



No. 2

SUPREME COURT
Respondent's Notice

Supreme Court record number 2018/ 00007

[Title and record number as per the High Court proceedings]

1. ACC Bank PLC	v	Aidan Cunniffe, Rita Cunniffe, John Lawless, Brian Cunniffe, James Cunniffe and all persons concerned (2011/ 753SP; 2011/ 254 COM)
2. John Lawless, Rita Cunniffe and Aidan Cunniffe		ACC Bank Plc, Kieran Wallace, KPMG, Michael Regan, Michael Regan Auctioneering Limited, Jarleth Mannion, Catherine Mannion, Enda Cusack, Stephen Grehan, Brian Kennedy, John Joe Kennedy (2013/ 6018P)
3. ACC Bank & Kieran Wallace		Aidan Cunniffe, Rita Cunniffe & John Lawless (2009/ 10169P)
<i>Date of filing</i>	26 January 2018	
<i>Name of Respondent</i>	ACC Bank Plc, Kieran Wallace	
<i>Respondent's solicitors</i>	A & L Goodbody	
<i>Name of appellant</i>	John Lawless, Aidan Cunniffe, Rita Cunniffe	
<i>Appellant's solicitors</i>	N/A	

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 ACC Bank Plc, Kieran Wallace

The respondent was served with the application for leave to appeal and notice of appeal on date:

Respondents were not served with the Notice of Appeal but had to request a copy of the Notice from the Supreme Court Office which furnished a copy of the Notice of Appeal on or about 22 January 2018.

The respondent intends:	N/A	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
	X	to oppose the application for leave to appeal
		not to oppose the application for leave to appeal
	X	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 (<i>please specify</i>)

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:

Respondent's Representation

Solicitor

Name of firm

Email

jmilne@algoodbody.com

Address

Telephone no.

01 6492250

Document Exchange no.

Postcode

Ref.

Document Exchange

E-mail

How would you prefer us to
communicate with you?

Post

Other (please specify)

Counsel

Name

Email

Address

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?

Document Exchange

E-mail

Post

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:

1. Section 4 of the Notice of Appeal refers this Honourable Court to the findings set out in paragraphs 1-3 and paragraphs 36-38 of the judgment of the Court of Appeal (hereafter "the CA Judgment"). The Respondent does not dispute the trial judge's findings of fact as set out therein.
2. The Notice of Appeal states that the Appellants have issued/ are to issue a motion on notice in this Honourable Court and that "*the first Appeal [the Slip Rule appeal will be dealt with by way of [this] motion*". The Respondents have no knowledge of this motion and do not understand its nature, purpose or how this motion is intended to articulate with the requirement for leave to appeal. The Respondents reserve their position in regard to this motion.
3. From s.4 of the Notice of Appeal, the Respondents understand that it is the intention of the Appellants to actively pursue appeals in respect of the first, second and fourth Appeals only. A formal appeal has been launched in respect of the Third Appeal (the striking out of the proceedings bearing record number [2013] 6018P) but this appeal, it appears, was launched in the belief that this was necessary in order to preserve the Appellants' right to pursue the second appeal.

4. Respondent's reasons for opposing leave to appeal

If leave to be appeal is being contested, set out concisely here the respondent's reasons why:

In the case of an application for leave to appeal to which Article 34.5.3^o of the Constitution applies (i.e. where it is sought to appeal from the Court of Appeal)—

**the decision in respect of which leave to appeal is sought does not involve a matter of general public importance*

** it is not, in the interests of justice, necessary that there be an appeal to the Supreme Court*

The First Appeal (Slip rule):

1. The Appellants make reference in the Notice of Appeal to a motion on notice which has not been served on the Respondents and the nature of which is entirely unclear. The Appellants assert that *“the first appeal will be dealt with by motion filed 15 June 2017 and the Appellants intend to file a further affidavit as directed by the Supreme Court Office...”*. It is noted that the Appellants have failed to offer any grounds in the Notice of Appeal as to why this Honourable Court should grant leave to appeal – this may be explained in the unseen motion. It is submitted that leave cannot be granted in these circumstances as no evidence that a matter of general public importance has arisen or that the interests of justice are engaged is presented in the Notice of Appeal.

The Second Appeal (VAT Invoice):

2. The Appellants offer two reasons why leave ought to be granted in this appeal. The first, as the Notice of Appeal states, is that:

“The Appellants contend that the position of a Receiver exercising a power of sale is now a matter of more pressing public importance, where the role of the receiver has become far more prevalent”.

