

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

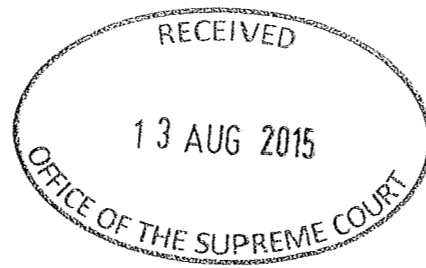
Leave is sought to appeal from	
<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court

[Title and record number as per the High Court proceedings]

Paul McCann and Patrick Dillon and by Order Bank of Scotland plc	v	The Trustees of the Victory Christian Fellowship being Brendan Hade, Sheila Hade and Gerry Byrne and Brian Hade, Niall Hade
High Court, Record No. 2013/5608P		Court of Appeal, Record No. 2014/1181 [Article 64 Transfer]
Date of filing		13 August 2015
Name(s) of Applicant(s)/Appellant(s)		Brendan Hade, Sheila Hade and Gerard Byrne as trustees of the Victory Christian Fellowship
Solicitors Applicant(s)/Appellant(s) for		Black and Company Solicitors
Name of Respondent(s)		Bank of Scotland plc
Respondent's solicitors		Arthur Cox
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input checked="" type="checkbox"/> Yes		<input type="checkbox"/> No
If yes, give [Supreme Court] record number(s)		2014/44
Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Mahon J.
Date of order/Judgment	Judgment dated and delivered 10 June 2015 Orders pronounced 17 June 2015 and perfected 20 July 2015.



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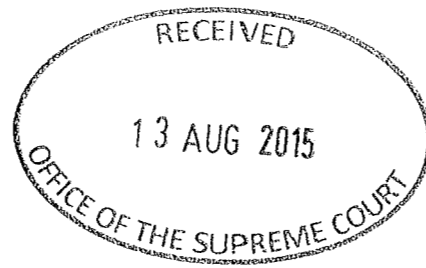
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2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	The Trustees of the Victory Christian Fellowship being Brendan Hade, Sheila Hade and Gerard Byrne
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Original status	<input type="checkbox"/> Plaintiff	<input checked="" type="checkbox"/> Defendant
	<input type="checkbox"/> Applicant	<input type="checkbox"/> Respondent
	<input type="checkbox"/> Prosecutor	<input type="checkbox"/> Notice Party
	<input type="checkbox"/> Petitioner	

Solicitor			
Name of firm	Black and Company Solicitors		
Email	office@blackco.ie		
Address	28 South Frederick Street Dublin 2	Telephone no.	(01) 679 5170
		Document Exchange no.	104 Dublin
Postcode	D02 YW57	Ref.	GB/EMcD

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)

Counsel			
Name	Patrick F. O'Reilly S.C.		
Email	patrick@patrickoreillysc.ie		
Address	Distillery Building 145-151 Church Street Dublin 7	Telephone no.	(01) 817 4900
		Document Exchange no.	816004 Dublin
Postcode	D07 WDX8		
Counsel			
Name	Ronan Quinn		
Email	Ronan.quinn@lawlibrary.ie		
Address	Distillery Building 145-151 Church Street Dublin 7	Telephone no.	(01) 817 4912
		Document Exchange no.	818236 Dublin
Postcode	D07 WDX8		

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	N/A
e-mail address	N/A
Telephone no.	N/A
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)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	Bank of Scotland plc
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Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant
	<input type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent
	<input type="checkbox"/>	Prosecutor	<input checked="" type="checkbox"/>	Notice Party upon its own motion on 10 July 2013
	<input type="checkbox"/>	Petitioner	<input checked="" type="checkbox"/>	Plaintiff by Order of the Court 24 July 2013 (on consent of the parties)

Solicitor			
Name of firm	Arthur Cox		
Email	mail@arthurcox.com		
Address	Earlsfort Centre Earlsfort Terrace Dublin 2	Telephone no.	(01) 618 0000
		Document Exchange no.	27 Dublin
		Ref.	Richard Willis
Postcode	D02 CK83		

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)

Counsel			
Name	Rossa Fanning		
Email	rossa@fanning.ie		
Address	Distillery Building 145-151 Church Street Dublin 7	Telephone no.	(01) 817 5425
		Document Exchange no.	816506 Dublin
		Postcode	D07 WDX8

If the Respondent is not legally represented please complete the following

Current postal address	N/A
e-mail address	N/A
Telephone no.	N/A

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)

