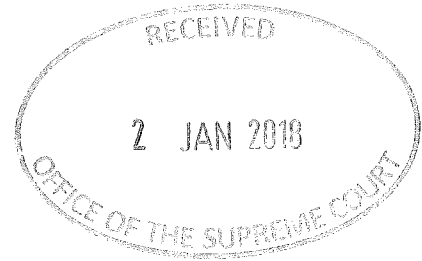


Appendix FF  
No. 2

O. 58, r. 18(1)

**SUPREME COURT**

**Respondent's Notice**



Supreme Court record number	S:AP:IE:2017:000166
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[Title and record number as per the High Court proceedings]

Permanent TSB plc and Cheldon Property Finance Limited	v	Jerry Beades
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Date of filing	2 January 2018
Name of respondent	Cheldon Property Finance Limited
Respondent's solicitors	Arthur Cox
Name of appellant	Jerry Beades
Appellant's solicitors	N/A – Appellant is a 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	
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The respondent was served with the application for leave to appeal and notice of appeal on date
19 December 2017

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

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 (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 type="checkbox"/>
--	--------------------------

Respondent's Representation

Solicitor			
Name of firm	Arthur Cox		
Email	dublin@arthurcox.com, Jillian.conefrey@arthurcox.com		
Address	Ten Earlsfort Terrace Dublin 2	Telephone no.	(01)920 1000
		Document Exchange no.	DX 27 Dublin
Postcode	D02T380	Ref.	2148/CH186/001
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	Barry O'Donnell SC		
Email	barryodonnell@barryodonnell.ie		
Address	Distillery Building 145 – 151 Church Street Dublin 7	Telephone no.	(01) 8174953
		Document Exchange no.	816597
Postcode	D07WDX8		

Counsel			
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

*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*

N/A

## 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:*

At section 4 of the *Application for Leave and Notice of Appeal*, the Appellant sets out what appear to be extracts from his notes of the judgment of the Court of Appeal from which he seeks leave to appeal. This Respondent disputes that the matters set out in section 4 of the Application for Leave accurately describes the judgments, and in any event does not constitute a "*concise statement of the facts found by the trial court (in chronological sequence) relevant to the issue(s) identified in Section 5*".

In light of that difficulty, the second Respondent proposes to set out a more detailed account of the factual issues and the findings of the Court of Appeal.

The first Respondent commenced proceedings against the Appellant seeking possession of three properties that had been mortgaged by the Appellant as security for a substantial loan. The proceedings were initiated by a Special Summons dated 12 June 2012, which was later amended to clarify the descriptions of the properties, and further amended to reflect a change in the name of the first Respondent.

The first Respondent relied, inter alia, on an affidavit of the 28 August 2012 sworn by Leo Gallagher, a manager in the commercial department of the first Respondent. That affidavit out that:

- (a) The Appellant sought a loan to finance three investment properties in Fairview. The premises comprised an investment property operated as a Bed and Breakfast.
- (b) The first Respondent issued a letter of offer dated 4 October 2002 offering a loan of €1.2 million. Among the terms attaching to the loan offer, the Appellant was to grant a legal mortgage / charge over the properties.
- (c) On or about 20 December 2002, the Appellant accepted the loan offer; and the loan was drawn down on or about the same date. The relevant acceptance form shows that the Appellant agreed that he had received the Letter of Approval, the Commercial Mortgage Loan Approval Conditions, and the Irish Permanent Commercial Mortgage Conditions 1999 for Natural Persons.
- (d) On or about the 23 December 2002, the Appellant executed an Indenture of Mortgage in respect of the properties; and the Indenture of Mortgage was registered in the Registry of Deeds on the 6 February 2003. The Indenture of Mortgage dated 23 December 2002 and the relevant terms and conditions were exhibited to Mr Gallagher's affidavit.
- (e) In breach of the Appellant's agreements with the first Respondent, the mortgage account fell

into arrears. By letter dated 29 November 2010, a formal written demand for possession was made by first Respondent, by which stage the arrears were €100,678.72 and the balance on the loan was €1,093,606.77.

