**THE SUPREME COURT**

**[Supreme Court Appeal No: 120/2018]**

**O'Donnell J.**

**McKechnie J.**

**MacMenamin J.**

**Dunne J.**

**O'Malley J.**

**BETWEEN:**

**PEPPER FINANCE CORPORATION (IRELAND) DAC**

**RESPONDENT/PLAINTIFF**

**AND**

**BRIAN CANNON AND CHRISTINA CANNON**

**APPELLANTS/DEFENDANTS**

**JUDGMENT of Ms. Justice O'Malley delivered on the 4th day of February 2020**

**Introduction**

1. In granting leave to appeal in this case, the Court observed that it raised a similar issue to that in *Seniors Money Mortgages v. McGovern* (in which judgment is also delivered today). This issue concerns the factors that an appellate court should take into account in exercising its discretion whether or not to extend time to appeal in circumstances where an appellant may meet some but not all of the criteria identified in *Éire Continental Trading Co. Ltd. v. Clonmel Foods Ltd.* [1955] I.R. 170. In this case the appellants were almost nine months out of time in lodging an appeal against an order made by the County Registrar for possession of their family home. The Circuit Court judge refused to extend time, and her decision was upheld in the High Court.

2. The substantive issue sought to be argued in an appeal, if time is extended, is that the County Registrar failed to carry out an assessment of the fairness of the terms of the mortgage, as required under Council Directive 93/13/EC on Unfair Contract Terms in Consumer Contracts (implemented in this State by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. 27/1995)).

3. That very brief synopsis of the background demonstrates that there is a distinct issue in the case which must be resolved before the applicability of the *Éire Continental* test is considered, concerning the jurisdiction of this Court having regard to the 33rd Amendment to the Constitution. The appeal is against a decision of the High Court made on appeal from the Circuit Court. There is no doubt but that under the previous constitutional regime such appeals were barred by virtue of s.39 of the Courts of Justice Act 1936, which continues to provide that the decision of the High Court (or

the High Court on Circuit) on an appeal under that part of the Act shall be "final and conclusive and not appealable". It is therefore necessary to determine whether an appeal lies under the new constitutional jurisdiction of this Court. On this aspect, the Court requested oral and written submissions from the Attorney General, as well as from the parties. The Court is grateful for the assistance received.

**The jurisdictional issue**

*The 33rd Amendment to the Constitution*

4. Prior to the 33rd Amendment, Article 34.4.3º of the Constitution provided that the Supreme Court should have appellate jurisdiction from "*all*" decisions of the High Court "*with such exceptions and subject to such regulations as may be prescribed by law*". There was no doubt that a provision such as s.39 of the Act of 1936 constituted an exception prescribed by law.

5. The Amendment provided for the establishment of the Court of Appeal. Article 34.4.1º sets out the appellate jurisdiction of that Court in the following terms:

> *4 1º The Court of Appeal shall –*
>
> *i save as otherwise provided by this Article, and*
>
> *ii with such exceptions and subject to such regulations as may be prescribed by law,*

*have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such other courts as may be prescribed by law.*

6. The text here clearly indicates that the Court of Appeal now enjoys the jurisdiction previously exercised by the Supreme Court in respect of appeals from the High Court. Thus, as observed in *Grace and Sweetman v. An Bórd Pleanála* [2017] IESC 10, restrictions imposed on an appeal to this Court under the previous regime now *prima facie* apply to the Court of Appeal.

7. The Amendment also altered the scope and machinery of the Supreme Court's jurisdiction. Article 34.5.3º deals with appeals to this Court from decisions of the Court of Appeal as follows:

*5 3º The Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the Court of Appeal if the Supreme Court is satisfied that –*

*i the decision involves a matter of general public importance, or*

*ii in the interests of justice it is necessary that there be an appeal to the Supreme Court.*

8. The next sub-article, Article 34.5 then provides:

*4º Notwithstanding section 4.1º hereof* [i.e. the jurisdiction of the Court of Appeal], *the Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the High Court if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors:*

*i the decision involves a matter of general public importance;*

*ii the interests of justice.*

9. Article 34.5.5º remains unchanged, and sets out an express prohibition on the enactment of any law excepting from the jurisdiction of the Supreme Court cases involving questions as to the validity of any law having regard to the provisions of the Constitution.

10. It is also relevant to note certain provisions of the Court of Appeal Act 2014. Firstly, s.8 of that Act provides for the general jurisdiction of the new court. Subject to specific exceptions not relevant here, there is now vested in the Court of Appeal "*all appellate jurisdiction which was, immediately before the establishment day, vested in or capable of being exercised by the Supreme Court*".