4. Information about the decision that it is sought to appeal

Please set out below:

whether it is sought to appeal from (a) the entire decision or (b) a part or parts of the decision and if (b) the specific part or parts of the decision concerned

(a) a concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5 below and on which you rely (include where relevant if certain facts are contested)

(b) in the case where it is sought to appeal in criminal proceedings please provide a concise statement of the facts that are not in dispute

the relevant orders and findings made in the High Court and/or in the Court of Appeal

1. Decisions being appealed:

The appellants are trustees of a church who are the first, second and third defendants. They seek to appeal the entire decision of the Court of Appeal. The appeal before the Court of Appeal was from a decision of the High Court (Gilligan J.) confirming the appointment of the plaintiff receivers over the trust's properties and granting judgment to the plaintiff bank for €18,758,244.88 and costs. Para. 4 of Mahon J.'s judgment in the Court of Appeal reflects that "*in the course of the hearing of the appeal, senior counsel on behalf of the defendants acknowledged that the said sum was due and owing to the bank and that the Order for Judgment in this sum is not now being appealed*". The appeal which was dismissed sought to set aside the appointment of the plaintiff receivers on grounds that the plaintiff bank had appointed them based on information disclosed to it by the defendants' agent in breach of confidence.

2. Findings of the Court of Appeal:

The appointment of the defendants' agent to deal with the bank 5 October 2012

Para. 6 of Mahon J.'s judgment states that "*[o]n 5th October 2012, the defendants notified ... (the bank) of the appointment of an accountant, Mr. L, to represent them in discussions and negotiations in relation to their indebtedness to the bank. Between that date and 29th May 2013" (when the receivers were appointed) "a number of meetings took place between Mr. L and the bank, and there was also email and telephone contact during this period. The focus of the contact between Mr. L. and the bank was to arrive at a consensus to deal with the Fellowship's very substantial indebtedness to the bank, and more particularly the transfer of that indebtedness to another bank"*.

The strategy agreed between the bank and the defendants' agent 26 March 2013

At para. 9 of Mahon J.'s judgment the Court referred to "*a meeting between the parties on 26th March 2013 (where) the possibility of reaching a consensual solution was discussed. Clearly, it was agreed at this meeting that some further time would be afforded to the defendants to arrive at a solution acceptable to both sides. An email from the bank at that time stated that "if the bank and borrower cannot agree on a number for a consensual sale or funding/refinance is not concluded within, say, three/four months, the bank will require to explore other options and this could involve taking control of the assets through an insolvency process."* It was accepted by the learned High Court judge that evidence from Mr. Arkinson, a bank official, satisfied him that as of 26th March 2013 no agreement had been reached between the parties, but that a consensual solution strategy was being discussed at that time".

The appointment of the receivers by the bank 29 May 2013

The bank appointed receivers over the properties on 29 May 2013. Following resistance from defendants and their congregants on 31 May 2013 the receivers applied *ex parte* to

the High Court (Ryan J.) and obtained an interim injunction to secure possession.

The discovery by the defendants of their agent's unauthorised disclosures to the bank

Para. 14 reflects that "[d]ocumentation discovered to the defendant in the course of these proceedings included a number of attendances, minutes and emails of meetings involving personnel of the bank and, on occasion, the defendant's agent, Mr. L." from which the defendants became aware for the first time that their agent Mr. L. had disclosed information detrimental to them to the bank without their knowledge or consent.

Para. 13 describes the two pieces of confidential information disclosed to the bank as "firstly, that the Revenue Commissioners had withdrawn the charitable status of the Fellowship with retrospective effect from 1st January 2009 and, secondly, allegations against the defendants that a number of fraudulent invoices facilitating VAT fraud were purportedly presented for payment to the bank during the construction of the defendant's premises by a party connected to the Fellowship. ... Undoubtedly, both matters which were the subject of this disclosure of information to the bank were matters which, at a minimum, had the potential to adversely affect the financial position of the Fellowship text".

Para. 29 states that "[i]n this case, Mr. L. disclosed confidential information to the bank without his client's authority and, undoubtedly, the bank received this confidential information, and willingly did so, in circumstances where it knew that the information was being disclosed to it without the authority of the defendants. It did not advise the defendants that it had been provided with the information by Mr. L."

