

SUPREME COURT

Respondent's Notice

Supreme Court Record No: 35/15
Court of Appeal Record No: 2014/84

THE HIGH COURT

Record No: 2013 / 1056 S

BETWEEN:

ACC LOAN MANAGEMENT LIMITED

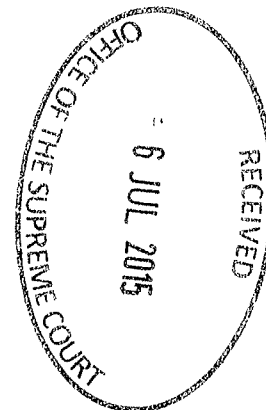
PLAINTIFF / RESPONDENT

-AND-

BRENDAN DOWLING

DEFENDANT / APPELLANT

Date of Filing: 6 July 2015
Name of Respondent: ACC Loan Management Limited
Respondent's Solicitors: A&L Goodbody
Name of Appellant: Brendan Dowling
Appellant's Solicitors: Not applicable / Litigant in Person



1. Respondent Details

Respondent's full name: ACC Loan Management Limited (ACC)

The Respondent was served with the application for leave to appeal and notice of appeal on date: 23 June 2015

The Respondents intend:

- 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
- To ask the Supreme Court to dismiss the appeal

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

Other

Respondent's Representation

	Solicitor
Name of firm	A&L Goodbody
Email	ehurley@algoodbody.com ; tcasey@algoodbody.com
Address	International Financial Services Centre, North Wall Quay, Dublin 1
Telephone No:	01 649 2930; 01 649 2959
DX No:	29 Dublin
Ref:	TCA/EHY 01412847

How would you prefer us to communicate with you?

By email

	Counsel
Name:	Brian Kennedy
Email:	brian@bkennedy.ie
Address	2 Arran Square, Arran Quay, Dublin 7.
Telephone No:	01 872 9488
DX No:	812143

	Counsel
Name:	Kenneth Bredin
Email:	bredink@gmail.com
Address	Suite 146/147, The Capel Building, St Mary's Abbey, Capel Street, Dublin 7
Telephone No:	01 828 0356
DX No:	814095

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

Not Applicable

3. **Information about the decision that it is sought to appeal**

The information set out in section 4 of the Notice of Appeal with respect of the Orders and findings of both Courts below is not complete and a concise statement of facts / findings has not been provided.

HIGH COURT

Name of Judge: O'Malley J

Date of Order / Judgment: 3 December 2014 (perfected 10 December 2014)

Neutral citation of the Judgment appealed against if known:

Not applicable. However a transcript of the judgment was prepared by Counsel for the Plaintiff and signed by O'Malley J. Same is attached and filed herewith at **Schedule 1**.

The relevant Orders made in the High Court:

An Order adjourning the proceedings for plenary hearing with a direction that the Plaintiff file a Statement of Claim by 12 January 2015 and the Defendant file a Defence within four weeks thereafter; and an Order reserving the costs of the proceedings with the exception of the costs of the first four Affidavits filed by the Plaintiff in the Motion for judgment.

Concise statement of facts / findings:

- (i) In this case the rate of interest applicable to the loan facility the subject matter of the proceedings was fixed by reference to the three month EURIBOR from 1 August 2008 onwards.
- (ii) It is more than arguable that where a person enters into a loan contract by reference to a particular rate of interest, there is an implied term that the rate is lawfully fixed. There is clear evidence in this case that over a period of time the EURIBOR rate was fraudulently and unlawfully manipulated. It is arguable that this was a breach of the implied term referred to.
- (iii) Insofar as the impact of that breach was concerned, nobody can say what that is. One cannot say the extent to which the rate for example has been affected, either upwards or downwards. In the opinion of the learned High Court judge, there were grounds for arguing that there was an unlawful element to the claim.
- (iv) Although there is only one defence of substance, where leave to defend is granted the Defendant is entitled to raise any ground of defence. In those circumstances leave to defend is not or should not be limited to just one ground of defence.
- (v) Judgment was not granted in part. Although the amount of the total interest applied to the account for the three month period commencing on 1 August 2008 was identified, the figure which allowed for the effect of being compounded since it was applied to the account was not available.

COURT OF APPEAL

Name of Judges: Ryan P, Kelly and Irvine JJ.