11. Section 74 provides that references to the Supreme Court, in relation to an appeal, in any enactment passed or made before the establishment of the Court of Appeal are to

be construed as references to the Court of Appeal unless the context otherwise requires. (An express exception to this general rule was provided for in relation to appeals to the Supreme Court from the then still-extant Court of Criminal Appeal.)

12. Prior to the date of establishment of the Court of Appeal, the Oireachtas had frequently provided in the legislation governing certain types of legal issue that a decision or determination of the High Court in a case governed by the enactment in question was to be final, subject to a right of appeal to the Supreme Court in certain circumstances. Thus, for example, the right of appeal in an immigration or environmental law case might be subject to the grant of permission to appeal by the High Court judge who decided the case, with such permission to be given only in accordance with particular statutory criteria. It was established by the jurisprudence of this Court that there was no appeal against a refusal to give permission.

13. Section 75 of the Act of 2014 now provides that any reference to such a decision or determination is to be construed as being without prejudice to Article 34.5.4º. It also provides that a reference to the "Supreme Court" in such legislation is to be construed as a reference to the Court of Appeal unless the context otherwise requires.

14. Section 76 deals with a different category of litigation, where pre-2014 legislation in respect of various matters made the decision of the High Court final in all respects, with no provision for a right of appeal in any circumstances. The section stipulates that such measures are to be construed as being without prejudice to Article 34.5.4º of the Constitution.

15. I do not suggest that the interpretation of a constitutional text can be guided by the provisions of a statute. The task of the Court is to adhere to the words approved by the People. Furthermore, it might be said that it is unnecessary for the legislature to expressly provide that an Act is to be construed as being without prejudice to the Constitution – that would be so in any event. Nonetheless, I think that it is appropriate to acknowledge the acceptance by the Oireachtas that the Amendment may have altered the former status of a statutory exclusion of this Court's jurisdiction in relation to certain decisions of the High Court.

*The decision in Grace and anor v. An Bórd Pleanála* [2017] IESC 10

16. The proceedings in this case were governed by s.50 of the Planning and Development Act 2000, as amended. The appellants' judicial review proceedings were dismissed in the High Court. Under the terms of the section, they could not appeal against that decision unless the trial judge certified that a point of law of exceptional public importance arose and that it was desirable in the public interest that an appeal be pursued. The High Court decision in the case was given in 2015, so, if such a certificate had been granted, the appeal would have gone to the Court of Appeal. An application for a certificate was refused, and the appellants then sought leave to appeal to this Court. The jurisdiction of the Court to hear the matter was disputed by the respondents in their objection to a grant of leave.

17. In holding that it had jurisdiction to hear the appeal, the Court placed emphasis on the new wording of Article 34.5.4º and the absence of any power to legislate for the exclusion of any appeal from this Court. The following passage appears at paragraph 3.4 of the joint judgment of Clarke and O'Malley J.J.:

> *"That provision must be seen in the light of that fact that, in order to obtain leave to appeal to this Court under the new regime, it is necessary that this Court be satisfied that a general issue of public importance* [sic] *arises or that the interests of justice require an appeal to this Court. The deliberate omission, in the constitutional amendment passed by the people, of an entitlement on the part of the Oireachtas to exclude an appeal to this Court under the new regime has to be seen in that context. Would it have been appropriate to allow the Oireachtas to prevent an appeal coming to this Court even though this Court was satisfied that the case raised an issue of general public importance or that the interests of justice required an appeal? But it seems to us to follow that any measure which prevents (rather than regulates) the exercise by this Court of its entitlement, under the 33rd Amendment, to consider whether a case meets that constitutional threshold must be considered to be an impermissible exclusion of the right of appeal to this Court. No express relevant measure has been introduced since the 33rd Amendment. Precisely what form of measure might be considered an exclusion rather than a regulation does not, therefore, fall for consideration in this case."*

18. The Court therefore held that the appellants had a right to invite the Court to consider whether the constitutional threshold had been met and thereafter, having obtained a favourable decision on that point, to pursue the appeal.

19. This conclusion did not, of course, touch upon the constitutional validity of s.50 of the Act of 2000 in any way. The section, in common with similar provisions imposing a certificate requirement for an appeal in other legislation, imposes a valid restriction on the right of appeal to the Court of Appeal in such cases.

*Submissions of the parties on jurisdiction*

20. In written submissions the appellants and respondent have agreed that the Supreme Court does, in principle, have jurisdiction to entertain an appeal from a decision of the High Court on a Circuit Court appeal, although they differ on the question whether this case satisfies the constitutional criteria.

21. The Attorney General also submits that the Court has jurisdiction. It is noted that it was emphasised by this Court in *Grace* that the wording of Article 34.5.4° of the Constitution makes it clear that relevant legislation may *regulate* but, unlike the situation under the previous text, cannot *exclude* an appeal to this Court. By contrast, the wording of Art. 34.5.3° refers expressly to the possibility that appeals from the High Court to the Court of Appeal can be *either* excluded or regulated by appropriate legislation. The Attorney General submits that this indicates an intention that under the new constitutional arrangements, the Oireachtas would not continue to have the power to create exceptions to the Supreme Court's appellate jurisdiction.