3. The orders and findings in the Court of Appeal:

The plaintiff receivers did not refer to the unauthorised disclosure in their *ex parte* application for interim relief. At para. 41 of the Court of Appeal's judgment Mahon J. states that "it is this Court's view that the receivers, in seeking equitable relief, objectively, had a duty of candour to disclose all relevant information relating to their appointment and this duty obliged them to make reference to the disclosure of confidential information to the bank by Mr. Dillon in his grounding affidavit. It is information which the High Court should have been made aware having regard to the fact that application sought relief in aid of the receivership." When dismissing the appellants' appeal, the Court of Appeal discounted by 25% the costs of the appeal awarded to the respondents as a mark of the Court's displeasure at the failure at the *ex parte* stage to disclose to the High Court the fact that the unauthorised disclosure had taken place. The Court of Appeal made no variation of the Orders of the High Court.

Para. 42 states that "[t]he bank had a contractual entitlement to appoint Receivers, and had a reason for so doing in any event in the absence of the confidential information being disclosed to them".

Para. 43 states that "[t]he most that can be said is that the disclosure of the unauthorised information heightened, to some degree, concern (concern that was present in any event because of the extent of the indebtedness and the failure to make repayments) within the bank as to the prospect of recovering its debt. As I have already indicated, I believe that the bank's knowledge of the confidential information was not, ultimately, a significant factor in the decision to appoint Receivers".

Para. 44 states that "[h]aving so concluded it is unnecessary to consider, in circumstances where the receipt of the unauthorised confidential information solely or primarily precipitated the appointment of Receivers, whether equity could intervene to prevent or invalidate such appointment where there existed in any event a contractual entitlement to make such appointment because of a breach of a debt repayment provision".

The appeal was dismissed.

5. Reasons why the Supreme Court should grant leave to appeal

In the case of an application for leave to appeal to which Article 34.5.3° of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—

Please list (as 1, 2, 3, etc) concisely the reasons in law why the decision sought to be appealed involves a matter of general public importance and / or why in the interests of justice it is necessary that there be an appeal to the Supreme Court

1. The Court of Appeal found at para. 29 of Mahon J.'s judgment that the plaintiff bank "knew that the information" (namely allegations made by the defendants' agent) "was being disclosed to it without the authority of the defendants". The Court of Appeal found at para. 42 that "[i]t may have been the case and probably was the case, that the confidential information provided to it by Mr. L did go some way to prompt the bank to make its decision to appoint Receivers" over the defendants' properties. In light of this finding the Court of Appeal failed to correctly balance the legal and equitable rights of the parties. This was so even where the bank only partly relied on the disclosure in appointing receivers.
2. The Court of Appeal erred in finding at para. 44 of Mahon J.'s judgment that "it is unnecessary to consider, in circumstances where the receipt of the unauthorised confidential information solely or primarily precipitated the appointment of Receivers, whether equity could intervene to prevent or invalidate such appointment where there existed in any event a contractual entitlement to make such appointment because of a breach of a debt repayment provision". In doing so the Court of Appeal failed to have proper regard to the Supreme Court's jurisprudence in the area and in particular *Mahon v. Post Publications Ltd.* [2007] IESC 15, [2007] 3 I.R. 338 and *House of Spring Gardens v. Point Blank* [1984] I.R. 611 and has created confusion as to the correct balance between the legal and equitable rights of parties; particularly in the case of a financial institution.
3. In deciding the within matter the Court of Appeal disregarded the duty of the plaintiff bank to inform the defendants before exercising its legal rights of information it had received about them by reason of the unauthorised disclosure. It is in the interests of justice and a matter of public importance that this be the subject of a Supreme Court judicial determination. This is particularly so in light of the Court of Appeal's finding at para. 41 of Mahon J.'s judgment "that the receivers, in seeking equitable relief, objectively, had a duty of candour to disclose all relevant information relating to their appointment and this duty obliged them to make reference to the disclosure of confidential information to the bank by Mr. Dillon in his grounding affidavit. It is information which the High Court should have been made aware having regard to the fact that application sought relief in aid of the receivership".
4. The Court of Appeal made a finding at para. 43 of Mahon J.'s judgment that "[t]he most that can be said is that the disclosure of the unauthorised information heightened, to some degree, concern (concern that was present in any event because of the extent of the indebtedness and the failure to make repayments) within the bank as to the prospect of recovering its debt. As I have already indicated, I believe that the bank's knowledge of the confidential information was not, ultimately, a significant factor in the decision to appoint Receivers". In doing so the Court of Appeal failed to have regard to the interests of justice which weighed in favour of the defendants being made aware of the confidential information before the bank exercised its contractual rights against them. It is of general public importance and in the interest of justice that such issue be determined by the Supreme Court.