- (f) A further written demand was sent to the Appellant by the solicitors for the first Respondent on 16 April 2012.
- (g) As no satisfactory proposal was forthcoming the proceedings were commenced.

McGovern J. in the High Court delivered his judgment on the 6 March 2014, and the consequent order was perfected on the 26 March 2014. The Order of the trial Judge granted the first Respondent possession of the three properties identified in the amended Special Summons.

The decision of the Court of Appeal in this case was in the form of an *ex tempore* judgment delivered shortly after the conclusion of the hearing on the 13 November 2017, by Ryan P.

Irvine J. and Whelan J. agreed with decision of Ryan P., albeit that Whelan J. made some additional observations. In that regard and with a view to assisting this Court the second Respondent has appended to this document an extract from the transcript of the hearing that contains the judgment and the application for consequential orders, together with the Judgment and Order of McGovern J. in the High Court.

Ryan P. identified the following:

The properties had been the subject of a mortgage executed by the Appellant on 23 December 2002 (the transcript erroneously identifies the date of the mortgage as 23 December 2012). The mortgage was on certain terms and conditions. These included terms providing for repayment, and terms that prescribed the consequences if there was default in payments under the mortgage.

The principal default provision entitled the mortgagee to apply for and obtain an order for possession of the properties. The first Respondent brought proceedings for possession, and McGovern J granted the orders. Subsequent to the High Court proceedings, the benefit of the mortgages were transferred to the second Respondent and in due course an Order was made in the Court of Appeal joining the second Respondent as co-plaintiff to the proceedings and co-respondent to the Appeal.

Ryan P. then set out the evidence that was before the High Court:

The case was set out in affidavits from Mr Gallagher and Ms Ferns. The affidavits described the mortgage and set out that there had been default. Notice of demand for possession was served on the Appellant on 29 November 2010, at a time when there was owing circa €1,093,000. The solicitors for the plaintiff served a further demand for possession on 16 April 2012.

The Appellant filed an affidavit in the High Court. The Appellant stated that the first Respondent was no longer in existence and the proceedings should therefore be dismissed. The Appellant stated that there were errors relating to the title of the properties that were the subject of litigation in the Circuit Court. The Appellant stated that he did not receive certain exhibits to the affidavit of Mr Gallagher. The Appellant stated that he had not received the letters of demand at the last address that he had advised to the Bank. The Appellant also raised certain issues relating to the Bankers Books Evidence Acts.

Ryan P. then noted the judgment of the High Court stated that the Appellant had raised a number of technical issues but that he had not denied that the sums claimed or a substantial part thereof were due and owing.

Ryan P. found that while one of the first Respondent's affidavits appeared to be defective, each item of the elements of the claim had been verified in the affidavits of Mr Gallagher and Ms Ferns.

Ryan P. found that by reference to the terms and conditions of the mortgage agreement there was no need for the plaintiff serve a formal letter of demand. The event of default triggered the entitlement of the bank to seek possession.

There was evidence before the High Court of default in the payment of instalments, and subject to an application to admit new evidence in the Court of Appeal, this was not in dispute.

Ryan P. considered the issue of a late application to admit fresh evidence that had been filed a short number of days before the hearing in the Court of Appeal.

Ryan P. found that evidence of a valuation report prepared at the time of the mortgage was available at the time of the hearing in the High Court or could have been available with reasonable diligence. The Appellant sought to admit the valuation report in order to show that there was a question as to the boundaries of the properties that had been mortgaged.

Ryan P. found that even if it had been proper to admit the evidence of the valuer, this evidence did not address the question of title. Ryan P. found that there was no issue around the identity of the properties that had been mortgaged, which had been described by the Appellant in the mortgage deed.

Ryan P. found that the properties that had been mortgaged were commercial in nature, being a bed and breakfast premises, and not residential; and that the loan was commercial.

Ryan P. also found that evidence from a forensic accountant that the Appellant had sought to adduce in the Court of Appeal did not assist the Appellant. That evidence – which purported to show overcharging of interest – did not displace the evidence that there had been events of default, which entitled the plaintiff to claim possession of the premises.

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

*Note: the second Respondent does not seek to appeal, cross appeal or vary the order in respect of which the application for leave is being made.*

The reasons set out herein are framed by reference to the recent Determination of this Court in *PWC v Quinn Insurance* [2017] IESC 73.

