



**THE SUPREME COURT
DETERMINATION**

Between

**THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND
AND TOM KAVANAGH
PLAINTIFFS/RESPONDENTS**

AND

**BRIAN O'DONNELL AND MARY PATRICIA O'DONNELL
DEFENDANTS/APPELLANTS**

Neutral Citation: [2015] IESCDET 17

Supreme Court record no: S:AP:IE:2015:000014

Court of Appeal record no: A:AP:IE:2015:000123

High Court record no: 2015 No 1736 P

Date of Determination: 28th April, 2015

Composition of Court: Denham C.J., MacMenamin J., Laffoy J.

Status: Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.3° OF
THE CONSTITUTION APPLIES**

RESULT: The Court does not grant leave to the applicants to appeal to this Court
from the Court of Appeal

REASONS GIVEN:

1. This determination relates to an application brought by Brian O'Donnell and Mary Patricia O'Donnell, the defendants/appellants, referred to as "the applicants",

who seek leave to appeal to this Court from a decision of the Court of Appeal (Finlay Geoghegan J., Peart J., Irvine J.) made on the 15th April, 2015, which dismissed their appeal from the High Court order of the 12th March, 2015, which granted an interlocutory injunction restraining the applicants, their servants or agents, or any other person acting on their behalf, or having notice of the order, from trespassing, interfering with, entering upon or otherwise attending the property known as “Gorse Hill”, together with an order to the applicants to vacate Gorse Hill, and other interlocutory orders. Thus, this application for leave to appeal is from the decision of the Court of Appeal primarily affirming the granting of an interlocutory injunction by the High Court.

2. As this is one of the early applications for leave to appeal to this Court from the Court of Appeal, it is appropriate to make some general observations about the proper approach under the Constitution to the grant or refusal of such leave.
3. This Court is, at present, in a transitional phase. First, it was necessary for both this Court and the Court of Appeal to seek to address the existing undecided appeals which had been brought to this Court prior to the establishment day, as a result of which the 33rd Amendment came into force and the Court of Appeal came into being. The work of dealing with the existing bank of cases was divided between the courts by virtue of the making by the Chief Justice of a direction providing that certain classes of appeals should be heard in the Court of Appeal. That direction, made on the 29th October, 2014, in substance left some of the existing caseload of this Court intact. Thus, during this transitional phase, this Court will be dealing with appeals of a type which might not necessarily warrant leave to appeal to this Court under the new regime.

4. Second, it must be acknowledged that it will take some time for a body of jurisprudence to develop concerning the precise basis on which this Court will grant leave to appeal under the new dispensation, whether under Article 34.5.3 or Article 34.5.4.. While certain very broad principles can be identified at this stage, any detailed consideration of the application of those broad principles, in practice, must, therefore, be taken to be somewhat tentative at this stage.

5. The starting point has to be to consider the wording of the relevant provisions of the Constitution itself.

6. Article 34.5.3 provides as follows:

“The Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the Court of Appeal, if the Supreme Court is satisfied that:

- (i) the decision involves a matter of general public importance, or*
- (ii) in the interests of justice it is necessary that there be an appeal to the Supreme Court.”*

7. The applicants, who are litigants in person, have sought leave to seek a stay on the order granting an interlocutory injunction made by the High Court pending the Supreme Court granting leave to appeal and the hearing of the appeal itself. There are two problems with this first aspect of the application. First, until this Court has granted leave to appeal on an application it has no jurisdiction in an appeal. Thus, no stay could be considered in advance of an application being granted. It is understood that a stay has been put in place by the Court of Appeal until the 29th April, 2015. Secondly, this is not a “leapfrog” appeal from the High Court. The appeal is from the Court of Appeal decision of the 15th April, 2015, and so that is the decision which has to be considered in this application.

8. However, bearing in mind that these are lay litigants (albeit that Brian O'Donnell is himself a solicitor), the Court addresses the issues which appear to arise in this application.

9. The applicants state that they wish to appeal from the entire decision of the Court of Appeal.

10. The applicants are required to set out a concise statement of the facts found by the trial Court which are relevant to the issue, and on which the applicants rely.

However, this has not been done, as the applicants set out extensive details of the High Court decision, and refer to other legal proceedings taken by the O'Donnell family concerning the property, Gorse Hill. The other proceedings taken by other members of the O'Donnell family are not part of this case and so are not part of this application for leave to appeal. Equally, a previous decision of this Court in other proceedings is not part of this application. This application is not a matter to be considered with "a significant number of prior sets of proceedings between the Bank, its subsidiary Bank of Ireland Private Banking Limited, (BOIPB), and the Second Named Respondent and members of the O'Donnell family and companies controlled by them" as the applicants suggest. The issues in this application arise only from the decision of the Court of Appeal of the 15th April, 2015. This is not, and cannot be considered to be, an application raising issues on the Supreme Court decision of the 25th February, 2015.

