

**SUPREME COURT**



**Application for Leave and Notice of Appeal**

**For Office use**

Supreme Court record number of this appeal	S:AP:LE:2016:000091
Subject matter for indexing	

Leave is sought to appeal from

<input type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court
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Title and record number as per the High Court proceedings

Rosbeg Partners Limited	V	L.K Shields Solicitors (A Firm)
Court Record	2010/3135P	of Appeal Record
Date of filing		19 July 2016
Name(s) of Applicant(s)/Appellant(s)	L.K. Shields Solicitors (A Firm)	
Solicitors for Applicant(s)/Appellant(s)	J.A Shaw & Company	
Name of Respondent(s)	Rosbeg Partners Limited	
Respondent's solicitors	Eversheds	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
If yes, give [Supreme Court] record number(s)		

Are you applying for an extension of time to apply for leave to appeal?			
If Yes, please explain why			

**1. Decision that it is sought to appeal**

Name(s) of Judge(s)	Judgment delivered by MacMenamin J. (sitting with Irvine J. And Finlay-Geoghegan J.)
Date of order/ Judgment	1 June 2016

**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	L.K. Shields Solicitors (A Firm)		
Original Status	<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	
	<input type="checkbox"/> Applicant	<input type="checkbox"/> Respondent	
	<input type="checkbox"/> Prosecutor	<input type="checkbox"/> Notice Party	
	<input type="checkbox"/> Petitioner		

<b>Solicitor</b>			
Name of firm	J.A. Shaw & Co, Solicitors		
Email	seamus@jashaw.ie		
Address	Block B, Second Floor Marlinstown Office Park Mullingar Co Westmeath	Telephone no.	044 93 48721
		Document Exchange no.	248001 Mullingar
Postcode			SMD001.446

How would you prefer us to communicate with you?

<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

<b>Counsel</b>			
Name	Aidan Redmond S.C		
Email	redmondsc@me.com		
Address	Suite 136 The Capel Building St. Mary's Abbey Dublin 7	Telephone no.	01-8719481
		Document Exchange no.	200136A The Capel Building
Postcode	D07 YF6A		

<b>Counsel</b>			
Name	Paul Fogarty BL		
Email	paulfogartybl@gmail.com		
Address	Law Library Four Courts Inns Quay Dublin 7	Telephone no.	0862344336
		Document Exchange no.	813095 Dublin
Postcode			

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

Current postal address	
e-mail address	
Telephone no.	
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	Rosbeg Partners Limited
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Original status	<input type="checkbox"/>	Plaintiff	<input type="checkbox"/>	Defendant	Is this party being served with this Notice of Application for leave?
	<input type="checkbox"/>	Applicant	<input type="checkbox"/>	Respondent	
	<input type="checkbox"/>	Prosecutor	<input type="checkbox"/>	Notice Party	
	<input type="checkbox"/>	Petitioner	<input type="checkbox"/>		

Solicitor			
Name of firm	Eversheds		
Email	JohnDavidMulcahy@eversheds.ie		
Address	One Earlsfort Centre Earlsfort Terrace Dublin 2	Telephone no.	200
		Document Exchange no.	146 Dublin
		NPF.JDM.17477.164	
Postcode			

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Hugh Mohan S.C		
Email	hmohan@lawlibrary.ie		
Address	Distillery Building 145-151 Church Street Dublin 7	Telephone	087 2485255
		Document Exchange	816117 Dublin
		Postcode	

Counsel			
Name	Rossa Fanning BL		
Email	rossa@fanning.ie		
Address	Suite 3.4.7.2 Distillery Building 145/151 Church Street Dublin 7	Telephone no.	087 9872561
		Document Exchange no.	816505 Dublin
		Postcode	

If the Respondent is not legally represented, please complete the following:

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)
<input type="checkbox"/>		<input type="checkbox"/>	

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

1. It is sought to appeal the decision in respect of causation and quantum, but not liability

2.(A) Concise statement of facts found by original Trial Court (in chronological sequence):

- (a) By e-mail dated 21<sup>st</sup> September, 2007 from John Burns (the agent for the potential purchaser Mr. Pino Harris,) an offer to purchase the Plaintiff's property for €10 Million was made subject to contract and subject to confirmation of total site areas of 2.56 acres. The offer confirmed a willingness to enter into a short-term letting agreement to rent the property back to the vendor at a term to be discussed and agreed at a rent equal to the 3 months' deposit rate from Anglo Irish Bank on the €10 Million offer price plus rates and service charges (if applicable). This offer was said to remain open for 5 working days and lapsed if not accepted by 5.00 pm, Friday 28<sup>th</sup> September, 2007.
- (b) An extension of time was sought and granted to the 5<sup>th</sup> October, 2007.
- (c) That, in or about the 24<sup>th</sup> September, 2007, the Plaintiff had decided to accept the offer and was taking steps to proceed with the transaction and this intention to accept (but not acceptance) was communicated to the Harris side.
- (d) That there were still details to be settled and tied down, such as the acreage and lease-back arrangement which was not unusual or troublesome or difficult. That the solicitor acting for Mr. Harris and the solicitor proposed by the Plaintiffs could have agreed the terms of a contract containing various special conditions to deal with the issues yet to be agreed and resolved on the vendor's side, including satisfying the purchaser as to the acreage.
- (e) That, instead of doing this, the Plaintiff's side set about sorting out the problem with which they had been confronted which took longer than would normally be expected or hoped for in an ideal world.
- (f) That the offer made by Mr. Harris was never accepted but a decision to accept the Harris offer was definitively made.
- (g) In mid-Febru[ary] 2008, Mr. Harvey acting on behalf of Mr. Harris indicated a verbal offer to purchase for €8 Million.
- (h) That by letter dated the 4<sup>th</sup> March 2008, the Plaintiff's agent wrote referring to the offer of €8 Million and advising that the Plaintiff was not prepared to accept this reduced offer, but was prepared to negotiate on the original offer of €10 Million.