The judgment of the Court of Appeal in respect of which leave to appeal is sought does not involve a matter of general public importance. On the contrary, this action involved the private law enforcement of a contractual right contained in a mortgage agreement. As such, the application in the High Court and later in the Court of Appeal was entirely straightforward.

The Appellant has failed to identify any matter of general public importance arising from the Judgment. This clearly is a case in which the default position now provided for in Article 34 of the Constitution that all appeals will be determined finally by a decision of the Court of Appeal is applicable. There are no exceptional reasons why the Appellant should be granted leave to appeal to this Court.

The second Respondent will address each of the reasons set out by the Appellant in section 5 of the

Application for Leave to Appeal document.

*Fair procedures (Appellant's reason no. 1)*

In respect of the assertion that the Appellant was not afforded fair procedures, this is not a matter of general public importance and an appeal is not required in the interests of justice. The claim has not been explained by the Appellant in his Application for Leave and Notice of Appeal. Insofar as this appears to relate to an attempt by the Appellant to adjourn the hearing in the High Court so that he could adduce evidence regarding the boundaries of the mortgaged properties, the assertion is misplaced. As set out in the judgment of McGovern J. the Appellant was afforded an ample opportunity to deliver any affidavit evidence upon which he sought to rely. No affidavit regarding boundaries was produced in the High Court. Moreover, the evidence that the Appellant sought to adduce in the Court of Appeal at the 'eleventh hour' was in fact considered by the Court and was found to be of no assistance to the Appellant.

The second Respondent notes that in any event the question of how fair procedures operate in any given situation is notoriously fact specific. In this case the Appellant has not provided any rationale as to how a consideration by this Court of an application for an adjournment in the High Court is of general public importance. The fact that the Court of Appeal actually considered the new evidence that the Appellant sought to admit and found it lacking demonstrates that an appeal on this issue is not in the interests of justice. Further, this Court has addressed the question of fair procedures on a number of occasions and the Appellant has not identified any need for those authorities to be reconsidered.

*Bias (Appellant's reason no. 2)*

The bias point asserted by the Appellant is not understood by the second Respondent. It appears to be a reference to the fact that the first Respondent made applications for substituted service as the Appellant had been avoiding service, and those applications were grounded on affidavit evidence. That evidence was not relevant to the critical issues in the substantive proceedings. In any event the assertion is framed too vaguely to admit of a finding that this constitutes a matter of general public importance or one that requires to be dealt with in the interests of justice. The second Respondent does not accept that the hearings in the High Court or the Court of Appeal was affected by any bias, to the contrary every effort was made by the Courts to accommodate the Appellant. In any event, there is a large body of existing contemporary jurisprudence on the question of bias, and the Appellant has not identified any necessity for that jurisprudence to be re-examined.

*Allegedly defective affidavit (Appellant's reasons nos. 3 and 11)*

The question of whether one of the affidavits filed by the first Respondent in the High Court was defective is wholly irrelevant, and does not raise any issue capable of requiring an authoritative ruling by this Court. As noted by the Court of Appeal, independent of the allegedly defective affidavit, there was ample evidence in the other affidavits filed to ground the claim and the findings of the Court. This is not a matter of general public importance or one in respect of which it is necessary in the interests of justice that there be an appeal to this Court.

*The role of the second Respondent (Appellant's reason no. 4)*

The Appellant appears to seek that this Court address the question of whether the second Respondent could be joined in an appeal in circumstances where the first Respondent has assigned or transferred the relevant loans and ancillary rights to the second Respondent. The decision of the Court of Appeal to join the second Respondent was made by Order dated the 17 October 2016. That Order is not the

subject of any appeal and in any event the time allowed for such an appeal has long since expired.

In any event the issue is not a matter of general public importance, or one that requires to be determined in the interests of justice. The first Respondent remained a party to the appeal, and by reason of its interest the second Respondent was joined as a party. The Appellant was in a position to prosecute his appeal in the Court of Appeal in the same way as if the first Respondent was the only party, and his rights in that regard were not altered by the presence of a further interested party.

