

SUPREME COURT

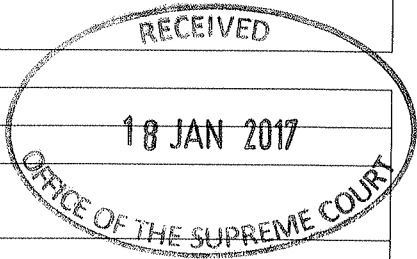
Respondent's Notice

Supreme Court record number	S AG IE 2016 144
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[Title and record number as per the High Court proceedings]

Kiernan Milling	V	Finbar Tolan
High Court Record No. 2013/ 2827S		
Court of Appeal Record No. 2015/000352		

Date of filing	4/1/17
Name of respondent	Kiernan Milling
Respondent's solicitors	John J. Quinn & Co.,
Name of appellant	Finbar Tolan
Appellant's solicitors	Lay Litigant



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	Kiernan Milling
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The respondent was served with the application for leave to appeal and notice of appeal on date	
20 th December 2016	

The respondent intends :

<input type="checkbox"/>	to oppose the application for an extension of time to apply for leave to appeal
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<input type="checkbox"/>	not to oppose the application for an extension of time to apply for leave to appeal
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<input checked="" type="checkbox"/>	to oppose the application for leave to appeal
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<input type="checkbox"/>	not to oppose the application for leave to appeal
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<input checked="" type="checkbox"/>	to ask the Supreme Court to dismiss the appeal
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<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
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<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;

Respondent's Representation

Solicitor			
Name of firm	John J. Quinn & Co.,		
Email	info@jjquinn.ie		
Address	Earl Street, Longford, Co. Longford.	Telephone no.	0433341541
		Document Exchange no.	29001
Postcode		Ref.	
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	Niall Flynn BL		
Email	nflynn@lawlibrary.ie		
Address	Law Library, Four Courts, Dublin 7.	Telephone no.	0877695900
		Document Exchange no.	818193
Postcode			

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 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

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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:

The Respondent disputes that the Appellant had cleared his account in full with the Respondent on the 21st December 2012. Mr. Justice Hanna heard evidence from the Appellant, Respondent and a number of witnesses and following a full hearing on this point, the learned High Court Judge was satisfied that the said payment was not in full and final settlement of monies due and owing from the Appellant to the Respondent.

Mr. Kevin McHale and Ms. Noeleen Kiernan did not give inconsistent untrue evidence.

This matter was listed before the Court of Appeal on the 14th November 2016. On the 11th November 2016, Counsel for the Appellant made an application for leave to file supplementary submissions. Submissions were filed in this matter by the Appellant in November 2015 and by the Respondent on the 11th February 2016. A hearing date was applied for on the 11th February 2016 and the matter was assigned the 14th November 2016 for hearing. The Appellant took no further steps prior to the 11th November 2016 to advance his case further. President Ryan correctly dismissed the application. The Appellant did not file Books of Appeal in this matter. The Appellant made an Application to adjourn the matter, on the 4th November 2016, to allow the Appellant file same. The Appellant argued that he had not obtained the necessary transcripts in order to file the Books of Appeal. The Respondent undertook and did file the Books of Appeal so as to avoid further delays.

The Appellant applied to the Court of Appeal, on the 22nd October 2015, for the DAR of the High Court hearings. This application was granted by the Court.

President Ryan did not appear biased towards the Appellant. President Ryan did not hear this matter in the High Court. This matter was listed before the Master of the High Court and transferred to the Common Law Motion List. The matter was adjourned out of the Common Law Motion List to the non-jury long motion list as it would take in excess of twenty minutes. The matter was never opened in the Common Law Motion List. This matter was opened before President Kearns in the High Court and was subsequently adjourned to Plenary Hearing before Mr. Justice Hanna.

4. Respondent's reasons for opposing leave to appeal

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

The reasons why the Respondent respectfully submits that the decision in respect of which leave to appeal is sought does not involve a matter of general public importance are as follows:

1.

(a) The proceedings between the parties herein arise out of a claim by the Plaintiff / Respondent (hereinafter referred to as "the Respondent") for summary judgment against the Defendant / Appellant (hereinafter referred to as "the Appellant") wherein the Respondent sought and obtained judgment in the sum of €44,892.50, being the sum of money lawfully due and owing to the Respondent by the Appellant in respect of cattle feed purchased by the Appellant from the Respondent. The proceedings relate solely to a private debt between the parties and do not involve any matter of general public

importance whatsoever.