22. It is acknowledged that in some cases it might be debatable whether a particular legislative provision constitutes an "exception" to an appellate jurisdiction, as distinct from a "regulation" of it. However, the Attorney General considers that no such question arises in respect of s.39 of the Act of 1936. The section would be in direct

contradiction to the terms of Article 34.5.4°, were it not for the limiting effect of s.76 of the Court of Appeal Act 2014.

23. In the course of the hearing a question arose as to the effect of the words *"warranting a direct appeal"* in relation to appeals from the High Court. On one view, the reference to a "*direct appeal*" might be taken to imply that the section is applicable only to cases where appeals would otherwise lie to the Court of Appeal, and therefore only to cases that the Court of Appeal has jurisdiction to hear.

24. The Attorney General disputes that interpretation, arguing that to accept it would create the possibility that the Oireachtas could limit the jurisdiction of this Court indirectly (by legislating to exclude categories of litigation from the jurisdiction of the Court of Appeal) where it could not do so directly (by legislating for exceptions to the jurisdiction of this Court). It is pointed out that the terms of the Constitution do not expressly limit the jurisdiction of the Supreme Court, in the case of appeals from the High Court, to cases where that Court was acting as a court of first instance, or to cases where there would otherwise be a right of appeal to the Court of Appeal. The constitutional distinction between the Court of Appeal and the Supreme Court, in terms of appellate jurisdiction, is said to be that the former has jurisdiction in all cases unless there is a relevant exception or restriction, while this Court has jurisdiction in all cases if the constitutional criteria are otherwise satisfied.

*Conclusion on the jurisdictional issue*

25. Section 39 of the Courts of Justice Act 1936 must now, by virtue of s.76 of the Act of 2014, be construed as if it read:

*"Without prejudice to Article 34.5.4º of the Constitution, the decision of the High Court… shall be final and conclusive and not appealable."*

26. Article 34.5.4º provides that this Court has appellate jurisdiction from a decision of the High Court, if it is satisfied in relation to specified matters. Those are that the Court must be satisfied that either or both of the general public importance and the interests of justice factors are present, and that there are exceptional circumstances warranting a direct appeal to it. Should these criteria be met, the Court has jurisdiction *notwithstanding* the jurisdictional provision made for the Court of Appeal in Article 34.4.1º.

27. It seems to me, therefore, that the jurisdiction of this Court in relation to appeals from the High Court is a matter to be assessed without reference to any exclusion or restriction affecting the jurisdiction of the Court of Appeal. It is clear that the jurisdiction of the two Courts is not intended to be co-terminous in all respects, in that the Oireachtas may validly legislate for exceptions in respect of the Court of Appeal but no longer has that power in respect of the Supreme Court. I agree with the Attorney General that the legislature cannot, in this regard, do indirectly what it cannot do directly – it cannot reduce the jurisdiction of the Supreme Court by reducing the jurisdiction of the Court of Appeal.

28. The analysis adopted in *Grace and Sweetman v. An Bórd Pleanála* is valid in this context. The same question can be posed – would it be appropriate to allow the Oireachtas to prevent an appeal from being taken against a decision of the High Court

in a Circuit appeal, if this Court was satisfied either that it involved a point of law of general public importance or that an appeal was required in the interests of justice?

29. It is relevant to note here that, while appeals from the Circuit Court generally concern well settled areas of law, it is always possible that a decision given in that context may give rise to some new legal development of widespread significance. In accordance with the principles discussed in *David Hughes v. Worldport Communications* [2005] IEHC 467, as approved in *Kadri v. The Governor of Wheatfield Prison* [2012] IESC 27, one High Court judge will normally follow a previous decision given by another judge of that Court unless satisfied that it was in error. However, the exclusion of Circuit appeals from the category of decisions of the High Court that could be further appealed has, in the past, brought about a situation where there were conflicting High Court judgments on important questions of law (see, for example, the decisions of Hogan J. and Kearns P. in, respectively, *Wicklow County Council v. Fortune* [2012] IEHC 406 and *Wicklow County Council v. Kinsella* [2015] IEHC 229).

30. It should be remembered that judges of the High Court may, before pronouncing final judgment or order in an appeal from the Circuit Court, refer any question of law for the determination of the Court of Appeal (s.38(3) of the Courts of Justice Act 1936 – for a discussion of this provision, including its application to cases where no oral evidence was heard in the Circuit Court, see *Irish Life and Permanent plc v Dunne*[2016] 1 I.R. 92.) However, it is nonetheless possible that, where this option is not adverted to or not taken, serious anomalies may remain unresolved.