*Overcharging allegations (Appellant's reasons nos. 5, 12, and 13)*

In relation to the claim of overcharging, this is a wholly inappropriate matter to ask this Court to determine. First, the claim was not made in the High Court, and only arose days before the hearing in the Court of Appeal, despite the fact that the proceedings were commenced in 2014. Second, because of the way in which the Appellant decided to seek to introduce this evidence, neither of the Respondents was afforded an opportunity to analyse properly the proposed new evidence, let alone to adduce any contrary evidence. Third, the Appellant did not seek to argue that the alleged overcharging resulted in the termination of the contract – which for the avoidance of doubt is not accepted as a legal proposition – instead the argument was directed to the new proposition that there was in fact no act of default. In those premises, because of the way in which the Appellant chose to introduce this matter, the issue has never been the subject of any proper evidential or legal consideration and it not appropriate or sufficiently framed to warrant consideration by this Court. As such it is in the nature of a purely moot point. The matter as it arises in the case is not one of general public importance, and it is not in the interests of justice that there is an appeal to this Court in respect of the issue.

Insofar as the Court of Appeal dealt with the question of the application to admit new evidence, this was entirely proper and done by reference to well established principles. The Appellant does not invite this Court to reconsider those principles or give any reason why the principles should be recalibrated. The notice of motion seeking to adduce new evidence was issued on the Friday before the hearing on Monday 13 November 2017. The Court of Appeal found that the evidence ought to have available to the Appellant by exercising reasonable diligence at the time of the High Court action. Further the Court found that the evidence did not assist the Appellant because he had admitted to the fact that he had defaulted in his compliance with the terms and conditions of the mortgage agreement.

*Whether the loan was commercial (Appellant's reason no. 6)*

This Court should not entertain the question of where the boundary is drawn between a residential loan and a commercial loan in this case. The Appellant did not adduce any evidence that the properties comprised a residential property. To the contrary all of the evidence was that the properties were operated as a bed and breakfast enterprise, and the loans clearly were understood as and intended to be treated as commercial in nature. It is telling that one of the Appellant's consistent arguments in both courts below was that the demands were not served at his then home address, which was not the address of the mortgaged properties. The Court is being asked, therefore, to address legal issues that have not been grounded in any proper evidence. This is not an issue of general public importance or one that requires to be determined in the interests of justice.

*Reliance on affidavit evidence (Appellant's reason no. 7)*

The question of whether findings of fact can be made without hearing oral evidence is not one of general public importance or one that ought to be determined in the interests of justice. These proceedings were dealt with on the basis of affidavit evidence. The judgment of McGovern J in the

High Court makes it clear that the Appellant sought to cross examine the first Respondent's deponents, but only in connection with a legal argument regarding the Bankers Books Evidence Acts. Hence the issue was not a live issue in the proceedings. It is established beyond doubt that proceedings commenced by way of Special Summons (and numerous other proceedings) are capable of being determined properly by reference to affidavit evidence.

*Arrears (Appellant's reason no. 8)*

The Appellant seeks leave to appeal in relation to a question as whether a loan that is not in arrears can be the subject of proceedings before the circumstances that allow recovery have occurred. However, this is not an issue that arose in this case. The judgments of the Courts below make clear that in this case the uncontroverted evidence was that there were substantial arrears, that events of default had occurred which triggered the entitlement of the first Respondent to possession of the mortgaged properties. This is not a matter of general public importance because in any case the precise terms of the agreement reached by the parties and the precise evidence will be critical to determining the question of whether proceedings should or should not succeed. There is no reason given by the Appellant as to how this is a matter that ought to be determined in the interests of justice.

*Reference to contractual conditions and service of notices (Appellant's reason no. 9 & 10)*

The Appellant has not explained what issue is raised by this point. Insofar as it is understood, it appears to be reference to a legal argument made by the second Respondent to the effect that the terms and conditions of the mortgage agreement did not actually require the first Respondent to serve the Appellant with letters of demand for possession. The Appellant therefore is acting under a misapprehension in seeking leave to appeal on a question relating to the admission of new evidence. The terms and conditions in question were already in evidence as they had been exhibited by Leo Gallagher in his affidavit of 28 August 2012. The case law relied upon by the second Respondent was the decision of this Court in *Irish Permanent v. Dunne* [2015] IESC 46. Where this Court produces a relevant judgment between a hearing in the High Court and a later appeal, it is entirely proper and there is nothing untoward or unfair in bringing that judgment to the attention of the later court.