- (i) That there was no response to this until a further verbal offer was made in August 2008, by Mr. Harvey to Mr. Pearson for a sum of €6 Million.
- (j) By letter dated 23<sup>rd</sup> September, 2008 it was indicated that the Plaintiff would be prepared to sell at a price of €8.5 Million subject to vacant possession and an agreed closing date.
- (k) Title was clear of any defect by September 2008.
- (l) By letter dated 22<sup>nd</sup> October, 2008, Mr. Harvey responded advising that his position on price had not changed since the last conversation and that the change in circumstances had dulled his appetite for new acquisitions despite their merits.
- (m) That the property value had slumped to €2.5 Million by the date of commencement of the proceedings.
- (n) That at the date of the hearing the value, according to the Plaintiff's value was €1 Million and according to the Defendant's value €1.5 Million.

**3. (i) Relevant Finding of the High Court:**

The High Court determined to draw inferences of fact from the evidence of the Plaintiff's witnesses only and to ignore the evidence of the Defendant's independent third party witnesses.

Mr. Stewart, (a principal of Rosbeg) was not acting irresponsibly or negligently when he tried to negotiate further with Mr. Harris rather than simply to take the offers being made, or to take any steps to dispose of the property, either before or after perfection of title, notwithstanding that the offers were at market value or above.

**(ii) Relevant Finding of the Court of Appeal:**

It is not the function of the Court of Appeal to parse, sift or delve, selectively, through the evidence to test whether inferences of fact were properly drawn so long as there was evidence to support the inferences drawn.

The Court of Appeal found, that the Plaintiff was entitled to reject all offers for the property even offers in excess of the value of the property without being guilty of contributory negligence or failure to mitigate loss

The Court of Appeal found, that the Plaintiff was entitled even after the title issue had been addressed to its satisfaction, to do nothing to reduce their loss both before and after the issue of proceedings as evidenced by the further loss allowed to the Plaintiff after the issue of the summons when it was well able to reduce its loss.

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

The failure to differentiate on appeal between findings of fact and inferences of fact constitutes a serious erosion of the principles in Hay-v-O'Grady and will likely lead to inconsistency in the High Court.

The refusal to apply any element of objectivity in the assessment of contributory negligence and the duty to mitigate loss inevitably will lead to extraordinary unfairness to Defendants in the assessment of damages and an impossibility to consistently address the underwriting of risk.

These are issues of the utmost public importance.

**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:
  - (a) The Court of Appeal erred in failing to differentiate between findings of fact and inferences of fact as specifically enjoined by the Supreme Court in Hay-v-O'Grady to do.
  - (b) Both contributory negligence and the duty to mitigate are to be objectively assessed not subjectively assessed as did the trial judge (supported in this view by the Court of Appeal). The finding of the trial judge entitling recovery of further loss of value up to the date of trial (at a remove of some six years from the signature loss event) and following the correction of any title issue was implicitly if not explicitly based on the Plaintiff's assessment of the reasonableness of its own behaviour.
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.

<p>(a) It is settled law that an appellate court is as well able as the trial judge to draw inferences based on facts found, if satisfied that those drawn by the trial judge are incorrect. This exercise requires a review of the evidence not just the evidence relied upon by the inferior court.</p> <p>(b) In the interests of fairness and justice the law on contributory negligence and the duty to mitigate loss in order to be fair to both Plaintiff and Defendant must be assessed on an objective basis.</p> <p>3. The specific provisions of the Constitution, Act(s) of the Oireachtas, Statutory Instrument(s) and any other legal instruments on which you rely</p> <p>4. The issue(s) of law before the Court appealed from to the extent that they are relevant to the issue(s) on appeal</p> <p>(a) Whether the review on appeal of inferences predicated upon findings of fact can only be fairly met by a review of all the relevant facts found as opposed to just those relied upon by the trial judge.</p> <p>(b) Whether the assessment of contributory negligence or failure to mitigate loss should be predicated upon a subjective test only.</p>
<p>Name of solicitor or (if counsel retained) counsel or applicant/appellant in person: Aidan Redmond S.C. - Paul Fogarty B.L.</p>

**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

[2016] IECA 161
References to Law Report in which any relevant judgment is reported

**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:

<p>An Order allowing the appeal and remitting the issue of quantum to the High Court or substituting any amount deemed appropriate by this Court with an order providing for the appropriate costs.</p>
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What order are you seeking if successful?

Order being appealed: 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

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

**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:

J A Shaw & Co  
J.A. Shaw & Co  
Solicitors 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.**