11. This application relates to the decision of the Court of Appeal on the 15th April 2015, which ordered that the appeal (from the High Court) be dismissed. Thus, an interlocutory injunction granted by the High Court remained. It was further ordered that the order of the High Court be stayed until 12 noon on the 29th April, 2015, and that the respondents recover the costs from the applicants.

12. In a written judgment of the Court of Appeal delivered on the 15th April, 2015, it was pointed out that it was an appeal from an order of the 12th March, 2015, of the High Court (McGovern J.)

13. *Inter alia*, the High Court, on the 12th March, 2015, ordered that the respondents' application for interlocutory injunctive relief be granted, and the Court granted a stay.

14. The Court of Appeal, in its written judgment dated the 15th April, 2015, considered the issues raised on the appeal, and dismissed the appeal against all the orders made in the High Court on the 12th March, 2012.

15. The applicants relied extensively on the High Court judgment which had been appealed to the Court of Appeal.

16. The grounds seeking leave to apply to the Supreme Court by the applicants were stated to be:-

- “(i) That this appeal involves a general matter of public importance and/or is in the interests of justice due to the fact it involves the failure of a High Court Judge to recuse himself on the grounds of objective bias. This addresses fundamental issues under the Constitution and European Convention on Human Rights and Fundamental Freedoms.
- (ii) That this appeal involves a general matter of public importance and/or is in the interests of justice due to the fact it involves the ability of banks and receivers to obtain a mandatory injunction to gain possession of a family home rather than issue proceedings for possession and have a full hearing on the matter. This has heretofore never been done in Irish legal history and addresses fundamental issues under the Constitution and European Convention on Human Rights and Fundamental Freedoms.
- (iii) That this appeal involves a general matter of public importance and/or is in the interests of justice due to the fact it concerns fair procedures and right to a fair hearing not being observed by the High Court in refusing litigants in person and litigants in general to prepare their cases properly. In this case a motion for a mandatory injunction was returnable within 48 hours and the [applicants] were afforded less than 24 hours to swear a replying affidavit in defence in relation to the possession of a family home. This has heretofore never been done in Irish legal history and addresses fundamental issues under the Constitution and European Convention on Human Rights and Fundamental Freedoms.

- (iv) That this appeal involves a general matter of public importance and/or is in the interests of justice due to the fact it concerns the lack of fair procedures and right to a fair hearing being afforded by the High Court in refusing litigants the ability to cross examine the [respondents'] witnesses on their evidence to obtain a mandatory injunction in circumstances where the mandatory injunction could have the effect of determining the outcome of the proceedings over a family home. This has heretofore never been done in Irish legal history and addresses fundamental issues under the Constitution and European Convention on Human Rights and Fundamental Freedoms.
- (v) That a stay of two weeks has been placed on the Order of the Court of Appeal after which time the mandatory injunction for the [applicants] to vacate their family home will become effective. In such circumstances if liberty to appeal and a stay is not granted by the Supreme Court within those two weeks the matter may effectively be determined in favour of the respondents without the [applicants] being afforded their right of appeal under the Constitution and European Convention on Human Rights and Fundamental Freedoms. For this reason this case is a general matter of public importance and/or is in the interests of justice.”

17. The respondents filed a response on the 24th April, 2015, opposing the application for leave to appeal, and asking the Court to dismiss the application.

18. The reasons advanced by the respondents for opposing leave to appeal were that the decision of the Court of Appeal in this case does not involve matters of general public importance and/or it is not, in the interests of justice, necessary that there be an appeal to this Court.

19. The respondents submitted that the decision of the Court of Appeal is not in the category of decisions which the Constitution envisages that the Court would grant leave.

20. Specifically, the respondents submitted:-

- (a) The decision does not involve any matter of general public importance.
 - (i) It was submitted that no novel legal issue arises in the decision, let alone an issue of general public importance. The decisions of both the High Court and on appeal the Court of Appeal involved the application of well-established legal principles to a very particular set of facts. Those principles involved the principles applicable on applications for interlocutory injunctive relief for an alleged trespass; the principles relating

to an application that a judge recuse himself on the grounds of objective bias on the part of the judge; the principles relating to cross-examination of deponents of affidavits filed in support of an interlocutory application and the exercise by a judge of his case management jurisdiction. Despite the applicants' apparent attempts to now assert in its application form that novel and important legal issues arise, the applicable legal principles were not in fact materially disputed by the applicants before the High Court or Court of Appeal.

- (ii) The applicants contend that the appeal raises issues of public importance because it involves the ability of banks and receivers to gain possession of a family home: however, the property in question was owned by an Isle of Man company which had mortgaged its interest in the property as security for substantial commercial borrowings; the applicants in fact had their permanent home in England and had not been living in the property up until immediately before the proceedings; and the applicants had signed (with the benefit of legal advice) a binding agreement that they would vacate the property in the event that the security over the property was called in (and it was called in). These specific (if not unique) factual dimensions to the case, coupled with the fact that it involved the application of well established legal principles, clearly render it a decision which could not be said to involve a matter of general public importance.

(b) It is not necessary, in the interests of justice, that there be an appeal.

