

No. 1

O. 58, r. 15



SUPREME COURT



Record No:

Application for Leave to Appeal

Part I

The information contained in this part will be published. It is the applicant's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court.

1. **Date of Filing:** 29th January 2019
2. **Title of the Proceedings:** [As in the Court of first instance]

Joseph Sheehan

Plaintiff

-v-

Breccia, Irish Agricultural Development Company, Blackrock Hospital Limited,
George Duffy, Rosaleen Duffy and Tullycorbett Limited

Defendants

3. **Name of Applicants:**
Breccia and Irish Agricultural Development Company

What was the Applicants' role in the original case:
First and Second Named Defendants
4. **Decision of Court of Appeal (where applicable):**

Record No: 2016 No. 197

Date of Order: 4 October 2018

Perfection Date: 8 January 2019

Date of Judgment: 30 July 2018, [2018] IECA 286

Names of Judges: Finlay Geoghegan J, Peart, J, Hogan J

5. **Decision of the High Court:**

Record No: 2014 / 10816 P

Date of Order: 12 April 2016

Perfection Date: 14 April 2016

Date of Judgment: 5 February 2016, [2016] IEHC 67, [2016] IEHC 120

Names of Judge(s): Haughton J

Where this application **seeks** leave to **appeal** directly from an Order of the High Court has an appeal also **been** filed in the Court of Appeal in respect of that Order?

Yes

No

6. **Extension of Time:**

Yes

No

If an application is being made to extend time for the bringing of this application, please set out concisely the grounds upon which it is contended time should be extended.

n/a

7. **Matter of general public importance:**

If it is contended that an appeal should be permitted on the basis of matter(s) of general public importance please set out precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance justifying appeal to the Supreme Court.

This section should contain no more than 500 words and the word count should appear at the end of the text.

Penalty Clause

1. This case raises important legal issues about the Irish law on penalty clauses in general, and surcharge interest clauses in particular. These issues include:

- 1.1. Whether the Irish courts should adopt the principles on the penalty rule laid down by the UK Supreme Court in *Cavendish Square*,¹ or whether the Irish courts should continue to follow the House of Lords decision in *Dunlop Pneumatic Tyre Co²* after that decision has been overruled in England.
- 1.2. In what circumstances, if any, will a surcharge interest clause be enforceable in Irish law.
2. There is uncertainty about these legal issues that it is desirable for the Supreme Court to resolve.
 - 2.1. The Irish law on the penalty rule has now significantly diverged from the law in England and other common law jurisdictions.
 - 2.2. In addition, the application of the penalty rule to surcharge interest clauses in recent Irish cases has produced very different results to other jurisdictions, where such clauses are in general enforceable.
 - 2.3. While the judgments in the High Court and Court of Appeal adhered to the *Dunlop* principles on the basis of precedent, both Haughton J³ and Finlay Geoghegan J⁴ intimated that it may be desirable for the Supreme Court to reconsider these principles. In *Launceston v Burke*,⁵ the Supreme Court said that “the live debate [on whether to follow *Cavendish*] must be left over for a more suitable case ...”, although the Court said *obiter* that it was not “immediately convinced” by the *Cavendish* approach.
3. The outcome of the appeal would have a significant impact on large numbers of other contractual parties, including lending institutions and borrowers:
 - 3.1. The vast majority of loan contracts include a surcharge interest clause. The enforceability of these clauses is of major importance for Irish lending institutions and borrowers.
 - 3.2. More generally, the legal principles applicable to the penalty rule are of significant importance to contracting parties in other contexts (for example, in construction contracts, which routinely include clauses providing for liquidated damages or delay damages).

Estoppel

4. While, at a high level of generality, the ingredients of estoppel by representation are not in dispute (see *Doran v Thompson*⁶), this case raises important legal issues about how those principles are applied. These issues include:
 - 4.1. What are the legal principles governing detrimental reliance? What degree of causal connection must exist between the representation and the detriment suffered? How significant or material a detriment is required to found an estoppel?
 - 4.2. Can a communication constitute an “unambiguous representation”, where the communication includes an express reservation of rights?