- (b) The substantive proceedings received a full hearing before Mr. Justice Hanna in the High Court on the 17th day of September 2014 who, having heard evidence and submissions by both sides, determined that a cheque paid by the Appellant to the Respondent was not in full and final settlement of all monies due and owing. The Appellant swore and filed four Affidavits prior to this matter been determined by Plenary Hearing. At no stage did the Appellant state that he did not order the goods. Further, Counsel for the Appellant, on the 14th November 2016, for the first time, made an issue about a contract being formally proved. The issue of contract was never argued in the High Court or in the Appellant's Notice of Appeal to the Court of Appeal. Further, it is a frivolous and vexatious argument to suggest there was no contract between the parties in circumstances where the Appellant has sued the Respondent in separate High Proceedings entitled "*Finbar Tolan v Kiernan Milling Record No. 2014/5197P*", for, inter alia, breach of contract.

Further, the Appellant does not set out that he did not order the goods nor does the Appellant state that the Respondent failed to prove their contract with the Appellant in the Grounds of Appeal to the Court of Appeal.

- (c) Thereafter, the Appellant herein appealed the decision of Mr. Justice Hanna to the Court of Appeal. The appeal was heard by the Court of Appeal on the 14th day of November 2016 with judgment subsequently delivered by the Court (President, O'Regan and Hogan J.J.) on the 14th day of November 2016. The Court of Appeal dismissed the Appellant's appeal with an Order for costs in favour of the Respondent. It is respectfully submitted therefore that the Appellant herein has had the benefit of a hearing in the High Court and, thereafter, had the benefit of an appeal to the Court of Appeal which, having considered all relevant matters, dismissed the said appeal. It is submitted that the Court of Appeal was correct in accepting the dicta in *Hay v O'Grady* as this continues to be the correct statement of the law on these matters.
- (d) The Appellant herein was represented by Solicitor and Counsel in the Court of Appeal but was a lay litigant in the High Court.
- (e) Insofar as the Appellant now asserts that the matters at issue herein involve a matter of general public importance, the Respondent respectfully submits that this is patently not the case. Firstly, the matter involves a private dispute between the parties herein. Secondly, the matter has been determined against the Appellant, both in the High Court and in the Court of Appeal.
- (f) Further and insofar as the Appellant asserts that it is in the interests of justice that the Supreme Court hears the appeal and/or refers it back to the Court of Appeal, it is respectfully submitted that there is no basis to do so. The Appellant was represented by a solicitor and counsel in the Court of Appeal. Paul Kelly Solicitors came on record for the Appellant on the 6th October 2015. This was prior to the Appellant's submissions been filed and a hearing date been obtained. The Appellant had the benefit of legal advice and representation for thirteen months prior to the hearing of this matter. The Appellant had ample time to prepare his appeal and put forward arguments to the Court of Appeal which were not contained in the Appellant's grounds of appeal. The Appellant has had the opportunity to have the decision of the High Court reviewed by the Court of Appeal and has had the benefit of having been able to put his case both at trial and on appeal. Therefore, it is respectfully submitted that the interests of justice will not require a further review on appeal to this Court.

2. The Respondent submits that the solicitor representing the respondent did not, in any

way, interfere with a Law Society investigation. It is submitted that the Respondent's solicitor, along with counsel instructed, appeared before the Law Society Regulation Committee to address the Appellant's complaints. The Respondent's solicitor, at all times, co-operated with the Law Society. Following a hearing, the matter was adjourned generally with liberty to apply. Mr. Justice Kearns, then President of the High Court, heard the Appellant on this issue. The Learned Judge stated that he could not see a conflict and if there was any conflict it was a matter for the Law Society. The Appellant re-ventilated his argument before Mr. Justice Hanna. Mr. Justice Hanna stated that if any conflict arose he would rule accordingly.