- (i) It was submitted that it cannot be maintained that it is necessary in the interests of justice that there be a further appeal to this Court. The applicants have had two full hearings in relation to the interlocutory injunction application, in the High Court and Court of Appeal. Their submissions have been fully and comprehensively aired, addressed and dismissed by two courts. The applicants signed an agreement, which remains binding, that they would vacate the property in the event that the Bank called in its security, which it did, some three years ago. The applicants' permanent home is in England and has been for over 3 years. It is also important to note that the decision in question was an interlocutory injunction decision. The applicants will, of course, have a full hearing at the substantive trial of the matter (including a full right of appeal in the event that they lose at trial). The interests of justice do not require a further hearing at interlocutory stage of issues which have already been exhaustively and properly examined by two Courts.

21. Arising from the applicants' application as to the urgency of this application for leave to appeal, because the stay granted by the Court of Appeal terminates at 12 noon on the 29th April, 2015, the respondents were directed to file their response by midday on Monday 27th April, 2015. In fact their response was filed on Friday 24th April, 2015.

22. Subsequently, on Monday 27th April, 2015, this Court considered the application for leave to appeal by the applicants.

23. This is an application for leave to appeal from an order of the Court of Appeal which dismissed an appeal from the order of the High Court, which had granted an interlocutory injunction. Thus, at the core of the application is the matter of an interlocutory injunction originally sought and granted in the High Court, and some other issues determined by the Court of Appeal upon which the applicants also seek leave to appeal.

24. The primary issue raised on this application is as to the entitlement of the respondents to an interlocutory injunction. What was raised before the Court of Appeal was the application of principles for the grant of an interlocutory injunction. These principles are well established. The Court of Appeal applied these general principles to the particular circumstances of the case. This does not render this case one of general public importance. Nor have any issues been raised to bring the application within the category where it is in the interests of justice necessary that there be an appeal to this Court. The decision whether or not to grant an interlocutory injunction is an area where a court enjoys a wide discretion "as to whether he or she will grant injunctive relief and that is a discretion with which this court will not lightly interfere": See **Riordan v. Minister for the Environment (No. 6)** [2002] 4 I.R. 404 at 407, Murphy J. (giving judgment for this Court).

25. The applicants raised the issue of the failure of the High Court judge to recuse himself on the grounds of objective bias in the context of an application for an interlocutory injunction. The Court of Appeal identified and applied well established law on the issue of objective bias. In all the circumstances this does not raise an issue that meets the constitutional threshold in Article 34.5.3 of the Constitution.

26. On what appears to have been an ancillary ground, the applicants raised an issue on the refusal of the High Court to adjourn the proceedings. Such an issue is quintessentially a matter for a trial judge. A Court of Appeal would be slow to intervene. In this case the Court of Appeal refused to intervene, laying emphasis on the fact that the High Court had had regard to all the relevant circumstances in which the proceedings and motion were commenced, and did not breach the applicants' rights to constitutional justice and fair procedures. These circumstances, raised by the applicants do not identify issues which meet the constitutional threshold set out in Article 34.5.3.

27. The applicants raised also the fact that the case was admitted to the Commercial Court list. This was considered by the Court of Appeal, which upheld the High Court ruling that the proceedings were appropriate to enter into the Commercial Court list in accordance with the rules of the Superior Courts. The Court of Appeal pointed out, *inter alia*, that, while the proceedings undoubtedly related to the home of the applicants' family, the property was given pursuant to arrangements made by the applicants as security for commercial borrowings. This issue, the admission to the Commercial Court list, raises neither a matter of general public importance, nor is it necessary in the interests of justice that there be an appeal to this Court on this issue.

28. The applicants raised the issue of the refusal of the High Court to allow cross-examination. This is a matter for the discretion of the trial court, in all the

circumstances of the case, including the nature of the proceedings as an application for an interlocutory injunction. The Court of Appeal considered and rejected this ground of appeal. This issue, in these circumstances, raises neither a matter of general public importance, nor is it necessary in the interests of justice that there be an appeal to this Court on this matter.

29. The applicants have had a full hearing in the High Court, where all these issues were aired. This was followed by a full appeal to the Court of Appeal, where the issues were raised, considered, and decided. Thus, the applicants have exercised their right of appeal.

30. The applicants have exercised their right to apply to this Court for leave to appeal. However, this Court may only grant leave when the constitutional parameters set out in Article 34.5.3 are met. Having considered all the issues set out in the application, as set out above, as set out in the application for leave, from the perspective of fair procedures generally, the Court finds that there is no basis to grant leave to appeal either on the grounds that the decision involves a matter of general public importance, or that in the interests of justice it is necessary that there be an appeal to the Supreme Court. Further, no legal basis has been established for a reference to the Court of Justice of the European Union.

31. In all the circumstances, the Court refuses the application for leave to appeal. Thus, the Court does not grant leave to the applicants to appeal to this Court from the Court of Appeal.

And It is hereby so ordered accordingly.