¹ [2016] 2 All ER 519.

² [1915] AC 79.

³ Haughton J, *Sheehan v Breccia* (HC) [2016] IEHC 67, para. 122.

⁴ Finlay Geoghegan J, *Sheehan v Breccia* (C of A) [2018] IECA 286, para. 21.

⁵ [2017] 2 IR 798, para. 43.

⁶ [1978] IR 223.

4.3. What is **the** effect, if any, of a contractual clause excluding any implied waiver of rights?⁷

5. It is submitted that if the Plaintiff's actions – efforts to buy back loans which never came to fruition, **and** which would have been made, **and** would have failed, irrespective of any "representations" – are sufficient to establish "detriment" and "reliance", then "detriment" and "reliance" are nugatory requirements which will be satisfied in almost any case.

Word count - 500

8. Interests of Justice:

If it is contended that an appeal should be permitted on the basis of the interests of justice, please set out precisely and concisely, in numbered paragraphs, the matters relied upon.

This section should contain no more than 300 words and the word count should appear at the end of the text.

1. The High Court and Court of Appeal held that Breccia could not recover surcharge interest on two alternative grounds: (a) that Clause 5 was an unenforceable penalty; and (b) that Breccia was estopped by representation from recovering surcharge interest attributable to the period between 31 December 2010 and 9 June 2015. The penalty issue and the estoppel issue are, therefore, closely connected: they both affect the enforceability of the same contractual right, and they both bar the recovery of the same sum (in respect of the period up to June 2015).
2. To the extent that the Court considers that one of these issues raises issues of public importance but the other does not, then it is submitted that it is in the interests of justice that leave should, if granted in respect of one issue, also be granted in respect of the other issue. The "interests of justice" may require leave to be granted where "a point may be raised in a case which itself may not be of general public importance but which is necessary to permit an appellant to argue, since otherwise determination of the issue of general public importance may not resolve the case": *PWC v Quinn Insurance*.⁸

Word count - 203

9. Exceptional Circumstances: Article 34.5.4:

Where it is sought to apply for leave to appeal direct from a decision of the High Court, please set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 300 words and the word count should appear at the end of the text.

N/a

10. Grounds of Appeal

⁷ This issue was the subject of submissions in the High Court and Court of Appeal, but was not considered in the judgments in either court.

⁸ [2017] IESC 73.

Please set out in the Appendix attached hereto the grounds of appeal that would be relied upon if leave to appeal were to be granted.

11. Priority Hearing:

Yes

No

If the applicant seeks a priority hearing please set out concisely the grounds upon which such priority is sought.

This section should contain no more than 100 words and the word count should appear at the end of the text.

1. The enforceability of surcharge interest is of major significance for all financial institutions and many borrowers in the State. The law is currently uncertain. It is in the public interest that this uncertainty be resolved as quickly as possible.
2. The proceedings were entered into the Commercial List by consent. All parties agreed that the proceedings were urgent. The High Court facilitated an expedited hearing of this module, with the agreement of all parties.

Word count - 75

12. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union please identify the matter and set out the question or questions which it is alleged it is necessary to refer.

N/a

Part II

The information contained in this part will not be published.

13. Applicant's Representatives:

Please identify the solicitor and counsel for the applicant, with contact details for the solicitor dealing with the matter including an email address for the solicitor and lead counsel. In the case of an applicant in person please provide contact details including telephone and email.

14. Respondent's Representatives:

Please set out details of solicitor and counsel for each respondent with contact details for the solicitor dealing with the matter including an email address for the solicitor and lead counsel. In the case of a respondent in person please provide contact details including telephone and email.

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15. Legal Aid:

In the case of an application by a defendant from an order in a criminal trial please confirm that a Legal Aid (Supreme Court) certificate has been granted by the Court below and please provide a copy of same.

