

SUPREME COURT**Respondent's Notice**

Supreme Court record number	S:AP:IE:2015:00023
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[Title and record number as per the High Court proceedings]

Patrick Horkan	V	Migjen Gjyrevc
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Date of filing	3 June 2015
Name of respondent	Patrick Horkan
Respondent's solicitors	Kilfeather & Company
Name of appellant	Migjen Gjyrevc
Appellant's solicitors	Appellant 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	Patrick Horkan
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The respondent was served with the application for leave to appeal and notice of appeal on date
21 May 2015

The respondent intends :
<input type="checkbox"/> to oppose the application for an extension of time to apply for leave to appeal
<input type="checkbox"/> not to oppose the application for an extension of time to apply for leave to appeal
<input checked="" type="checkbox"/> to oppose the application for leave to appeal
<input type="checkbox"/> not to oppose the application for leave to appeal
<input checked="" type="checkbox"/> to ask the Supreme Court to dismiss the appeal
<input type="checkbox"/> 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
<input type="checkbox"/> 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"/>
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Respondent's Representation

Solicitor			
Name of firm	Trevor Collins		
Email	Kilfeather & Company Solicitors		
Address	The Halls Quay Street Galway	Telephone no.	091 562037
		Document Exchange no.	DX4020 Galway
Postcode		Ref.TC.6942A	
How would you prefer us to communicate with you?			
<input checked="" type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name	Stephen Walsh		
Email	Stephen.walsh@lawlibrary.ie		
Address	Distillery Building 145-151 Church Street	Telephone no.	0876663116
		Document Exchange no.	816717
Postcode	Dublin 7		

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 checked="" 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

Not Applicable

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

The Order in respect of which leave to Appeal is sought by the Appellant concerned an application by the Appellant to extend the time within which to appeal to the Court of Appeal from an Order made by Mr. Justice Binchy in the High Court on 17 December 2014. The effect of the said High Court Order was, *inter alia*, to restrain the Appellant/Defendant from interfering with the Plaintiff/Respondent's role as Receiver of certain properties identified in the Plenary Summons herein.

It is not therefore correct for the Appellant to assert – as he does in Part 4 of the Notice of Application for leave to appeal – that the Court of Appeal “*approved*” of the High Court Order.

The decision of the Court of Appeal (Kelly J.; Hogan and Irvine JJ. concurring) concerned the narrow question of whether or not to extend the time within which to appeal from the High Court Order and did not consider the underlying substance of the appeal, save to the extent as was necessary in applying the long-established test espoused by the former Supreme Court in *Éire Continental v Clonmel Foods Limited* [1955] I.R. 170.

4. Respondent's reasons for opposing leave to appeal

Far from involving a matter of general public importance, the decision in respect of which leave to appeal is sought represents an orthodox application of a test which has been accepted as representing the proper approach of an appellate court to an application of this nature for over 60 years.

In the Court of Appeal, the only ground of appeal identified by the Appellant in seeking to discharge the onus of demonstrating that the appeal was at least arguable was that the injunction granted by the High Court was mandatory in nature. The Respondent does not accept that the High Court Order was mandatory in nature: the substance of the relief sought by the Respondent in the High Court was prohibitory.

In any event, it is not the case that mandatory injunctive relief may not be granted on an interlocutory basis. The *locus classicus* of the jurisdiction to grant interlocutory injunctive relief – *Campus Oil v Minister for Industry and Commerce (No. 2)* [1983] I.R. 88 – was itself a case in which the Supreme Court concluded that it was appropriate to grant interlocutory relief.

There is no other good reason to allow the Appellant to appeal from the Order of the Court of Appeal. In particular, the Respondent contends that it is not necessary (in the interests of justice or otherwise) that there be an appeal to the Supreme Court from the Judgment and Order of the Court of Appeal.

The Respondent further does not accept that the effect of either the High Court Order or the Court of Appeal Order is to render the underlying proceedings moot. The Appellant will be afforded a full opportunity of defending the Respondent's claim at the trial of the action and enjoys the benefit of the Respondent's undertaking as to damages until the determination of the underlying proceedings. On 29th May 2015 the Respondent delivered its Statement of Claim and a Defence is currently awaited from the Appellant.

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

1. The Order of the Court of Appeal from which leave to appeal is sought did not address the substance of the relief sought by the Plaintiff/Respondent and granted in the High Court; the Order of the Court of Appeal concerned – and only concerned – the Appellant's application for an Order extending the time within which to appeal from the High Court Order. Notwithstanding the foregoing, the Respondent maintains there was sufficiently clear and uncontroverted evidence before the High Court to justify the making of the relevant High Court Order.

2. This Application for leave to appeal does not raise issues of public importance – or issues of any importance – whether in the context of Receivership cases or otherwise. The intended appeal only concerns the decision of the Court of Appeal to refuse an extension of time within which to appeal from the High Court Order. As noted above, the Court of Appeal decision constituted an orthodox and straightforward application of the well-established *Éire Continental* test.

3. The Respondent contends that none of the proposed grounds of appeal relied on by the Appellant in this section are relevant to the refusal by the Court of Appeal to extend the time within which to appeal from the High Court Order and were not relied on by the Appellant at the hearing of the said application in the Court of Appeal. All further arguments and contentions are delivered hereunder without prejudice to the foregoing position.

(a) – (b) The decision of the Supreme Court in *Kavanagh v McLaughlin* [2015] IESC 27 does not avail the Appellant for a number of reasons. First, and most fundamentally, this is an application for leave to appeal from an Order of the Court of Appeal refusing the Appellant's application for an extension of time within which to appeal from the High Court Order; it does not concern the substantive correctness of the High Court Order.

