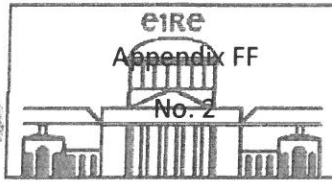




O. 58, P. 18(1)



**SUPREME COURT**  
**Respondent's Notice**

24744150  
511850



Supreme Court record number	S:AP:IE:2018:000162
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[Title and record number as per the High Court proceedings]

David Van Dessel	v.	Pat Carty [2016 No. 8209 P.]
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Date of filing	26 November 2018
Name of respondent	David Van Dessel
Respondent's solicitors	AMOSS Solicitors
Name of appellant	Pat Carty
Appellant's solicitors	Litigant in Person

**1. Respondent Details**

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	David Van Dessel
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The respondent was served with the application for leave to appeal and notice of appeal on date
15 November 2018

The respondent intends :

to oppose the application for an extension of time to apply for leave to appeal

not to oppose the application for an extension of time to apply for leave to appeal

to oppose the application for leave to appeal

not to oppose the application for leave to appeal

<input type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
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<input type="checkbox"/>	to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court
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<input type="checkbox"/>	Other (please specify)

If the details of the respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:	<input checked="" type="checkbox"/>
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### Respondent's Representation

<b>Solicitor</b>			
Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode		Ref.	
How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

<b>Counsel</b>			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

<b>Counsel</b>			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address
Telephone no.
e-mail address

How would you prefer us to communicate with you?			
<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

**2. Respondent's reasons for opposing extension of time**

<p>If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused</p> <p>N/A</p>
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**3. Information about the decision that it is sought to appeal**

Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:

- (i) The Respondent objects to the contents of section 4 of the Application for Leave and Notice of Appeal on the grounds that it is prolix and consists of legal submission rather than a concise statement of the facts found by the trial court relevant to the issues identified in section 5 of same.
- (ii) The facts found by the trial Court relevant to the issues identified in section 5 of the Application for Leave and Notice of Appeal are those described in paragraphs 4 to 33 of the judgment of the High Court (Allen J.) of 12 November 2018 (the "Judgment").

#### **4. Respondent's reasons for opposing leave to appeal**

If *leave* to appeal is being contested, set out concisely here the respondent's reasons why:

- (i) This is an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. it is sought to appeal to the Supreme Court from the High Court). The Respondent does not intend to bring any cross-appeal seeking to vary the Order or Judgment the subject matter of the Application for Leave and Notice of Appeal.
- (ii) The Respondent contends that the decision in respect of which leave to appeal is sought does not involve a matter of general public importance in the following circumstances.
- (iii) These proceedings arise from the Respondent's appointment as Receiver over lands owned by the Appellant pursuant to the powers contained in mortgages and charges dated 20 December 2004 and 6 July 2005, and by same the Respondent seeks, *inter alia*, permanent injunctions restraining the Appellant from impeding and/or obstructing the Respondent from taking possession of the receivership property. The proceedings accordingly arise from private contractual arrangements made between the parties to the relevant loan agreements and security instruments (and/or their successors) and involve no issues of general public importance.
- (iv) On 16 March 2017, the High Court (Gilligan J.) made an interlocutory Order in these proceedings, *inter alia*, restraining the Appellant from impeding or obstructing the

Respondent from taking possession of the receivership property. While the Appellant was not present in court when the order was made, he had been served with the motion papers in compliance with prior Orders of the High Court; he had filed a detailed replying affidavit setting out his objections to the application; and had been notified of the hearing date for the application. The Appellant conceded before the High Court in the course of the application for attachment and committal that he had decided not to attend the hearing before Gilligan J. and that it had been a mistake not to do so. No stay was sought by the Appellant on the Order of 16 March 2017 and the said Order has not been appealed. The Appellant refused to comply with the said Order and, as a result, the Respondent issued a motion for attachment and committal on 28 March 2018 which resulted in the Order and Judgment the subject matter of the present leave application.

(v) In the circumstances, the Appellant's contention that the Judgment in relation to the attachment and committal application has created confusion in relation to the law on receiverships, and/or has resulted in "*the existence of conflicting judgments based on the same facts*" is without foundation. There are no conflicting judgments in this regard. In his affidavit which he filed in response to the Respondent's application for injunctive relief, and which was opened to the court at the hearing, the Appellant argued that the Respondent was not entitled to the injunctive relief which he had sought because the Deed of Appointment by which he had been appointed him as "*Receiver*" whereas the Deed of Mortgage defined the term "*Receiver*" to mean "*Receiver and Manager*." Despite this argument, Gilligan J. concluded that the Respondent was entitled to the injunctive relief sought. The Appellant then argued before Allen J. that no order for attachment or committal should be made because the Order of Gilligan J of 16 March 2017 should not be enforced because it is inconsistent with the subsequent judgment of McDonald J in *McCarthy v Moroney* [2010] IEHC 379 of 29 June 2018. In fact the two judgments are not inconsistent at all but even if it was not possible to reconcile them, this would not deprive Gilligan J's Order of legal force. The Appellant's argument was rejected by the High Court (see, *inter alia*, paragraphs 65 and 71-75 of the Judgment) and it is submitted that it is an argument devoid of any merit or any possible public importance.

