THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 353

Record No. 2018/169

McGovern J.
McCarthy J.
Kennedy J.

BETWEEN/

ACC LOAN MANAGEMENT LIMITED

PLAINTIFF/

RESPONDENT

- AND -

DECLAN FAGAN AND BERNADETTE FAGAN

DEFENDANTS/

APPELLANTS

JUDGMENT (*ex tempore*) of the Court delivered on the 5th day of November 2018 by Mr. Justice McGovern

1. The Court has considered the application of the appellant who argues that we must deal with the issue of jurisdiction of the Court before dealing with anything else. At the commencement of the hearing the Court asked counsel for the respondent whether they wished to proceed with the entire appeal dealing with both jurisdiction and the merits of the appeal and they indicated to the Court that they would be happy to do so but Ms. Fagan was quite insistent that the Court should deal with the jurisdiction question first and the Court has decided to accede to her request to do so and will now proceed to rule on the question of jurisdiction.

2. But before doing so there is also an issue of legal aid and the appellant has argued to the Court that she is prejudiced by the fact that this matter is proceeding before she obtains a decision on whether or not she will be granted civil legal aid and, in effect, she is looking for an adjournment on that basis. Two matters arise on this point. No satisfactory explanation has been offered to the Court as to why the appellant chose not to make a legal aid application until as recently as August of this year. The matter was listed for directions before the Court of Appeal on the 15th June 2018 and the appellant made no mention of a legal aid application nor did the appellant object to a hearing date being fixed. In *McKee & Farrell* [2009] 4 I.R. 703 the Supreme Court held that a litigant has no legal right to legal aid in a civil case even where constitutional rights are an issue. If the appellant had wished to seek legal aid she should have done so before now and this is not a good ground for seeking an adjournment of this hearing. Furthermore, in the case of *Kavanagh v. Bank of Scotland* [2015] 3 I.R. 555 Clarke J.(as he then was), said that a last minute decision by a borrower to instruct a new legal team was not a good basis for an application to adjourn an appeal and the same principles would apply in a situation such as arises here. There is no reason why the application could not have been made earlier and for that reason I would refuse the application for an adjournment.

3. So, I will now go on to deal with the issue of the Court's jurisdiction having regard to the provisions of s. 39 of the Courts of Justice Act 1936. The appellant argues that the High Court judge whose decision is being appealed was dealing with the matter at first instance. I cannot agree with that proposition. For the matter to proceed before the Master of the High Court as a late application and for leave to extend the time for appealing, that was part of the appellate jurisdiction process and it is within that appellate jurisdiction process that Meenan J. heard the issue before him and made an order reversing the decision of the Master of the High Court in extending the time for appeal.

4. This Court has considered the decision of the Supreme Court in *Kinahan v Baila*, an unreported judgment of the Supreme Court on the 18th July 1985. In the course of that judgment Finlay C.J. said that the *"basis on which it was sought to distinguish this appeal from what would appear otherwise to be the very clear and unambiguous terms of s. 39 was that the application made to the High Court was an interlocutory application touching on a matter, namely, security for costs which had not been the subject of any application, and therefore, of any decision, in the Circuit Court proceedings. I am quite satisfied that that does not take this appeal outside s. 39 and I am quite satisfied that any interlocutory application made and any decision made by the High Court exercising its appellant jurisdiction under the Courts of Justice Act 1936 in relation to appeals from the Circuit Court is captured, as is every other decision by the High Court on a Circuit Appeal, by s. 39 and there is no room in the interpretation of Section 39 to make a special exception in relation to matters by way of interlocutory application raised for the first time in the proceedings, provided they are raised in a Circuit Appeal."*

5. The words of Finlay C.J. are quite specific and he refers not only to any interlocutory application made but also he refers to *any decision* made by the High Court exercising its appellate jurisdiction under the Courts of Justice Act 1936.

6. In my view when Meenan J. made his order in the High Court he was exercising his appellate jurisdiction and he was not acting as a judge of first instance and it follows therefore, that by virtue of the provisions of the Courts of Justice Act 1936 his decision was final and un-appealable and it also follows, therefore, that this Court has no jurisdiction to entertain the appeal and it will not be necessary therefore for the Court to embark upon a hearing of the substantive issue.

7. So, I would dismiss the appeal to this Court on the basis that the Court has no jurisdiction to entertain it.