Even addressing, for the sake of argument, the Appellant's reliance on *Kavanagh v McLaughlin* on its merits, the case itself is of no relevance to the within proceedings. It concerned the entitlement of Bank of Scotland plc to appoint a Receiver and to enforce its security in circumstances where the assets and liabilities of Bank of Scotland (Ireland) Limited had been transferred to Bank of Scotland pursuant to the European Communities (Cross Border Merger) Regulations 2008. Following the transfer, Bank of Scotland plc was not registered as the owner of the securities pursuant to the Registration of Title Act, 1964.

In the present case, no such issues arise on the basis that the charges and mortgages at issue in the within proceedings vested in KBC Bank Ireland plc at all material times was entitled to appoint the Plaintiff/Respondent as Receiver over the relevant properties. In any event, the import of the decision of Laffoy J. in *Kavanagh v McLaughlin* was that notwithstanding any failure to register Bank of Scotland as the transferee of the securities, Bank of Scotland nonetheless enjoyed a *contractual* right to appoint the receiver as and from the date of transfer.

(c) In advance of the hearing in the High Court, the Appellant impugned the validity of the Deed of Appointment of the Plaintiff/Respondent on the basis that it was not under seal. In his affidavit sworn on 4 December 2014, the Respondent invited the Appellant to the Respondent's offices to inspect the original Deed on which the seal was visible. That invitation was not taken up by the Appellant.

The clear and uncontroverted evidence before the High Court was that the Bank's seal had been affixed to the Deed of Appointment in accordance with the Bank's Articles of Association: see the second Affidavit of Shane O'Connor sworn on 2 December 2014

During the course of the hearing of the application in the High Court, the Appellant's counsel did not take issue with the execution of the Deed of Appointment despite being informed by the Respondent that the original Deed of Appointment was available for inspection in Court.

(d) – (e) The Appellant is correct in that the Deed of Mortgage and Charge pursuant to which the Respondent was appointed was originally entered into between the Appellant and IIB Bank plc. By Special Resolution which was received by the Registrar of Companies on 24 October 2008, IIB Bank plc resolved to change its name to KBC Bank Ireland plc: see paragraph 6 of the first Affidavit of Shane O'Connor sworn on 13 October 2014.

Thus, KBC Bank is not a new owner of the Deed of Mortgage and Charge at issue in these proceedings in the same way Bank of Scotland plc was in respect of the security at issue in *Kavanagh v McLaughlin*. IIB Bank plc and KBC Bank plc are the same legal persons and the change of name of the company did not affect any of its rights or obligations: see Section 23(4) of the Companies Act 1963 (as was in force at the date of the change of name of the company).

In the premises, KBC Bank Ireland plc was and is not obliged to become registered as the owner of the relevant securities which were not the subject of a “*transfer*” within the meaning of Section 64 of the Registration of Title Act, 1964.

(f) The Respondent does not accept that the Appellant failed to lodge his Notice of Appeal due to a lack of knowledge of the relevant Rules of Court.

In his affidavit grounding the application for an extension of time within which to appeal the Appellant appears to imply that he was not in a position to file a Notice of Appeal as he had been out of the jurisdiction visiting a family member at the relevant time.

In moving the Application before the Court of Appeal - and on the final page of the within Notice of Appeal – the Appellant has contended that he had been in Ireland on 12 February, the day before the appeal period elapsed, when he met his erstwhile legal advisers, both solicitor and counsel.

The Appellant now states that he was not in a position to lodge the Notice of Appeal in time as he did not have an “*original*” copy of the Order (presumably this is intended to be a reference to an attested copy of the Order). That contention is difficult to understand in circumstances where the uncontroverted evidence before the Court of Appeal was that the Respondent's solicitors served a copy of the perfected Order on the Appellant's solicitors under cover of letter dated 6 February which was received on 9 February.

(g) The Respondent does not dispute the correctness of this legal principle which does not assist the Appellant in the within appeal.

(h) The Respondent does not understand the relevance of this ground of appeal which does not, in any event, properly reflect or record the terms of Article 40 of the Irish Constitution.

(i) The Appellant is incorrect in asserting that KBC Bank plc did not have the power to appoint the Respondent as receiver of the relevant properties. There is no risk of a miscarriage of justice in circumstances where the Appellant will be afforded the full opportunity to present his case and to challenge the appointment of the Receiver at the substantive trial of the action in the High Court.

In respect of the balance of the grounds of appeal being relied on by the Appellant, the Respondent contends that they have no bearing whatever on the decision of the Court of Appeal to refuse to extend the time within which to appeal from the Order of the High Court.

Without prejudice to the foregoing, the circumstances in which the Appellant failed to lodge a Notice of Expedited Appeal in the time allowed have been addressed in paragraph (f) above and are repeated here.

STEPHEN WALSH BL

6. Additional grounds on which decision should be affirmed


1. For the reasons outline above at paragraph (f) of Section 5 herein, the Appellant's application to the Court of Appeal for an extension of time within which to appeal from the Order of the High Court ought to have been refused on the additional ground that the Appellant failed to demonstrate some element of mistake having regard to the fact that mistake of counsel or solicitor – each of whom were retained by the Appellant at the relevant time – is not, under usual circumstances, sufficient to satisfy the test.
2. In all the circumstances of the case, the Court of Appeal was correct in exercising its discretion so as to refuse the application to extend time.

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions? Yes No

make a reference to the Court of Justice of the European Union? Yes No

Will you request a priority hearing? Yes No

Signed: 
Kilfeather & Company
Solicitors for the Respondent
The Halls
Quay Street
Galway

To: The Office of the Registrar to the Supreme Court
The Four Courts
Inns Quay
Dublin 7

And To: Migjen Gjyrevci
Main Street
Manorhamilton
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