N/a

Signed:

Please file your completed form in:

**The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin 7**

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

Appendix

Notice of Appeal

1. Title of the Proceedings: *[As in the Court of first instance]*

Joseph Sheehan

Plaintiff

-v-

Breccia, Irish Agricultural Development Company, Blackrock Hospital Limited,
George Duffy, Rosaleen Duffy and Tullycorbett Limited

Defendants

2. Grounds of Appeal:

Please set out in numbered paragraphs the Grounds of Appeal relied upon if leave to appeal were to be granted.

A. Penalty clause

1. The Court of Appeal and High Court erred in law and fact in concluding that **Clause 5.1 is an unenforceable penalty clause.**
2. The Irish courts should adopt the refinement of the penalty rule laid down by the UK Supreme Court in *Cavendish Square v El Makdessi*.¹

2.1. In *Cavendish Square*, the UK Supreme Court thoroughly reviewed the case law, and clarified the legal principles for determining whether a **clause** is a penalty. It criticised the over-reliance on the summary of the principles set out by Lord Dunedin in *Dunlop v Pneumatic Tyre Company*. It criticised the dichotomy between "genuine pre-estimates of loss" and "penalties", which are neither "natural opposites" nor "mutually exclusive". It confirmed that compensation is not the only legitimate interest in enforcing a primary obligation. It held that a **clause** that had the purpose of deterring a breach of contract was not necessarily objectionable. It identified the essential test of a penalty as whether the clause "imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party

¹ [2016] 2 All ER 519.

² Haughton J [2016] IEHC 67, para. 122. Finlay Geoghegan J [2018] IECA 286, para. 21.

³ [1996] QB 752.

⁴ [2012] IEHC 435.

⁵ Finlay Geoghegan J, Sheehan v Breccia (C of A) [2018] IECA 286, paras. 51 and 56

⁶ Finlay Geoghegan J, Sheehan v Breccia (C of A) [2018] IECA 286, para. 52

⁷ Finlay Geoghegan J, Sheehan v Breccia (C of A) [2018] IECA 286, para. 55

⁸ *Gillett v Holt* [2001] Ch 210; v *Hutchinson* [2006] EWCA Civ 1551.

⁹ *Ibid.*

¹⁰ Hogan J, Sheehan v Breccia (C of A) [2018] IECA 286, paras. 24, 25, 27, 33

¹¹ Hogan J, Sheehan v Breccia (C of A) [2018] IECA 286, paras. 12, 26, 27, 28, 29, 30

in the enforcement of the primary obligation." It emphasised that the penalty rule was an exception to the principle of freedom of contract. The strong initial presumption must be that the parties themselves are the best judges of what is legitimate.

