

O. 58, r. 15

No. 1



SUPREME COURT

Record No:

~~XXXXXXXXXX~~ 85/19

Record No: ~~XXXXXXXXXX~~

Application for Leave to Appeal

Part I

The information contained in this part will be published. It is the applicant's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. Date of Filing: ^{30/4/19} ~~13~~/4/2019

2. Title of the Proceedings: Irish Bank Resolutions Corporation Limited (and formerly Irish Nationwide Building Society)

-v-

**Patrick Raftery and Patricia Raftery
and Mars Capital Ireland DAC**

3. Name of Applicant: Patricia Raftery

What was the applicant's role in the original case: 2nd Defendant

✓

[Irish Bank Resolution Corporation, Patrick Raferty 1st Defendant and Patricia Raferty 2nd Defendant and Mars Capital Ireland DAC.

4. Decision of Court of Appeal (where applicable): Motion Refused

Record No: ~~████████████████████~~

2014/642

Date of Order: 12th April, 2019

Perfection Date: 15/04/2019

Date of Judgment: 12/04/2019

Names of Judges: Justice Michael Peart, Justice Edwards, Justice McGovern

5. Decision of the High Court:

Record No: 1996/217SP

Date of Order: 3/10/2012

Perfection Date: 17/10/2012

Date of Judgment: 9/8/2012

Names of Judge(s): Justice Hedigan

Where this application seeks leave to appeal directly from an Order of the High Court has an appeal also been filed in the Court of Appeal in respect of that Order?

Yes

No

6. Extension of Time:

Yes

No

If an application is being made to extend time for the bringing of this application, please set out concisely the grounds upon which it is contended time should be extended.

7. Matter of general public importance:

If it is contended that an appeal should be permitted on the basis of matter(s) of general public importance please set out precisely and concisely, in numbered paragraphs, the

matter(s) alleged to be matter(s) of general public importance justifying appeal to the Supreme Court.

This section should contain no more than 500 words and the word count should appear at the end of the text.

The Court is asked to consider the protection afforded to a non-owning Spouse and the onus placed on the bank/ lender by Section 3 of the Family Home Protection Act 1976.

The Spouse took a conveyance in the family home. The conveyance being, the perfection of a prior security. The effect of the conveyance is that the family home is forfeited to satisfy that security.

This requires the provision of independent legal advice in particular circumstances. It is in these circumstances where there was evidence not adduced at trial, or brought to the attention of the learned trial Judge by the lender.

The trial Judge made a determination and a finding of fact that the mortgage and the deed of transfer were signed on that same date of 12th of November 1992. The Court of Appeal erred in law in not allowing in new evidence. This new evidence can now show that the mortgage and the deed of transfer were signed at a considerable remove from 12th of November 1992 and at some date in 1995 and lodged in the land registry on the 27th of November 1995.

The Court of Appeals failure to allow in the new evidence set at nought the statutory protection afforded by the Family Home Protection Act 1976 to the non-owning Spouse.

Further the effect of the new evidence would establish that the security for mortgage was invalid.

Further it is stated that the Court of Appeal erred in law in holding that the appellant did not satisfy the criteria in *Murphy v The Minister for Defence*.

It is respectfully submitted that evidence was not made available at the time of the High Court by the moving party. This evidence was available at the time of the trial and was not obtainable by the reasonable diligence of the appellant at the time of the trial. The unavailability was due to at the very least inadvertence on behalf of the moving party or some other more serious motivation on their part, that may conceivably account for its absence. Had this evidence been considered by the learned trial Judge, it is my respectful submission that the outcome for the appellants would have would not have resulted in the loss of the family home. It is therefore submitted that in the interests of common sense and the justice of the case. A trial Court should have benefited from this evidence prior to making a determination that has such adverse consequences for the Statutory protective rights of the non-owning Spouse, as set out in S 3 of the Family Home Protection Act 1976.

If a non-owning spouse is taking a legal interest in the family home, but if the effect of that conveyance is to perfect a prior security pledging the family home. Then the appellant contends that there is an onus on the lender to advise that independent legal advice should be sought regarding the consequences of such a transfer.

Word count – 492

8. Interests of Justice:

If it is contended that an appeal should be permitted on the basis of the interests of justice, please set out precisely and concisely, in numbered paragraphs, the matters relied upon.

This section should contain no more than 300 words and the word count should appear at the end of the text.

It is contended the Appeal should be allowed in the interest of Justice in that the:

1. The Pleadings in the High Court were inaccurate and misleading.
2. The High Court Judge made a finding of fact in relation to the dating and documents allegedly signed by the Appellant being the 12th November 1992, which rendered the Mortgage valid, whereas there was no evidence adduced in support of this finding of fact by the High Court.
3. By Order of Discovery of the High Court dated the 13th day of February 1998 all documents pertaining to the Mortgage Loan, the subject matter of these Proceedings were given to the Plaintiff Bank, including all documentation, correspondence and Memorandums held on file by the only Solicitor acting therein in relation to the Mortgage/Loan/the Family Home Protection Act, Deeds of Transfer which clearly proved that the Mortgage herein was invalid, insofar as at the date of the execution of the Mortgage, the 2nd Named Appellant/Defendant had no property interest in the Family Home, the subject matter of the Mortgage and could therefore not transfer any interest in the property. The Deed of Transfer (allegedly executed on the 12th day of February 1992) whereby the Second Named Appellant/Defendant became the Joint Owner of the property, was in fact executed in November 1995 some three years after the alleged execution of the Mortgage.
4. These documents clarifying exactly the date of execution of the Deed of Transfer were available to the Plaintiff Bank in July 1998. The absence of these documents at the trial of the action before the learned High Court Judge can only be explained either concealing them from the High Court, or else negligently or otherwise failed to fully advise the High Court and therefore caused the High Court to make a decision in error, while certainly and/or constructively were fully aware of the said error being made.
5. It is in the interest of Justice to the Appellant that such an error be set right.
6. It is in the interest of Justice to the Appellant and Public that such conduct by the Plaintiff Bank in concealing or negligently or otherwise failing to advise the High Court of such relative and important detail and documents, be dealt with appropriately in order to prevent any similar repetition of same.

