

UNAPPROVED



THE COURT OF APPEAL

Appeal Number: 2021/181 & 2022/7

High Court Record Number: 2018/2431P
Neutral Citation Number [2023] IECA 116

BETWEEN/

**Costello J.
Faherty J.
Butler J.**

DECLAN KEHOE AND UNA KEHOE

PLAINTIFFS/APPELLANTS

-AND-

PROMONTORIA (ARAN) LIMITED AND KEN FENNELL

DEFENDANTS/RESPONDENTS

RULING of Ms. Justice Butler delivered on the 12th day of May, 2023

Introduction

1. The Court gave judgment in this appeal on 30 March 2023 [2023] IECA 72 refusing the appeal. The Order dismissing the appeal was perfected on 9 May 2023.
2. By a notice of motion dated 24 April 2023 the appellants applied pursuant to Practice Direction 14 (“PD 14”) for leave to issue a motion for an order to rescind or vary the judgment of the Court.

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 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 judgment made operates to deny the applicant justice and clearly breaches the intending applicant’s constitutional rights (*In the Matter of Greendale Developments Ltd. (in Liquidation)* [2000] 2 IR 514)

6. *“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 a party seeks to address, critically or otherwise, the judgment;*

(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.*

(Launceston Property Finance DAC v Wright [2020] IECA 146 para. 7)

7. In accordance with the provisions of PD 14 the panel of judges who heard the appeal and delivered judgment have considered the draft notice of motion and draft grounding affidavit of Harry McCullagh, solicitor, and, having regard to the principles referred to in the relevant case law (including the caselaw referred to in the recitals to in the practice direction) the panel is of the view that the intended application is not one in respect of which a hearing on the merits is justified.

8. The central complaint is that the appeal against Allen J’s case management decision was twofold –an appeal against both the refusal of an adjournment and the refusal to allow the plaintiffs liberty to file a supplemental affidavit. The plaintiffs now complain that the judgment of this Court does not expressly decide whether they should have been allowed to file another affidavit nor give reasons for refusing this aspect of the appeal. The accompanying submission complains that the judgment is critical of the deficiencies in the plaintiffs’ evidence and suggests that if that appeal had been allowed then further evidence would have been before the court.

9. There is no substance to this complaint. The procedural history of the case is set out at some length and it is clear from paragraph 30 of the judgment that the applications in question were for an adjournment for the purposes of filing a supplemental affidavit, i.e. the two were interlinked. Allen J’s reasons for the refusal - which included that the plaintiffs were not entitled to adjourn a matter listed for hearing to remedy evidential deficiencies which had been identified by the defendants - are also set out.

10. Although the section dealing with that aspect of the appeal (from paragraph 49 to 54 of the judgment) is headed “*Appeal Against Allen J’s refusal of an Adjournment*”, it is clear

throughout that the adjournment and the request to file a supplemental affidavit are interlinked, i.e. the adjournment was for the purpose of filing a further affidavit. The appellants' argument was rejected on the basis of (a) mootness – the appeal had proceeded on the date fixed and (b) the significant discretion to be afforded to a Judge in charge of a list in making case management decisions.

11. The judgment expressly relies (at paragraph 53) on the similarities between this case and *Hanrahan v Minister for Justice* [2020] IECA 340 where the refusal of an adjournment which had been requested on an identical basis was upheld– i.e. in order to file additional affidavits to meet points raised in the other side's written legal submissions. The judgment positively affirms that this matter was properly dealt with by Allen J in treating it in a similar manner to *Hanrahan*.

12. The request for leave to file a further affidavit cannot be divorced from the fact that it was made so close to the hearing that it would have necessitated an adjournment of the hearing. The applications were made by the plaintiffs on a connected basis and two were treated together by both the High Court and this Court. The plaintiffs had a full opportunity to file any affidavit evidence they wished in response to the defendant's application. The amount and detail of the evidence they chose to submit was up to them. What they did not have was an entitlement to mend their hand in response to the defendant's written legal submissions. This is what was decided by the High Court and upheld by this Court. There is neither a failure to deal with this aspect of the appeal nor to provide a reason for its refusal.

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