31. If the legislature, hypothetically, were now to enact a provision excluding the possibility of an appeal in such a case, it would not be affected by s.76 of the Act of

2014 (since that measure applies only to legislation enacted before the establishment of the Court of Appeal). It would be difficult, in those circumstances, to see such a provision other than as an impermissible exception to the jurisdiction set out in the Constitution.

32. The reference in Article 34.5.4º to a "*direct appeal*" does not, in my view, support an alternative analysis. It is not only the fact that such an alternative analysis would, obviously, permit indirect exclusions from the jurisdiction of this Court. It seems to me that it would also require the reading in of words such as "*where the Court of Appeal would otherwise have jurisdiction to hear the appeal*". The literal interpretation appropriate to technical provisions of the Constitution would reject such an exercise. In my view the "direct appeal" envisaged in the Article is simply an appeal that comes directly from the High Court to this Court, rather than *via* the Court of Appeal. It is an apt description of such an appeal, whether or not the Court of Appeal would have had jurisdiction to hear it.

33. I would conclude, therefore, that this Court has jurisdiction to grant leave to appeal from a decision of the High Court made on appeal from the Circuit Court, notwithstanding s.39 of the Courts of Justice Act 1936, provided that the constitutional criteria are satisfied. However, certain considerations must be stressed. The most significant feature of leave to appeal from the High Court is that an applicant for leave must, under Article 34.5.4º, demonstrate *exceptional circumstances* warranting such an appeal, as well as the presence of a point of law of general public importance and/or the requirement for an appeal in the interests of justice.

34. It was submitted by the appellants in their notice of application for leave to appeal that if the general public importance or interests of justice aspect of the threshold test were to be reached, the very fact that the legislation excluded an appeal to the Court of Appeal might provide the exceptional circumstances justifying a direct appeal to this Court. This submission was strongly disputed by the respondent, who submits that the "*exceptional circumstances*" must be specific to the applicants and their case, and cannot be found in legislation that is of general application to all litigants.

35. In its determination granting leave to appeal in *Grace* (see *Grace & Anor v An Bórd Pleanála* [2016] IESCDET 29), the Court suggested that if the constitutional threshold was met in respect of general public importance or the interests of justice, then the "exceptional circumstances" might very well be found in the fact that an appeal to the Court of Appeal was excluded under the relevant legislation. Ultimately, that aspect did not require to be addressed either in the substantive judgment in that case or, as yet, in any subsequent appeal in relation to the Planning and Development Acts.

36. It seems to me that the analysis in the *Grace* determination is a valid one in this context. Exceptional circumstances are required in the case of an appeal from the High Court precisely because of the fact that in most cases the most appropriate route of appeal will be to the Court of Appeal. If that Court does not have jurisdiction, there will be the possibility that a point of law that is of general public importance will remain unaddressed by either the Court of Appeal or the Supreme Court. That is not the intention underlying the constitutional structure, and in my view is capable of being seen as an exceptional circumstance that can justify a grant of leave.

37. However, in any case of this nature where leave to appeal to this Court is sought, four particular factors will be borne in mind. The first is that the general policy of the legislature, unchanged since 1936, is that Circuit Court litigation should not be appealed beyond the High Court. The second is that in the same statute the legislature has provided for a means by which the High Court can refer questions of law for determination by the Court of Appeal. It is highly desirable that this procedure should be utilised in cases of doubt, and particularly where a High Court judge is being asked, in a Circuit appeal, to disagree with a previous High Court judgment. An applicant for leave to appeal to this Court can therefore expect to have to address the question why that procedure was not pursued. The third is that cases of this nature will rarely meet the criteria of the "interests of justice" category, since there will already have been both a hearing and a full appeal. Finally, the fact that there has already been one level of appeal means that the absence of a further right of appeal is not as exceptional as, for example, the category of cases where a certificate of leave from the trial judge is required.

38. It seems to me that this case meets the constitutional criteria. The proper application of the *Éire Continental* criteria has already been identified in *Seniors Money v. Gately* as raising an issue of general public importance. The substantive issue also concerns a point of law of general public importance, being the operation of the Directive and Regulations. The extent of any obligation on a court to assess the terms of a mortgage, or other consumer contract, for unfairness has not previously been the subject of a written judgment of this Court, and is clearly capable of being a matter in respect of which guidance may be desirable at every level of the court system.

**The background facts**

39. The appellants entered into a loan agreement in or about December 2007 for the sum of €810,000. The loan was secured on their partly-constructed home, the property that is now the subject of the order for possession. It appears that part of the loan was used to satisfy a Revenue debt and the rest was spent on the completion of the construction.

