the initial deliberations of the Official Assignee ... to the process' conclusion in the granting of the order for possession of their home by the Circuit Court...*" This case concerns an application for leave to seek judicial review for the purposes of obtaining an order of certiorari quashing the Order for Possession. To succeed, the Appellant and Mrs Fagan are required to demonstrate that the Circuit Court Judge failed to apply proper procedures or in some way exceeded her jurisdiction. In any event, both the Appellant and Mrs Fagan have at all stages of the "*determination process in aggregate*" sought to challenge in court ACCLM's attempts to obtain possession of the Property and have on each occasion been afforded fair hearings by the judges concerned. The fact that they have not been successful does not indicate that the "*determination process in aggregate*" does not meet the requirements of the Constitution or of the European Convention on Human Rights.
- 1.4 The Appellant and Mrs Fagan have been allowed to challenge the Official Assignee's decision to accept the validity of the Charge and their challenge by way of an application for directions to the sitting Bankruptcy Judge was dismissed. The fact that the Bankruptcy Judge held against them does not

breach the requirements of the European Convention on Human Rights. More importantly, this issue does not touch upon or concern the fairness of the procedures which the Circuit Court Judge adopted or whether she exceeded her jurisdiction and therefore has no relevance to an application for judicial review.

- 1.5 The Official Assignee simply decided that there was no basis for challenging the legal validity of the Charge. This was a decision which he was entitled to make and in which his conclusion was legally correct. The fact that his decision had the effect of narrowing the grounds upon which both the Appellant and Mrs Fagan could seek to prevent ACCLM from obtaining an Order for possession in respect of the Property is not unfair nor does it amount to a breach of their fundamental personal rights. More importantly, this issue does not touch upon the fairness of the procedures which the Circuit Court Judge adopted or whether she exceeded her jurisdiction and therefore has no relevance to an application for judicial review.
- 2.1 The decision by the Official Assignee not to challenge the validity of the Charge was not a disposition of property whether within the meaning of s. 61(4) of the Bankruptcy Act 1988, or at all. In fact, it was the Appellant and Mrs Fagan who had entered into a disposition of the Property in entering into the Charge with ACCLM. Furthermore, this issue is not relevant to the fairness of the procedures which the Circuit Court Judge adopted nor is it relevant to the question of whether she exceeded her jurisdiction and on this basis, has no relevance to an application for judicial review.
- 2.2 The Appellant does not identify how it is that he contends that the Circuit Court Proceedings were improperly taken, but it is in any event respectfully submitted that they were properly brought for the reasons set out in this Respondent's notice.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

ANDREW FITZPATRICK SC

6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

N/A

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: McCann FitzGerald
McCann FitzGerald
Solicitors for the Respondent
Riverside One
Sir John Rogerson's Quay
Dublin 2

Please submit your completed form to:

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

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.