Date of Order / Judgment: Order made 28 April 2015 (perfected 27 May 2015)

Neutral citation of the judgment appealed against if known: Not yet available

The relevant orders made in the Court of Appeal:

- (1) An Order allowing the appeal and setting aside the Judgment and Order of the High Court; and

- (2) An Order granting judgment against the Defendant in the sum of €140,245.35 and awarding the costs of the appeal and proceedings to the Plaintiff.

Concise statement of facts / findings:

- (i) The High Court had referred the entire claim to plenary hearing on the basis of the illegality alleged. In this respect the High Court was in error. There was no basis on which the whole of the claim could be considered to be in dispute. At best from the Defendant's point of view, only a portion of the interest claimed was in issue.
- (ii) According to the Defendant the issue is one of "*clean hands*". He argues that there is a clear acknowledgement by Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (ACC's parent company and hereinafter referred to as **Rabobank**) of wrongdoing for a period of time in terms of interference with the proper calculation of the EURIBOR rates, and that ACC therefore cannot be entitled to recover in this case by reason of its association with Rabobank. ACC argues, based on the case-law, that an implied term as held in the High Court cannot be implied into Mr Dowling's loan agreement with ACC. The Court accepts ACC's contention and agrees that an implied term of the kind the High Court suggested could not arise to defeat the entitlement to claim the money due on the agreement.
- (iii) Even if one assumes that the allegations of wrongdoing against Rabobank set out in the US Department of Justice Statement of Facts are correct, Mr Dowling nevertheless must demonstrate some element of loss. In the present case, Mr Dowling has not demonstrated or quantified any such loss. The UK authorities and case-law show that if a claim for loss is set up and calculated, that may give rise to a cause of action against the bank concerned or, at most, a set-off. However that itself requires a number.
- (iv) Mr Dowling submitted that if the matter was referred to plenary hearing that would allow the entire relationship between ACC and Rabobank to be explored. Mr Dowling might then discover materials which would yield up a defence to the claim. However this is not a basis for remitting the matter to plenary hearing.

4. Respondent's reasons for opposing leave to appeal

- 4.1. The decision in respect of which leave to appeal is sought does not involve a matter of general public importance.
- 4.2. There is no novel legal issue involved. The decision of the Court of Appeal (and the High Court) involved the application of the well-established legal principles on whether summary judgment should be granted or whether the claim should instead be referred in whole or in part to plenary hearing. There was no particular dispute regarding these legal principles.
- 4.3. Whilst those legal principles were applied to the particular circumstances of this case and the particular defences raised by Mr Dowling, that does not render the case of general public importance.
- 4.4. It is also not, in the interests of justice, necessary that there be an appeal to the Supreme Court.

- 4.5. The Motion for judgment in the present case was the subject of a full hearing in both the High Court and the Court of Appeal.
- 4.6. Mr Dowling relies on alleged breaches of the Constitution (Article 34.6.1) and the European Convention on Human Rights (Article 6) in the hearing conducted before the Court of Appeal as justifying leave to appeal. The factual basis for these allegations is set out in a limited fashion in Section 6 of the Notice of Appeal. However, the hearing before the Court of Appeal involved no breach whatsoever of Mr Dowling's constitutional rights or entitlement to fair procedures.
- 4.7. It is accepted that ACC filed a Supplemental Affidavit on 2 April 2015 for the purposes of the appeal. This Supplemental Affidavit sought to establish, by way a forensic analysis, that the Defendant had suffered no actual loss in this particular case, even if wrongdoing by Rabobank in connection with the calculation of EURIBOR rates was assumed (and even if it were relevant to the Defendant's loan from ACC). Mr Dowling filed a Replying Affidavit on 9 April 2015 which challenged the accuracy and validity of that analysis, but did not object to its admissibility. Mr Dowling's Affidavit also introduced new allegations and evidence on a number of matters put forward by way of a defence to the claim, including the allegation of common directorships, referred to at paragraph 2 of the Grounds of Appeal in section 6 of Mr Dowling's Notice of Appeal to this Court. These matters were in turn responded to by ACC by a further Affidavit sworn on 22 April 2015. Neither party objected to the admissibility of these affidavits at the hearing before the Court of Appeal. Mr Dowling cannot now assert that the Court of Appeal should not have admitted these Affidavits into evidence in circumstances where he never sought to object to their admission at the hearing. Furthermore Mr Dowling cannot realistically object to the admission of these Affidavits where he himself seeks to rely on the new matters raised in his own Affidavit sworn for the purposes of the appeal.
- 4.8. There is simply no evidence of bias in the hearing in the Court of Appeal. The admission of the Affidavits referred to above – without objection by Mr Dowling – and the rejection of his arguments with respect to the accuracy and validity of the analysis conducted by ACC is not bias, but a determination made in the normal course of the appeal hearing. Furthermore, in circumstances where Mr Dowling's own Replying Affidavit was also admitted, it is clear that an equal latitude was shown to both parties in terms of the admission of evidence.
- 4.9. Mr Dowling has failed to set out a concise statement of relevant facts found by the High Court and the Court of Appeal (including contested facts) in the Notice of Appeal.