- 2.2. Both the High Court and Court of Appeal held that they were bound by precedent to apply the *Dunlop* approach. Both courts' intimated that it may be desirable for the Supreme Court to reconsider these principles in light of *Cavendish*.
- 2.3. The *Cavendish* approach is, in principle, preferable to the *Dunlop* approach and should be followed in this jurisdiction.
 - 2.3.1. A test focused on the effect of a clause (i.e., the proportionality between the consequences stipulated for breach and the innocent party's interest in performance) rather than the purpose of the clause (i.e., whether the clause aims to pre-estimate loss or deter breach) is more consistent with (i) the pre-*Dunlop* case law, (ii) the ratio of the House of Lords in *Dunlop*, (iii) the post-*Dunlop* case law, and (iv) the approach taken by the CJEU in applying the Consumer Contracts Directive.
 - 2.3.2. The *Cavendish* approach is more conceptually coherent and easier to apply in practice than the classic interpretation of Lord *Dunedin's* principles.
 - 2.3.3. It would, other things being equal, be undesirable for the Irish law to diverge from that of the UK and other common law jurisdictions, absent strong principled reasons for such divergence.
 - 2.3.4. Any consumer protection rationale for the stringent application of the penalty rule in this context has been seriously weakened by the introduction of the statutory power under the Consumer Contract Regulations to refuse to enforce an excessive surcharge interest rate in a consumer loan.
- 2.4. If the Court applied the *Cavendish Square* approach in this case, Clause 5 would not be an unenforceable penalty. Lenders have a "legitimate interest" in ensuring that borrowers repay their loans, because (i) a borrower's default causes lenders to incur additional costs, and (ii) lenders have a broader commercial interest in ensuring that loans are repaid on time. The expert evidence was that a borrower's default could result in the lender incurring costs in excess of the 4% surcharge rate. Every objective benchmark available in evidence suggested that there was nothing excessive about a 4% surcharge rate. The 4% surcharge rate appears to be the rate to ever be struck down as penal in Ireland or the UK.
3. In the alternative, if the Court does not adopt the principles set out in *Cavendish Square*, the Court of Appeal erred in its application of the principles laid down in *Dunlop* and *Pat O'Donnell* to Clause 5.1 in this case
 - 3.1. The Court erred in law in its interpretation of the *Dunlop* principles, as interpreted in *Pat O'Donnell*. In particular, the Court failed to assign sufficient weight to the principle that a sum will be penal where it is "extravagant or unconscionable in relation to any possible amount of damages that could have been within the contemplation of the parties at the time when the contract was made".
 - 3.2. The Court erred in law in failing to assign sufficient weight to the principle that courts should be reluctant to strike down a clause as penal, especially in commercial cases with legally advised parties of comparable bargaining power.
 - 3.3. The Court erred in law in failing to assign sufficient weight to the principle that the greater the uncertainty about the potential loss, the greater the latitude afforded.
 - 3.4. The Court erred in law in disregarding the line of Irish and English decisions, referred to in *Pat O'Donnell*, in which default interest clauses have been enforced

and, what is more, imposed by the Court in the absence of any **agreed rate**.

- 3.5. The Court of Appeal erred in law in failing to properly interpret or apply *Lordsvale v Bank of Zambia*³ (adopted in Irish law in *ACC v Friends First*⁴), which applied the *Dunlop* principles in the context of surcharge interest. *Lordsvale* recognised that a surcharge interest clause that was not a liquidated damages clause would nevertheless be upheld if it was "*commercially justifiable*".
- 3.6. The Court of Appeal erred in law and fact in disregarding, or assigning insufficient weight to, the centrally important facts that the sum of 4% per annum was: far **less** than surcharge interest rates that have been upheld or applied in previous cases, in Ireland and elsewhere; a **small fraction** of the interest rate that, on the evidence, other lenders would have **charged** the **Plaintiff**; below the surcharge interest rates that were applied by other banks in 2006; below the amount that the Court could have imposed under the general law.
- 3.7. The Court of Appeal erred in law and fact in taking into account, and assigning significant **weight** to, the various features of the contractual terms set out at **para. 51** of the judgment. The Court erred in law and **fact** in finding **that there** was no "*express provision as to when the surcharge interest becomes payable by the borrower*" (paras. 51, 56)⁵. The Court erred in law and fact in concluding that the surcharge interest provision did not constitute an "*uplift*" in the applicable interest rate⁶. The Court erred in finding⁷ that the surcharge interest provision **takes** no account of the amount of the loan. The Court of Appeal erred in fact in proceeding on the assumption that **Basel II** "*probably applied at the time of the 2006 loans*".