(vi) Furthermore, even if it were desirable that the Appellant would be given leave to appeal to the Supreme Court for purposes of reconciling the "*different provisional conclusions on the strength of the same argument based on the same document*" (para. 73, Judgment) arrived at by Gilligan J in the present case and McDonald J in *McCarthy v Moroney*, it is submitted that no such clarification could occur in the proposed appeal because the appeal concerns an Order for attachment and committal which Allen J. made and not the

Order for injunctive relief which Gilligan J. made. The time for appealing Gilligan J's Order has long since expired. Furthermore, the Appellant has identified no reason why the clarification of the law in relation to receiverships which he seeks could not be pursued before the Court of Appeal.

- (vii) There are no exceptional circumstances warranting a direct appeal to the Supreme Court. In this regard, section 5 of the Application for Leave and Notice of Appeal does not identify any such exceptional circumstances.

#### 5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc. in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

- (i) The learned Trial Judge did not fail to have regard to the legal authorities opened to the High Court in relation to the meaning and effect of compliance with Mortgage deeds in the issue of a deed of appointments and the conflicting situation involving the Appellant's defence. In this regard, the learned High Court Judge had regard to the authorities which were opened to him by the Appellant and expressly referring in his Judgment to the cases of *The Merrow Limited v Bank of Scotland* [2013] IEHC 130 (paragraph 55, Judgment), *McCarthy v Moroney* [2018] IEHC 379 (paragraph 56, Judgment), *Maha Lingam v Health Service Executive* [2005] IESC 89, and *Rousk v Sweden* (Application No. 27183/04). Allen J also expressly confirmed in his judgment that he had read, *inter alia*, the written submissions filed by the parties (Judgment, paragraph 61).
- (ii) The learned trial judge did not fail to ensure the principles of existing law and precedent were applied to the Appellant, nor did he deny the Appellant the guarantees enshrined under Article 40.1 of the Constitution. In this regard, the Appellant argues that in light of his Constitutional right to equality before the law, the Order of Gilligan J of 16 March 2017 should not have been enforced, as enforcing the said Order resulted in different treatment for the Appellant when compared to the treatment afforded to the defendant in *McCarthy v Moroney* [2018] IEHC 379. This is an argued devoid of merit which, if accepted as correct, would mean that any Order could be rendered unenforceable by virtue of a subsequent Order in a different case. Furthermore, there has been no unequal treatment of the Appellant by reason of the delivery of the Judgment giving rise to any breach of his rights under Article 40.1.

(iii) The learned Trial Judge did not fail to take cognizance of the principles under Article 1 of the European Convention on Human Rights or the principles in *Rousk v. Sweden* (Application No. 27183/04). The High Court considered the judgment in *Rousk* at paragraph 64 of the Judgment and distinguished it from the present case on the basis that the decision in *Rousk* turned on the fact that the applicant's home was sold while he had appeals pending against the sale, whereas the Appellant did not apply for a stay on the Order of Gilligan J and did not appeal against the said Order. Furthermore, the Appellant does not live on the lands the subject matter of the Order of Gilligan J.

(iv) The learned Trial Judge did not err in his assessment of the High Court's jurisdiction to vary or set aside the Order of Gilligan J. The learned High Court Judge articulated the nature of the Court's jurisdiction in this regard between paragraphs 67 and 71 of the Judgment and correctly concluded at paragraph 71 that this was not a case in which the Court might exercise the said jurisdiction, in light of, *inter alia*, the fact that the Appellant was given every opportunity to participate at the hearing of the injunction application but did not, that the Appellant had put the case he wished to make in relation to the injunction application on affidavit, and that the Appellant's answer to the injunction application was, as far as was material, precisely the same as the argument now offered as to why the injunction should not be enforced.

Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:

David Whelan BL

Andrew Fitzpatrick SC

#### 6. Additional grounds on which decision should be affirmed

Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:

N/A

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

Yes

No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

Signed: AMOSS Solicitors

AMOSS Solicitors

Solicitors for the Respondent

**Please submit your completed form to:**

The Office of the Registrar to the Supreme Court

The Four Courts

Inns Quay

Dublin

This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.