Moreover, as noted above, the question of when a lender can initiate an application for possession of a property that has been the subject of a commercial mortgage quintessentially is a matter that depends in the first instance on the terms and conditions of the particular agreement entered into by the parties and the particular evidence before the court.

Accordingly this issue is not one of general public importance or a matter that needs to be addressed in the interests of justice by this Court.

In the circumstances, the Appellant has put forward no properly arguable basis for an appeal to this Court.

##### 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):*

1. The Appellant was afforded fair procedures. The Court of Appeal did not err in dismissing the Appeal.



2. The Court of Appeal did not err in failing to find that the Appellant was affected by any alleged bias. There was no bias. The Appellant did not suffer any unfairness or prejudice if he was not afforded an opportunity to respond to affidavits relating to applications for substituted service, as these matters were not relied on in deciding that the first Respondent was entitled to the orders sought in the Special Summons.
3. & 11. The Court of Appeal did not err in failing to allow the Appeal by reference to an allegedly defective affidavit of verification. The Court correctly and within jurisdiction found that all of the evidence required to ground the application for possession was set out in other affidavits sworn on behalf of the first Respondent.
4. The Court of Appeal did not err in failing to allow the Appeal by reference to the participation of the second Respondent in the Appeal. The second Respondent was joined to the proceedings and the appeal in October 2016 and that order was not appealed. The second Respondent was a proper party to the proceedings and the appeal thereafter and was entitled to participate.
5. & 12. The Court of Appeal did not err in failing to allow the Appeal by reference to an argument that the contract between the Appellant and the first Respondent was terminated by reason of alleged overcharging. This was not an argument made in the High Court or in the Court of Appeal. The Appellant sought to adduce new evidence before the Court of Appeal one working day before the hearing of the Appeal. The Appellant sought to adduce the new evidence to show that the mortgage account was not in default and not to ground an argument that the alleged overcharging led to the termination of the contract.
6. The Court of Appeal did not err in failing to allow the Appeal by reference an argument that the loans related to a commercial property. There was no evidence that the mortgaged properties constituted a principal private residence or family home. The evidence established, that the Court was entitled to find, that the loans were for purposes connected to a commercial bed and breakfast premises. There was no reason for the Court of Appeal or the High Court to consider the requirement of the MARP or consumer code.
7. The Court of Appeal was both entitled to and correct to determine the Appeal by reference to affidavit evidence.
8. The Court of Appeal was correct to find and did not err that the loan was in arrears and that there were events of default entitling the first Respondent to seek possession of the mortgaged properties.
9. & 10. The Court of Appeal did not introduce any new evidence by referring to a condition of the mortgage agreement. The terms of the mortgage agreement were exhibited in the proceedings before the High Court and properly before both Courts. The Court of Appeal was fully entitled to consider the judgment of the Supreme Court in *Irish Permanent v Dunne* [2015] IESC 46, which judgment issued after the determination of these proceedings in the High Court.
13. This ground is misplaced. The Court of Appeal merely referred to the fact that the Appellant was entitled to seek leave to appeal from the Court of Appeal to this Court. In no sense can those observations operate as a basis for assuming that leave would in fact be granted.
14. The Court of Appeal properly considered the application by the Appellant to adduce new

evidence regarding his allegation that the boundaries of the mortgaged properties were not clear. The Court of Appeal was correct in finding that the application did not meet the requirements for such an order in this case. Without prejudice to that contention, the Court of Appeal was correct to find that the proposed new evidence did not in any event substantiate, assist or progress the Appellant's arguments.

15. The Court of Appeal was correct and did not in the manner in which it treated the application to adduce fresh evidence in the form of a forensic accounting report.

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

**Barry O'Donnell 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: Arthur Cox  
Arthur Cox  
Solicitors for the second respondent  
10 Earlsfort Terrace  
Dublin 2

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.