B. Estoppel

4. **The Court of Appeal and High Court erred in concluding that Breccia was estopped from recovering surcharge interest which accrued before 9 June 2015.**
5. **The Court of Appeal erred in law and / or fact in concluding that the actions of the Plaintiff (assuming that the facts found by the High Court were correct) were sufficient to constitute "reliance" and "detriment".**
 - 5.1. The Court of Appeal erred in law in concluding that, on the basis of the High Court's findings of fact, the requirements for estoppel (the other party has "*acted to his detriment*" in "*reliance*" on an unequivocal representation) were satisfied.
 - 5.2. The height of the High Court's findings (approved at **para. 40** of the judgment of Hogan J) was that the Plaintiff unsuccessfully **engaged** with IBRC and with prospective financiers "*on the basis that he needed to raise a figure somewhat in excess of €16m and not the figure of some €19m*". These findings, even if adequately supported by evidence (and, with respect, they were not), were not sufficient as a matter of law to constitute a "*change of position*", "*detriment*" or "*reliance*".
 - 5.3. The Plaintiff did not "*change his position*" in "*reliance*" on any **representations** about the loan amount. While the Plaintiff did enter negotiations **with IBRC** about buying his loans in March / April 2014 and in October / November 2014, there was no finding that he would not have done so had he been informed that surcharge interest applied. There would have been no evidence to support any such finding.
 - 5.4. The Plaintiff's **efforts** to buy his loans were unsuccessful. His position has not materially changed. The Plaintiff admitted that the **failure of these** attempts was unconnected to any issue about surcharge interest.
 - 5.5. The High Court inferred that the **Plaintiff** expended money on professional fees in his unsuccessful attempts to raise finance to acquire or repay his loans. However, there was no evidence about the level of any such expense. Further, there was no finding

or evidence of any causal connection between any such expenditure and any representations about surcharge interest.

6. The Court of Appeal further erred in law in failing to advert to important legal principles that apply to the "reliance" and "detriment" requirements, including:

- 6.1. The principle that *"there must be sufficient causal link between the assurance relied on and the detriment asserted"*.⁶
- 6.2. The principle that the detriment must be *"substantial"*, and *"whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded ..."*.⁷

7. The Court of Appeal erred in failing to overturn the High Court's findings and / or inferences of fact in relation to reliance and detriment. Some of the key findings made by the High Court were not supported by any evidence, or were contrary to the Plaintiff's own evidence. In particular:

- 7.1. The Court erred⁸ in assigning significant weight to the fact that bank statements sent by Anglo and IBRC to the Plaintiff did not expressly mention surcharge interest, and in accepting that the Plaintiff relied on these statements. The Plaintiff's own evidence was that he did not rely on those statements.
- 7.2. The Court erred¹¹ in assigning significant weight to the Plaintiff's reliance on correspondence from IBRC to the Plaintiff on 31 October and 12 November 2013. At no stage during his evidence did the Plaintiff mention either of those letters.

8. The Court of Appeal erred in law in failing to have regard to the fact that the loan and mortgage documentation expressly excluded the possibility of a waiver or variation of Breccia's rights arising by conduct, implication, inaction or silence on the part of Breccia or its predecessors.

9. The Court of Appeal erred in law and / or fact in failing to give sufficient weight to the fact that communications by Breccia and its predecessors in title expressly reserved all contractual rights and expressly informed the Plaintiff that additional sums may be due.

JOHN LAVELLE BL
BRIAN O'MOORE SC

3. Order(s) sought

Please set out in numbered paragraphs the order(s) sought if the Appeal were to be successful.

1. An Order discharging those parts of the Order of the Court of Appeal which:

- 1.1. Dismissed the appeal of the First and Second Defendants against the determination of the High Court that Clause 5 of the General Conditions is a penalty clause and unenforceable;
- 1.2. Dismissed the appeal of the First and Second Defendants against the determination of the High Court on the question of estoppel;
- 1.3. Ordered the First and Second Named Defendants to pay the Plaintiff 80% of the costs of the appeal; and

- 1.4. Varied the Order of the High Court so as to order that the First and Second Named Defendants pay to the Plaintiff 80% of the costs of the redemption module in the High Court.
2. An Order confirming that Breccia is entitled to recover from the Plaintiff surcharge interest pursuant to Clause 5 of the General Conditions in respect of the period since 31 December 2010 (or, alternatively, 9 June 2015).
3. An Order amending the Order of the High Court so as to make clear that the "Redemption Figure" for the "Loans" includes surcharge interest payable by the Plaintiff pursuant to Clause 5 of the General Conditions from 31 December 2010 (or, alternatively, 9 June 2015) to the date of payment.
4. An Order awarding the First and Second Named Defendants the costs of and incidental to the appeal to the Supreme Court, the appeal to the Court of Appeal, and the hearing of the redemption module of the proceedings in the High Court.