40. Under the terms of the loan offer the mortgage was repayable in 468 monthly instalments over 39 years. The interest rate was fixed at 6.70% for the first three years. At that point the lender might choose to offer a further fixed rate period or to apply a variable rate, whereby the rate would vary either upwards or downwards at the lender's discretion.

41. An express provision in the agreement drew the borrowers' attention to the fact that the loan, and the security, would be freely transferable by the lender. However, in the event of such transfer, and subject to its terms, the policy in respect of interest rates and the handling of arrears would not change unless either the lender or the borrowers were in breach of their obligations.

42. Following the economic downturn, the appellants went into arrears on their loan payments. Although they have continued to make some payments to the respondent, the sums paid since their first default in March 2009 are greatly exceeded by their obligations under the loan.

43. A civil bill for possession was issued in November 2014. Several terms of the mortgage agreement were expressly pleaded as grounding the claim:

(i) That the borrowers would pay the secured monies, including the balances, interest and other sums due on foot of the loan facility at the times and in the manner provided for;

(ii) That the borrowers would secure the payment of the monies by charging the property in favour of the lender;

(iii) That the borrowers would pay the secured monies on demand;

(iv) That all monies remaining unpaid and secured by the mortgage would immediately become due and payable on demand, on the occurrence of any event of default including default in making payment of any monthly or other periodic payment;

(v) That the secured monies were deemed to have become due and payable, within the meaning and for all purposes of the Conveyancing Acts, on the execution of the mortgage;

(vi) That, at any time after the execution of the mortgage, the lender could without any further consent from or notice to the borrowers enter into possession of the mortgaged property or any part thereof; and

(vii) That the power of sale would be exercisable by the lender without the restrictions on its exercise imposed by s.20 of the Conveyancing Act 1881.

44. It was averred in the grounding affidavit that the appellants had first defaulted in making repayments in March 2009. Correspondence was exhibited to establish that the respondent had engaged with the appellants, in compliance with the 2013 version of the Central Bank's Code of Conduct on Mortgage Arrears and the prescribed Mortgage Arrears Resolution Process. Such Codes, issued under statutory authority, are legally binding on lenders. The 2013 version stipulated *inter alia* that lenders

must, apart from attempting to find a solution that would obviate the need for repossession, wait at least eight months after the first default in payment before taking enforcement action. In the event, it was not until February 2014 that the respondent informed the appellants that no alternative repayment arrangement could be offered as, essentially, they did not have sufficient income to service the mortgage. Other options available to the appellants were outlined – the "Mortgage to Rent" scheme, assisted voluntary sale and voluntary surrender.

45. The appellants had a right to appeal this decision in accordance with the Code, but did not do so and did not take up any of the suggested options. A demand for payment of all outstanding monies was made on the 26th May 2014, and was followed by a demand for vacant possession on the 18th June 2014.

46. The matter was first listed before the County Registrar in March 2015, and then adjourned from time to time before being finally dealt with on the 19th January 2017. The appellants were represented by solicitor and counsel at the hearing. As of that date the figure for the arrears was €325,434. The appellants were making payments of €300 per month, which was less than 10% of the due figure. It may be noted here that the records exhibited by the lender demonstrated that the interest rate applicable to the mortgage had dropped to 4.78% in February 2010, and was further reduced in the course of 2011.

47. The possession order was made by the County Registrar, but a stay was given until the 1st August 2017. No appeal was brought by the appellants within the prescribed ten-day period.

48. The appellants engaged a new solicitor in July 2017. That solicitor wrote to the respondent's solicitor on the 27th July 2017, days before the expiry of the stay, stating that the appellants intended to appeal the possession order on the basis that it was made without any assessment of the fairness of the terms of the loan agreement as required under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995. These regulations implement Council Directive 93/13 ("the Directive"), a harmonising measure concerning consumer contracts.

49. The respondent's solicitor, in replying to this and subsequent correspondence, stated that *AIB v. Counihan* [2016] IEHC 752 (in which Barrett J. had held that a court considering a consumer contract must conduct such an assessment of its own motion) had been expressly drawn to the attention of the County Registrar and that she had said that she was aware of it.

50. The appellants filed a motion in the Circuit Court in October 2017, seeking an extension of time to appeal the decision of the County Registrar. In the grounding affidavit it was averred by the first named appellant that he and his wife had not sought to appeal earlier because they had been advised by the solicitor then acting for them that they had no grounds for appeal or judicial review. He deposed that his "recollection" was that the County Registrar had not carried out an assessment of the terms of the loan. He further asserted that there had been no assessment of the proportionality of a possession order in the context of their rights under the Charter of Fundamental Rights and the European Convention on Human Rights. He asked for an extension of time "given that we formed the intention to appeal within the prescribed time limit, that my previous solicitor did not inform me of these rights and that we have a strong ground of appeal". He undertook to continue paying €300 per month.

51. There was no evidence, whether by way of affidavit or an attendance note, from the appellants' original legal representatives.