~~*In the case of an application for leave to appeal to which Article 34.5.4° of the Constitution applies (i.e. where it is sought to appeal to the Supreme Court from the High Court)—*~~

~~Please list (as 1, 2, 3, etc) concisely the reasons in law:~~

~~i. why the decision sought to be appealed involves a matter of general public importance and/or why in the interests of justice it is necessary that there be an appeal to the Supreme Court and~~

~~ii. why there are exceptional circumstances warranting a direct appeal to the Supreme Court~~

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

Please list (as 1, 2, 3, etc) concisely:

1. The specific ground(s) of appeal and the error(s) of law related to each numbered ground:

1. The Court failed to have due or any regard to the jurisprudence in respect of breach of confidence and its application in the present situation where the respondent financial institution had been given information by a third party about the appellants which affected the appellants' banking relationship with it; which it knew had been disclosed without the appellants' consent or knowledge; and yet acted on foot of it without first putting the disclosures to the appellants.

2. The Court failed to have sufficient or any regard to the balance of equity and law in finding that the appellants' indebtedness absolved the respondent bank from any obligations under equitable principles.

3. In addition and or in the alternative the Court failed to correctly apply the golden rule of duty of candour at the *ex parte* stage.

2. The legal principles related to each numbered ground and confirmation as to how that/those legal principle(s) apply to the facts or to the relevant inference(s) drawn therefrom.

1. The unauthorised disclosure was information that had "*the necessary quality of confidence*"; was communicated in circumstances importing an obligation of confidence; and was used to the detriment of the party communicating it. The Court of Appeal incorrectly imputed motives to the disclosure finding at para. 37 of Mahon J.'s judgment that "*it may well have been the case that he felt himself under a legal obligation to inform the bank of information which was potentially detrimental to the interests of the (appellants)*", particularly when the Court had found as a fact at para. 36 that "*the reasons why Mr. L. in this case passed on information which was clearly confidential ... are unknown*".

2. The appellants contend that the Court failed to have sufficient or any regard to the equity of the case. The Court placed undue weight on the appellants' indebtedness disregarding the respondent bank's obligation to exercise its legal (contractual) rights as against its customer (the appellants) with due regard to the equity of the situation.

3. When applying for *ex parte* relief a plaintiff must, in the absence of the defendant, disclose to the Court all matters relevant to the exercise of the Court's discretion whether or not to grant relief, failing which the *ex parte* order will be discharged; and to mark its displeasure the Court may refuse further *inter partes* relief even though it may be warranted. The undisclosed facts were material to the application for *ex parte* relief and were at least capable of affecting the mind of the Court in the exercise of its discretion. The respondent receivers (who originally instituted these proceedings to obtain possession) grounded their *ex parte* application for interim relief on the indebtedness alone without any reference to the unauthorised disclosure.

3. The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely.

None such.

4. The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal

1. The Court of Appeal incorrectly dismissed the defendants' appeal where the learned High Court judge failed to have due or any regard to the jurisprudence in respect of breach of confidence and its application in the present situation.

2. The Court of Appeal failed to have adequate regard to the jurisprudence in respect of the issues contended.

3. The Court of Appeal erred in placing too much or any reliance on the appellants' indebtedness in considering the respondent bank's obligations under equitable principles.
4. The Court of Appeal failed to exercise its discretion to refuse *inter partes* relief where the moving party withheld facts material to its application for *ex parte* relief.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Ronan Quinn

7. Other relevant information

Neutral citation of the judgment appealed against e.g. Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

[2015] IECA 117

References to Law Report in which any relevant judgment is reported: *none such*

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

The appellants, the first, second and third defendants, seek an Order vacating the judgment of the learned High Court Judge of the 3rd day of December 2013 insofar as it granted "*permanent injunctive relief restraining the defendants from interfering with the three properties*" and further seek an Order vacating the judgment of the learned Court of Appeal Judge of the 10th day of June 2015 dismissing their appeal. The appellants, the first, second and third defendants, also seek that the costs Orders against them of both the High Court and the Court of Appeal be vacated and that they be awarded the costs of the High Court and Court of Appeal together with the costs of the within appeal.

What order are you seeking if successful?

Order being set aside vary/substitute

Original order: set aside restore vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution

N/A

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention

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:

This appeal is likely to entail a short hearing before this Court.

Signed: *Black & Company*

Black and Company

(Solicitor for) the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court

The Four Courts

Inns Quay

Dublin

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

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.