3. The Respondent submits that Appellant made an application by Notice of Motion for the release of the DAR of the High Court hearings. The release of the DAR was ordered by the Court of Appeal on the 22nd October 2015. The Appellant, with the benefit of legal representation, did not lodge submissions until the 19th November 2015. This matter was listed for directions on the 11th February 2016 for purpose of fixing a hearing date. On that occasion, Counsel for the Appellant, confirmed that the release of the DAR had been ordered and that submissions had been filed. The Appellant made no complaint regarding the DAR nor did the Appellant mention supplemental submissions. As all matters were in order, the matter was assigned a hearing date on the 14th November 2016. The Respondent respectfully submits that the Appellant corresponded with the Respondent's solicitors seeking the DAR. The Appellant requested the release of the DAR from the Court and as it was the Appellant's appeal there was no obligation on the Respondent to either obtain the DAR or furnish same to the Appellant in order to prosecute the appeal. It is incorrect to submit that the President directed the Respondent to furnish the DAR on the 4th November 2016. The Respondent had, prior to the 4th, written to the Appellant undertaking to lodge the Books of Appeal. These were to include the transcripts from the High Court and same were to be furnished to the Appellant. The Appellant contends that he was prejudiced by not having supplemental submissions before the Court which would show that the Respondent had not proved their contract with the Appellant. The Appellant never denied that a contract existed between the parties in the High Court or in his Notice of Appeal to the Court of Appeal. Further, the issue of a contract between the parties was never put in issue in the High Court proceedings nor was it contained in the Appellant's grounds of appeal to the Court of Appeal.

4. The President of the Court of Appeal did not hear this matter when it was before him in the High Court. The matter was listed in the Common Law Motion List before Mr. Justice Ryan on the 31st March 2014. The Appellant made an application for an adjournment so as to allow him to file a further Affidavit. Counsel for the Respondent indicated that this matter would take in excess of 20 minutes and that it should be transferred to the long motion list which was presided over by Mr. Justice Kearns. Mr. Justice Ryan acceded to this application and transferred it to the long motion list on the 9th April 2014 to fix a hearing date. The Appellant was given a further six weeks to file his Affidavit. This matter or its merits were never opened before Mr. Justice Ryan in his capacity as a High Court Judge.

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

Using the numbering set out in the Appellant's Notice of Appeal, the Respondent's grounds of opposition to the grounds of appeal set out by the Appellant are as follows:

1. The Respondent submits that any untruths or inconsistencies are matters that were fully considered by the Courts below. The High Court heard evidence from a number

of witnesses for the Respondent and one witness on behalf of the Appellant. There was a finding of fact by the learned High Court Judge and, in accordance with the dicta in *Hay v O'Grady*, the appellate courts should not interfere with the finding unless there is an error on behalf of the Judge. The Court of Appeal had possession of the High Court transcript, written submissions from both parties and the Court was in a position to assess any alleged inconsistencies and untruths.

2. The Respondent submits that the Appellant's Appeal was adjudicated on by a fair and impartial court. President Ryan did not hear the merits of the matter whilst sitting as a High Court Judge. The matter was listed before President Ryan in the Common Law Motion List 1. President Ryan adjourned the matter to the long motion non-jury list on application from counsel. This matter only opened before Mr. Justice Kearns and Mr. Justice Hanna in the High Court. The Appellant was afforded every latitude by the Courts below in advancing his defence. Further, the Appellant took no issue with the President hearing the Appeal. This matter was mentioned before President Ryan on the 4th and 11th November 2016 and no issue was raised by Counsel for the Appellant regarding the composition of the Appellate Court.
3. The Respondent submits that the Appellant had ample opportunity to put supplementary submissions before the Court. A hearing date was obtained in this matter in February 2016. The Appellant took no further step in this matter until the 4th November 2016 wherein he sought to have the matter adjourned to allow him to file the Books of Appeal. The Appellant made an application on Friday 11th November 2016 to file supplemental submissions. The Court heard the application and dismissed the application. Further, the Appellant alleges that these supplemental submissions related to the Respondent not proving the existence of a contract between the parties. This argument was not put before the High Court nor was it contained in the Appellants grounds of appeal.
4. The Respondent submits that this ground was argued before Mr. Justice Kearns. Mr. Justice Kearns held that it was a matter for the Law Society. The Appellant made a complaint to the Law Society. The Law Society conducted a formal hearing into the complaint. Following the hearing, the Law Society adjourned the matter generally with liberty to apply. The Appellant re-ventilated this argument before Mr. Justice Hanna. Mr. Justice Hanna held that if any conflict arose he would rule accordingly. No such conflict arose.
5. The Respondent submits that the learned Trial Judge did not rely on untrue inconsistent evidence. The Learned Trial Judge heard evidence from both parties and their respective witnesses. The Learned Trial Judge made a finding of fact and correctly held that the test was on the balance of probabilities and not beyond a reasonable doubt. The Respondent submits that the Court of Appeal was entitled to rely on the dicta in *Hay v O'Grady*.

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

Niall Flynn BL

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:

The within appeals relate to matters which commenced by way of summary summons. Proceedings were commenced on the 4th September 2013. The Respondent is anxious to recover the monies in circumstances where other litigation is pending against the Appellant.

Signed: 
(Solicitor for) the respondent

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.