52. A draft notice of appeal was exhibited, with three grounds of appeal. The first was that the County Registrar did not assess the terms in accordance with the Regulations; the second was that, if such an assessment had indeed been carried out, it had not been recorded and no reasons for the decision had been given; and the third was that there had been no proportionality assessment.

53. A replying affidavit on behalf of the respondent asserted that *AIB v Counihan* had been drawn to the attention of the County Registrar, as had each of the contractual terms being relied upon by the respondent in seeking the order for possession. The County Registrar had considered the papers before her, and in particular the letter of loan offer and the mortgage, and had been satisfied that the respondent was entitled to an order. Regard had also been had to the appellants' personal circumstances and the stay was given for that reason.

54. The application to extend time was ultimately refused by the Circuit Court on the 13th February 2018. It is clear from the DAR transcript that the trial judge, in holding that the appellants had not met the *Éire Continental* criteria, laid considerable emphasis on the fact that the appellants had been legally advised at the time they entered into the agreement and at all material times thereafter including the hearing before the County Registrar. She also stressed the length of time that had elapsed between the order and the motion to extend time. Finally, she referred to a judgment given by Ní Raifeartaigh J. some weeks earlier (*Pepper Finance v. Hanlon,* a decision delivered *ex*

*tempore* in January 2018), where that judge had commented on the failure of the mortgagor to point to any particular term in a mortgage that could be said to be unfair.

55. The Circuit Court refusal to extend time was appealed, and the first named appellant swore a further affidavit in which he averred that he and his wife had wanted to appeal the decision of the County Registrar "*immediately*", but had been advised they had no grounds. He then made specific reference to a clause in the loan agreement that purported to allow the respondent to vary the interest rate at its discretion, in the absence of any factors limiting that discretion, and asserted that this was unfair. In this regard he exhibited a Central Bank addendum to the Consumer Protection Code. The addendum, which became effective on the 1st February 2017, obliges a regulated lender to produce a summary statement of its policy for setting each variable mortgage interest rate in respect of loans to personal consumers, and to update the policy when it changes. The statement must *inter alia* clearly identify the factors that may result in a change, and the criteria and procedures applicable to the setting of the rate. A copy of the statement, and any change to it, must be provided to the consumer.

56. It should be noted here that these amendments to the Code were made on foot of the European Union (Consumer Mortgage Credit Agreements) Regulations 2016 (S.I. 142/2016), which apply to agreements entered into after the 21st March 2016.

57. The appeal was dismissed by the High Court (Noonan J.) on the 17th July 2018. It is clear from the ruling that there was, again, emphasis on the fact that the appellants had been represented before the County Registrar.

58. Turning to *Éire Continental*, Noonan J. referred to it as setting out the "test" for an extension of time, with three "requirements" that any applicant for an extension "must" satisfy. In this case, Noonan J. was prepared to assume for the purposes of the application that there was an arguable ground of appeal. However, he considered that the appeal should be dismissed on the basis that the appellants had not crossed the first two hurdles. The first affidavit contained no evidence of the formation of an intention to appeal. The second affidavit was not of assistance, since to "want" to appeal (which Noonan J. saw as a natural reaction for a losing party) was not the same thing as to "form an intention" to appeal. It was, in his view, clear that the appellants had decided to accept their lawyers' advice after the hearing and on that basis had formed an intention not to appeal.

59. Similarly, Noonan J. did not accept that there was evidence of a mistake of the sort that he considered was envisaged in *Éire Continental.* He stated that a mistake as to procedure, or the meaning of a rule, would not suffice and he saw a mistake as to the law applicable to the substantive matter before the Court as being in the same category.

60. Counsel had relied upon *Goode Concrete v. CRH Plc and Others* [2013] IESC 39 and *Tracey v. McCarthy* [2017] IESC 7. Noonan J. felt that they did not assist the appellants either, but rather affirmed the correctness of *Éire Continental*. In both cases Clarke J. had emphasised the importance of finality in litigation, and therefore the justification for the setting of short time limits for the bringing of appeals. Such limits were intended to facilitate the fundamental legal principle that finality is important – parties are entitled to order their affairs on the basis that once the case has been decided, and no appeal has been brought, the matter has run its course. The delay in

this case, of almost nine months, had to be compared with the ten-day limit within which the appeal should have been brought.

**Submissions in the appeal**

*The appellants*

61. At this point the appellants accept that they do not meet two of the *Éire Continental* criteria, in that it is no longer argued either that they formed an intention to appeal within ten days of the order or that there was anything in the nature of a mistake. Their concentration is on the arguability of the grounds of appeal, which they say are strong. They emphasise the discretionary nature of the jurisdiction to extend time, and suggest that what were originally intended as guidelines may have come to be applied in an overly rigid manner. However, it is noted that the flexibility of the criteria has been highlighted in a number of judgements of this Court such as *Goode Concrete v. CRH Plc and Others* [2013] IESC 39 and *Lough Swilly Shellfish Growers Co-operative Society Ltd. v. Bradley & Ivers* [2013] IESC 16.