This appears to argue that the asserted prevalence of receivership today is sufficient to justify classing cases involving receivers exercising powers of sale as involving a matter of general public importance. Just this type of broad argument was recently rejected by this honourable Court in *PWC v Quinn Insurance* [2017] IESC 73 (see particularly paragraph 9) as its acceptance would be inconsistent with the exceptional nature of an Appeal to this Honourable Court.

3. Secondly, the Appellants contend that the Court of Appeal did not consider the decision in the *Secret Hotels 2* case (*Commissioners for Revenue and Customs v Secret Hotels 2 Ltd* [2014] UKSC 16) and this led to an

(unspecified) error in the Court's treatment of *Customs & Excise v Redrow* ([1991] WLR 408). In respect of these two assertions the Respondent responds as follows:

- (a). The Appellants' written submissions to the Court of Appeal made mention of the *Secret Hotels 2* case in a single sentence and provided no explanation or analysis of it. The Court of Appeal invited the Appellants to address the Court on this case by way of oral submission but the Appellants declined to do so, Mr. Lawless stating that he had not read it recently and so was not in a position to offer any submission on it to the Court. To assist the Court, Counsel for the Respondents opened the case and took the Court through it. The Court then considered the case but did not find it to be of particular assistance. It is not explained in what way the Court erred in so treating it.
 - (b). In respect of *Redrow*, the Court of Appeal gave detailed consideration to same (see principally the CA Judgment paragraphs 48-50; 55- 58). Again, the Appellants have not attempted to explain in what way the Court of Appeal is alleged to have erred in its treatment of *Redrow*. The Appellants assert that "*it is a matter of considerable public importance as to whether the law in this area was fully and properly applied by the Court of Appeal*". This statement, however, is entirely without force in circumstances where no specific errors have been asserted. Furthermore, this Honourable Court has previously rejected a similar proposition in *PWC v Quinn Insurance* (supra) where it was suggested – and rejected - that it was sufficient for leave to be granted that "*this Court... form an initial prima facie view as to the possibility of error in the court below*" (paragraph 8). The Court rejected this proposition noting the difference between error and injustice. The principle must apply with particular force where, as here, the allegation is in the form of a bare assertion such as could not give rise to even a *prima facie* view that the lower court had fallen into error.
4. Finally, it is submitted (as set out by the Court of appeal at the CA Judgment paragraphs 51, 52 & 56) that the interaction between *Bula* and *Redrow* is such that the Appellants' case must, of necessity fail. Most of the indicia set out in *Redrow* are explicitly considered in *Bula* and found to be absent in respect of a receiver's relationship with a mortgagor. The Appellants accept that *Redrow* is good law and so urge this Honourable Court to depart from *Bula* on the grounds that it is not "*a modern representation of the law in this area*" (Notice of Appeal s.6). No reasons have been offered as to why *Bula* is wrongly-decided or outmoded and so leave ought to be refused.

The Third Appeal (Strike Out appeal):

5. It is noted that the Appellants are not appealing the making of an Order striking out High Court proceedings [2013] 6018P (the Strike Out appeal) in the within Notice of Appeal.

The Fourth Appeal (the Isaac Wunder Order):

6. The Appellants first argument is that making of the Isaac Wunder Order in this case:

“raises issues of the most fundamental issues [sic] of pressing public importance as the Order made denies the appellants their constitutionally guaranteed right of access to the Courts”.

It is important to note that the instant case involved the application of long-established principles previously approved and applied by this Court. No new law was made. The argument presented here again inverts the exception and the rule for leave to appeal. If the Appellants' contention is correct, leave to appeal to the Supreme Court would be required wherever a litigant's right of access to the Courts was restricted by the making of an Isaac Wunder Order. It is submitted that this argument is too broad to succeed and further that the particular facts of this case and the law applied to same are unexceptional and so disclose no matter of general public importance.

