

UNAPPROVED



**THE COURT OF APPEAL
CIVIL**

**Court of Appeal Record Number: 2016/99 & 2018/441
High Court Record Number: 2014/5484P & 2014/5848P
Neutral Citation Number: [2024] IECA 309**

**Whelan J.
McCarthy J.
Butler J.**

BETWEEN/

DOMINIC CARNEY

PLAINTIFF/ APPELLANT

- AND -

**BANK OF SCOTLAND PLC (FORMERLY BANK OF SCOTLAND (IRELAND)
LIMITED)**

DEFENDANT

- AND -

GEARÓID COSTELLOE

DEFENDANT/ RESPONDENT

RULING of Ms. Justice Butler delivered on the 23rd day of December 2024

Introduction

1. The court gave judgement on this appeal on 3rd October 2024 ([2024] IECA 237) refusing the appeal. The order dismissing the appeal has not yet been perfected in circumstances

where the court allowed the parties a period of time after delivery of the judgement within which to make submissions on the proposed costs order.

2. The court has received an application pursuant to Practice Direction 14 (PD 14) for leave to issue a motion seeking an order reviewing the judgement of 3rd October 2024 on constitutional grounds.

The Jurisdiction

3. Article 34.4.3 of the Constitution provides:

“The decision of the Court of Appeal shall be final and conclusive, save as otherwise provided by this article.”

4. The article then provides for appeals to the Supreme Court in limited circumstances. In a case which does not satisfy the threshold requirements for leave to appeal to the Supreme Court, the decision of the Court of Appeal is final and conclusive.
5. There is a truly exceptional jurisdiction for the court to review its final and conclusive decision. The intending applicant bears a very heavy onus of establishing that the order or judgement operates to deny the applicant justice and clearly breaches the intending applicant’s constitutional rights (*In Re Greendale Developments Ltd (in liquidation)* [2000] 2 IR 514).
6. The principles applicable to the jurisdiction to determine such an application were summarised by this court in *Launceston Property Finance DAC v. Wright* [2020] IECA 146. That summary was based on review of then-existing case law including *Greendale*, *DPP v. McKeivitt* [2009] IESC 29, *Friends First Managed Pension Funds Ltd v. Smithwick* [2019] IECA 197 and *Bailey v. Commissioner of An Garda Síochana* [2018] IECA 63. The summary is as follows –

“In summary, the jurisdiction: –

- (i) *is wholly exceptional;*
- (ii) *it must engage an issue of constitutional justice;*
- (iii) *requires the applicant to discharge a very heavy onus;*
- (iv) *is not for the purpose of revisiting the merits of the decision;*
- (v) *alleged errors which have no consequence for the result do not meet the required threshold;*
- (vi) *cannot be invoked on the basis of the discovery of new evidence;*
- (vii) *requires the applicant objectively to demonstrate that there is a fundamental issue concerning a denial of justice, by which is meant some error which is so fundamental as to have an effect on result;*
- (viii) *cannot be used as a species of appeal where party seeks to address, critically or otherwise, the judgement;*
- (ix) *is to be distinguished from the application of the Slip Rule in respect of errors of fact which have no bearing on the outcome.”*

7. In accordance with the provisions of Practice Direction 14, the panel of judges who heard the appeal and delivered judgement have considered the draft notice of motion and draft grounding affidavit of the applicant/appellant along with his outline written submissions. Having considered the principles referred to in the relevant case law (including the case law referred to in the recitals to PD 14) the panel is of the view that the intended application is not one in respect of which a hearing on the merits is justified.

The Application

8. The central complaint made by the applicant is that the court’s interpretation and application of section 85(3A) of the Bankruptcy Act 1988 was incorrect. In his appeal the applicant had contended that when he was automatically discharged from bankruptcy on 12th March 2020,

twelve months after the date of his adjudication, his unrealised estate did not remain vested in the Official Assignee but automatically re-vested in him 3 years after the date of his adjudication. This 3-year period derives from section 85(3A) which makes special provision for the return to a bankrupt of his or her family home if that property has not been realised within 3 years of the date of adjudication and there is no outstanding application to court for an order for the sale of that home. The applicant's case was essentially that the provisions of section 85(3A) applied to the entire of his unrealised estate and not merely to his family home. This argument is considered in detail in paragraphs 37 to 44 inclusive of the judgement.

9. The applicant is strongly of the view that the Official Assignee must have a finite time within which to deal with a bankrupt's estate. He is also of the view it cannot be a correct reading of the legislation for the bankrupt's estate to remain vested in the Official Assignee, potentially indefinitely, after a bankrupt has been discharged from bankruptcy and that this would not be consistent with the 'second chance' that discharge is intended to afford a bankrupt. He argues that the history of the Bankruptcy Act 1988 and, in particular, amendments made to it in 2011, 2012 and 2015 show that it was not the intention of the Oireachtas to provide the Official Assignee with complete autonomy over bankrupt's estate indefinitely.
10. It is correct that the version of section 85 substituted into the Bankruptcy Act 1988 by section 30(g) of the Civil Law (Miscellaneous Provisions) Act 2011 provided that on discharge from bankruptcy after 12 years, any property of the bankrupt which remain vested in the Official Assignee would be returned to the bankrupt and re-vested in him. However, subsequent amendments which reduced the period of bankruptcy from 12 to 3 years and then to 1 year expressly changed that rule to provide that the unrealised property of the bankrupt would remain vested in the Official Assignee for the benefit of the bankrupt's

creditors. This is subject only to the exception now provided for section 85(3A) which applies only to a family home. There is no basis for the applicant's suggestion that these amendments were merely transitional provisions intended to deal with situations where an envisaged 12 or 3 year bankruptcy was being reduced to 3 years or to 1 year respectively. The applicant has not pointed to any provision of the Bankruptcy Act 1988 as it currently stands which would suggest that what is now section 85(3) is not a provision of general application.

11. Apart from a general complaint of an absence of legal reasoning and a breach of his and others' constitutional rights by virtue of the court's decision, the applicant does not identify in his grounding affidavit or the outline legal submissions which accompany it, any exceptional circumstances which would justify the court re-opening its decision. Nor does he point to any error or other strong reason which would warrant the exercise of this exceptional jurisdiction (per Whelan J. in *Friends First Managed Pension Funds Ltd. v. Smithwick*). In *DPP v. McKevitt*, Murray C.J. indicated that to be successful an application of this nature "*must patently and substantively concern an issue of constitutional justice other than the merits of the decision*" and that the grounds of the application must "*objectively demonstrate that there is a substantive issue concerning a denial of justice*". This application manifestly does not meet those criteria.
12. The applicant is clearly dissatisfied with the outcome of his appeal and does not agree with the view taken by this court as to the interpretation and application of section 85(3A). However, the exceptional jurisdiction of the court to re-open and review a decision which is otherwise final and conclusive does not fall to be exercised merely because a litigant is dissatisfied with the result.

13. Therefore, in accordance with paragraph 6 of the Practice Direction, the panel refuses leave to make the application and directs the registrar to notify the attending applicant of such refusal.