62. Further, the appellants submit that since they are relying on rights under European Union law, there are two additional considerations that, independent of their own action or lack of action in progressing an appeal, may require a recalibration of the *Éire Continental* criteria in any event. The first is that the principles of equivalence and effectiveness must be considered when national procedural rules are being applied. The other is that the courts, and court officials such as the County Registrar, are obliged to vindicate rights created by a protective regime established by the

European Union. It is submitted that a failure in this regard must be taken in consideration when the appellate court is asked to extend time.

63. On the substance of the issue sought to be argued in an appeal, the appellants submit, in summary, that the jurisprudence of the Court of Justice of the European Union establishes that there is an obligation on the part of a national court to assess, of its own motion, whether contractual terms falling within the scope of the Directive are unfair, where it has available to it the legal and factual elements necessary for that task. The purpose of the process is to compensate for the imbalance which exists between the consumer and the seller or supplier. The role attributed to the national court by EU law in this area therefore goes beyond the normal function of ruling on a dispute between parties. If the court finds a term to be unfair, that term will be unenforceable, whether or not the consumer has raised an argument in court in that regard, and whether or not the seller or supplier has invoked the term as against the consumer. It is further submitted that domestic law principles concerning the finality of judicial proceedings and the principle of *res judicata* may, at times, be required to give way to the obligation to take a binding rule of EU law into consideration.

64. The appellants argue that certain terms in the mortgage in question are unfair and therefore unenforceable. In particular, they contend that the "acceleration" clause (providing that the entirety of the secured debt would become due and payable on demand on the happening of any event of default) was unenforceable. They say that it follows that the full amount of the principal and interest was not due to the respondent when it sought possession. They also refer to the interest variation clause and to

clauses giving the lender power to enter into possession of the appellants' home and to transfer the contract without any restrictions.

*The respondent*

65. The respondent accepts that the *Éire Continental* principles are to be seen as guidance rather than as "a prescriptive doctrinal test", and that discretion ultimately remains with the court. However, it is submitted that the importance of each of the three criteria is reflected in the fact that they have survived for in excess of 60 years, and have been re-affirmed in countless decisions of the superior courts. The respondent relies in particular on the observation in *Goode Concrete* that the *Éire Continental* test would apply in the vast majority of cases.

66. It is submitted that the appellant must provide some justification, where a *bona fide* intention was not formed within the time permitted by the Rules. Further, it is submitted that *Goode Concrete* requires that the justification should be based on some fact or information that did not arise in the court below – this is based on the comments in that judgment to the effect that in general parties will be aware of the time-limits and will have available the materials, submissions and information that were before the first instance court. In this context it is stressed that the issue of an "own motion" assessment was expressly raised by counsel for the respondent at the original hearing, in the presence of the appellants as well as their counsel.

67. It is argued that the appellant must show that the application to extend time was brought promptly once the intention was formed. On the assumption that an intention to appeal was formed in late July 2017, no application to extend time was brought until more than two months later. This is said to be a significant delay in a context in

which the appropriate time period within which to apply was 10 days of the original decision. (The appellants attribute the delay during that period to the correspondence attempting to ascertain whether or not the County Registrar had conducted the appropriate assessment.)

68. On the facts of the case it is submitted that the appellants have "manifestly" failed to meet the first two *Éire Continental* criteria. In asking the Court to overlook such a failure, an appellant must, it is submitted, demonstrate a "very strong" case that would be likely to overturn the substantive result at first instance, rather than merely "arguable" grounds of appeal. This is said to be necessary in order to ensure an appropriate balance of justice as between the parties. However, in this case, it is contended that the appellants do not even reach the lower bar of "arguable" grounds of appeal. Based on the affidavit evidence, the respondent asserts that the County Registrar was aware of her own obligations under the Directive and Regulations, that she considered the relevant contractual provisions in the light of the relevant case law of the CJEU and that she concluded, nonetheless, that the respondent was entitled to an order for possession.

69. Further to this submission the respondent makes a number of points on the issues of EU law. First, it is contended that the obligation to repay the secured monies, coupled with the entitlement of a mortgagee to obtain possession of a property on foot of a deed of mortgage in the event of default, are the *sine qua non* of any deed of mortgage. It is thus argued that those terms are the very essence of the subject matter of the contract and fall within the ambit of Article 4(2) of the Directive and Regulation 4 of the Irish regulations.