7. The second argument raised is that Gilligan J's decision to grant an Isaac Wunder Order breached the Appellants' rights under Article 6 of the ECHR by reason of the fact that he had previously refused to grant one. The relief was refused in September 2014 but, 16 months later, and in response to further meritless and oppressive litigation, the High Court granted the instant Order in January 2016. The Court of Appeal heard the Appellants' argument that the initial refusal ought to have precluded the later granting of the Order and rejected it. Indeed the Court considered that the initial refusal of the Order confirmed the *“cautious and conscientious approach of the judge”* and evidenced the judge's exercise of *“considerable restraint”* in the case (the CA Judgment paragraph 136). It is submitted that this analysis is correct and the contention of the Appellants clearly misconceived.
8. Finally, it is noted that Mr Lawless, in open Court, in both the High Court and the Court of Appeal stated his intention to continue pursuing litigation against the Respondents (see the CA Judgment paragraph 136) unless restrained. It is common cause then that the Isaac Wunder Order was necessary in this case to restrain further litigation which litigation the Courts have deemed to be oppressive and without merit.

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):

The First Appeal (Slip Rule appeal):

1. It is noted that no grounds of appeal have been offered in relation to the First Appeal (the Slip Rule appeal). The Appellants apparently intend to deal with this appeal by way of motion.

The Second Appeal (VAT Receipt):

2. The Court of Appeal did not fail to apply the decision in *Secret Hotels 2*, nor did it misapply the legal principles identified in *Redrow*. Furthermore, the assertion that the Court's alleged failure to apply *Secret Hotels 2* case resulted in the misapplication of the principles set out in *Redrow* is incoherent.
3. As appears from the Notice of Appeal, it is common cause that the House of Lords decision in *Redrow* sets out the correct legal principles to be applied in this appeal – the Appellants' complaint is not that the Courts applied these principles when they ought not to have accepted them but rather that the Courts 'misapplied' them or did not apply them "fully and properly". In this appeal it seems to be accepted by the Appellants that in order for this Court to find in their favour, it would have to overturn its decision in *Bula v Crowley* [2003] 1 IR 396 (see the CA Judgment paragraphs 51-52). In *Bula Denham J* (as she was then) provided a comprehensive and detailed analysis of the nature of receivership and the relationship between receiver and mortgagor. If the description of receivership set out by this Honourable Court in *Bula* is correct then the application of the *Redrow* indicia to the case of receivership leads inexorably to the finding that the services of a receiver are not supplied to the mortgagor but rather are supplied to the bank or debenture holder. Thus the Appellants' case fails (see the CA Judgment paragraph 56). *Bula* represented a detailed analysis and synthesis of a large body of existing law in this area and so to overturn it would involve not merely overturning one of this Courts own well-established precedents but would also involve rejecting many of the fundamental principles of Receivership.
4. As noted above, the Appellants' sole basis for asserting an entitlement to deduct the VAT charged by the receiver is that the mortgage deed states (in the usual terms) that the receiver will be deemed the "agent" of the

mortgagor. If the receiver is the agent of the Appellants, the argument goes, he must be supplying them with services. This argument was correctly dismissed at the CA Judgment paragraphs 56-59 (see especially paragraph 56(b)). In addition to relying on *Bula*, the Court of Appeal correctly noted that the jurisprudence of the European Court (see *Newey* at the CA Judgment paragraph 58) required the Courts of Member States to look beyond the bare language of contractual documents and to examine whether the terms employed therein reflected the “*economic realities*” of the particular transaction at issue. Correctly applying EU law and having regard to the nature of receivership as set out in *Bula*, the Court found that the contractual and economic realities of the relationship between a receiver and a mortgagor were not such that the mortgagor could be regarded as the recipient of the receiver’s services (the CA Judgment paragraph 58).

The Third Appeal (Strike Out appeal):

5. It is noted that no grounds of appeal have been offered in relation to the Third Appeal (the Strike Out appeal).

The Fourth Appeal (the Isaac Wunder Order):

6. In s. 6 of the Notice of Appeal, the Appellants refer to section 5.3 of the Notice of appeal wherein they state that it is a breach of Art 6 of the ECHR to grant an Isaac Wunder Order in circumstances where one has previously been refused. The substance of this argument has been dealt with above (s.4.6) by way of response to 5.3 of the Notice of Appeal.

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

Stephen Fennelly BL

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?

No

If Yes, please give details below:

/

make a reference to the Court of Justice of the European Union?

No

If Yes, please give details below:

/

Will you request a priority hearing?

No

If Yes, please give reasons below:

Please submit your completed form to:

The Office of the Registrar of the Supreme Court

The Four Courts

Inns Quay

Dublin

A. L. Goodbody.