Word count - 300

9. Exceptional Circumstances: Article 34.5.4:

Where it is sought to apply for leave to appeal direct from a decision of the High Court, please set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. This is a matter that has serious consequences for the family home and the protection afforded in respect, in the form of the Family Home Protection Act 1976 and the Constitutional protection afforded to the dwelling. It is contended that the Court should be extra vigilant in these circumstances and ensure that all relevant evidence is before it when making a decision that will have such adverse consequences for the non-owing spouse.
2. The courts are tasked with ensuring fairness in litigation and as such all relevant evidence should be available to the trier of fact this is more so in circumstances where the legislature has singled out the non-owing spouse for special protection
3. The question of exceptional Public Importance is thus that the Court of Appeal should have considered that where the legislature had seen fit to protect the interest of the non-owing spouse that the criteria as set out in the Murphy Criteria
4. It is exceptional that a case like this, with such potential for far reaching consequences would go uncorrected, in disregard of such conduct and have such detrimental consequences for the borrower, their spouse, or any member of the public affected directly, or potentially by such a High Court Decision made in error, due to the possible mal fides and improper conduct and/or negligence of the moving party in concealing or failing to disclose such relative and important detail and documentary evidence.

Word Count 243

Word count - ~~100~~

10. Grounds of Appeal

Please set out in the Appendix attached hereto the grounds of appeal that would be relied upon if leave to appeal were to be granted.

11. Priority Hearing: Yes No

If the applicant seeks a priority hearing please set out concisely the grounds upon which such priority is sought.

This section should contain no more than 100 words and the word count should appear at the end of the text.

The Appellant has now lived under threat of eviction from her Family Home since the Proceedings (SP 217/96) were instituted in 1996 by the Plaintiff Bank, but allowed to lie unprocessed from the time of the Order of Discovery in July 1998 for fourteen years until brought to the High Court in July 2012, while simultaneously building up a sum of interest at penal rates, far in excess of the value of the Family Home. Both the Appellant and her spouse being retired Pensioners are even yet living under the threat of eviction, which threat is causing enormous stress to both parties, in particular the Appellant herein as certified and confirmed by her Medical Advisor.

Word count - 100

12. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union please identify the matter and set out the question or questions which it is alleged it is necessary to refer.

Part II

The information contained in this part will not be published.

To be served on: A.B. Wolfe & Co. Solicitors , 70 Sir. John Rogerson's Quay, Grand Canal Dock, Dublin .

(Solicitors for) Respondent(s)

Notice Party.

Please file your completed form in:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin 7

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

Appendix

Notice of Appeal

1. **Title of the Proceedings: *I.B.R.C.***

-v-

Patrick Raftery and Patricia Raftery

2. **Grounds of Appeal:**

Please set out in numbered paragraphs the Grounds of Appeal relied upon if leave to appeal were to be granted.

1. The Court of Appeal erred in law in finding that the new evidence should not be admitted in its application of the *Murphy v The Minister for Defence* criteria, in that the evidence as sought to be included was not discoverable with reasonable diligence for use at the trial by the appellant's Solicitors in circumstances where, this evidence was available to the Plaintiff's in the High Court hearing.
2. The Court of Appeal erred in law in not allowing in the new evidence as being the best evidence available, had the evidence been allowed in it would have been decisive in determining the issue between the second named appellant and the respondent bank in finding that the mortgage was either valid or invalid.
3. The Court of Appeal erred in law in not allowing in new evidence, that could prove that the mortgage was invalid and unenforceable, as evidenced by documents and actions known to the Plaintiff Bank at the time of the High Court hearing in July 2012 who, nevertheless concealed or failed to disclose the said documents and relevant evidence and thereby allowed the High Court to fall into error.
4. The Court of Appeal failed to give due weight to the significance of the new evidence in circumstances where has been an effluxion of time. However this evidence was not dependant on memory or witness recall but stood alone and was determinative of the disputed time line regarding the execution of the mortgage and the deed of transfer. In actual fact it was one of the few pieces of independent evidence and therefore should be admitted.
5. The Court of Appeal erred in law and fact in failing to give any weight to the fact that the respondent did not have independent legal advice at the time of signing the deed of transfer. Consequently, the applicant was not aware of the significance of the new evidence that was now sought to be adduced.

4. The Court of Appeal erred in law in failing to vindicate the statutorily protected rights of the non owning Spouse in failing to allow in the new evidence and effectively set at nought the statutory protection afforded by the Family Home Protection Act 1976 to the non owning Spouse.

3. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Appeal were to be successful.

Order to adduce additional evidence of correspondence from the sole and only Solicitor acting herein as exhibited and discovered already and therefore before the Court.