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

- 5.1. The Court of Appeal concluded that Mr Dowling had not set out an arguable defence to the claim either in whole or in part. This decision was entirely correct and there was no evidence put forward on Affidavit to support any other conclusion.
- 5.2. The decision of the Court of Appeal was manifestly within its discretion and supported by the evidence before it. There is no basis in those circumstances to set aside that decision.
- 5.3. ACC relies upon and repeats the grounds it set out and argued in its appeal against the decision of the High Court. In this respect, ACC refers to and relies upon the Notice of Expedited Appeal filed in the Court of Appeal on 12 December 2014 and the written legal submissions filed by ACC on 5 February 2015, copies of which are attached at **Schedule 2**.
- 5.4. In particular, in giving Mr Dowling leave to defend, the High Court had found that it is more than arguable that where a person enters into a loan contract by reference to a particular rate

of interest, there is an implied term that the rate is lawfully fixed and that insofar as the EURIBOR rate had been fraudulently and unlawfully manipulated, it was arguable that there was a breach of such an implied term.

- 5.5. Insofar as the High Court considered that it was arguable that such an implied term arises irrespective of whether the party to the contract is the party which entered into the loan agreement, there can be no basis at law for implying such a term. Insofar as the High Court considered that it was arguable that such an implied term arises where the party to the loan contract engages in inappropriate behaviour, ACC relies on the fact that neither it nor its officers or employees had any involvement whatsoever in the submission process for EURIBOR rates. Although Rabobank is the indirect parent company of ACC and was involved in the submission process for EURIBOR rates (together with in excess of forty other financial institutions), it is manifestly a separate legal entity. The position of ACC cannot be equated to the position of Rabobank. In those circumstances, Mr Dowling had no defence in respect of any claim brought by ACC (or any entitlement to make a counter claim against ACC) in respect of the said submission of EURIBOR rates.
- 5.6. Furthermore if there had been any breach of an implied term, the appropriate characterisation of such a claim* would be that the breach amounted to a breach of warranty, entitling Mr Dowling to maintain a claim for damages, as opposed to one which could in some way disentitle ACC from recovering sums advanced by it to Mr Dowling, together with such interest as was appropriate.
- 5.7. The defence or claim raised by Mr Dowling – even if arguable – could only apply to a small portion of the interest claimed in the proceedings. In this respect, the appropriate Order at a minimum was to grant judgment to ACC in such lesser amount as to which there was no valid or bona fide dispute and adjourn only the balance of the claim to plenary hearing. Accordingly, to this extent, it was incumbent on Mr Dowling to demonstrate and quantify, at least in broad terms, his alleged loss.
- 5.8. However Mr Dowling was not able to establish any loss had been incurred by him in the present case. Indeed, Mr Dowling made no attempts to establish or set out that loss. By contrast, ACC put forward convincing evidence that the Defendant had incurred no such loss.
- 5.9. Without prejudice to the foregoing, if any part of the ACC's claim is to be remitted for plenary hearing, the same should be limited to the ground or grounds of defence which are arguable.
- 5.10. Such further or other grounds as this Honourable Court may permit to be advanced at the hearing of this appeal.

Name of Counsel or Solicitor who settled the grounds of appeal from the High Court to the Court of Appeal (if the appellant is legally represented), or name of appellant in person:

Brian Kennedy S.C.
Kenneth Bredin B.L

6. Additional grounds on which decision should be affirmed:

Not applicable

7. Are you asking the Supreme Court to:

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

Yes

No

If Yes, please give details below:

Not Applicable

(ii) make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:

Not Applicable

(iii) Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

ACC relies on the fact that the proceedings were brought by way of summary summons and, consequently, if the appeal were successful, it would be necessary for the proceedings to be remitted to plenary hearing, meaning that it would be some time before they were disposed of. In addition, it wishes to bring finality to this matter in view of the extended number of Court applications made in this respect.

Date: 6 July 2015

Signed: A&L Goodbody
A&L Goodbody