70. Even if this were not the case, it is argued that the relevant terms are not unfair within the meaning of the Directive and regulations. Furthermore, it is submitted that if the appellants do satisfy the court that their rights pursuant to EU law have been infringed, the CJEU's own interpretation of the finality principle, as relied on by Ní Raifeartaigh J. in *Cronin v Dublin County Sheriff* [2017] IEHC 685, makes it clear that it is not necessary to disapply domestic rules on finality due to a (disputed) misapplication of EU law. It is submitted that the appellants have failed to demonstrate any basis upon which they should be entitled to circumvent that principle.

**Discussion**

71. Before engaging in an analysis of the enactments and decisions relevant to the Directive, it will, I think, be helpful to deal briefly with one aspect of the appellants' submissions. It has been argued that the approach to extensions of time for appeals should be recalibrated to take account of the requirements of EU law relating to the principles of equivalence and effectiveness and the obligation of the courts to protect rights conferred by EU law. However, I can see no basis for an argument in respect of either equivalence or effectiveness. Equivalence is not breached by time-limits that are applied to litigation in general, whether related to EU law or national law. The principle of effectiveness requires Member States to ensure that the protection of EU rights by national courts is not made impossible or excessively difficult – again, there are no grounds upon which it could be contended that the ordinary time-limits, which are coupled with the discretion to extend time, result in a situation where it is impossible or unduly difficult for consumers to defend their rights.

72. Further, it must be borne in mind that the principles of *res judicata*, including the principle that judicial decisions become definitive after the expiry of time-limits for appeal, are part of the jurisprudence of the European Union. This position is exemplified in the judgment of the CJEU in *Kapferer v Schlank Schick GmbH* (C-234/04, EU:C:2006:178) where one of the questions asked by the referring court was whether a national court was under an obligation to review and set aside a judicial decision, that was otherwise final, if that decision infringed Community law. In its response, the Court said:

> *"In that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (Case C-224/01 Kobler [2003] ECR I-10239, paragraph 38).*
>
> *Therefore, Community law does not require a national court to disapply rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision in issue (see, to that effect, Case C-126/97 Eco Swiss [1999] ECR I-3055, paragraphs 46 and 47)."*

73. The Court therefore stated that the obligation of a national court to review a decision that appeared to have been made in breach of Community could arise only if the court in question was empowered under national law to do so. As it has in many judgments, the Court also stressed that, in laying down procedural rules designed to protect the rights acquired by individuals through Community law, Member States must respect the principles of equivalence and effectiveness.

74. I do not suggest here that the instant case is *res judicata*, insofar as the Court has yet to determine whether or not an appeal should be permitted to proceed. The point is that, once the principles of equivalence and effectiveness are satisfied, there are no separate considerations applicable to the case by reason only of the fact that its subject-matter concerns EU law. The considerations identified in the Irish case-law concerning the need for finality in litigation are equally important in EU law.

75. Having said that, it will be seen that the acceptance by the CJEU of the importance of the principle of *res judicata* does not necessarily mean that a decision that would normally be regarded as final may not be revisited in respect of an issue that was not addressed.

***The Directive and Court of Justice authorities***

*General approach to the Directive*

76. According to the recitals, the Directive was adopted by the Council of the European Communities as part of the process of establishing the internal market. It was noted that there were disparities between the laws relating to contracts in the Member States

and, in particular, that there were marked divergences in relation to unfair terms in consumer contracts. This could lead to distortions of competition, and an unwillingness on the part of consumers to purchase goods or services in other Member States. The removal of unfair terms from consumer contracts was seen as essential. The adoption of uniform rules in respect of such contracts would have afforded the most effective protection, but, as national laws stood at the time, only partial harmonisation could be envisaged.

77. The Directive proceeds on a presumption that statutory or regulatory provisions already in force in Member States, that directly or indirectly affect the terms of consumer contracts, do not themselves contain unfair terms. The principal obligation imposed on Member States is to ensure that unfair terms are not used in contracts concluded with consumers by a seller or supplier and that if, nevertheless, such terms are so used, they will not bind the consumer. Where an unfair term is found, the contract will, nonetheless, continue to bind the parties if it is capable of continuing in existence without that term.

78. The line of authorities on the Directive cited by the parties includes *Pannon GSM v Gyorfi* (C-243/08, EU:C:2009:350), where the CJEU was asked whether the consumer protection provided by the Directive required the national court to carry out a review of the fairness of contractual terms of its own motion, even where they had not been challenged in court by the consumer.

79. The Court commenced its analysis with the statement that the system of protection introduced by the Directive was based on the idea that the consumer was in a weak position *vis-à-vis* the seller or supplier, in relation to both bargaining power and level

of knowledge, and could be led to agree to terms without being able to influence their content. The aim of compensating for that imbalance would not be achieved if it was left to the consumer to raise the unfairness of the terms, and therefore effective protection could only be attained if the national court acknowledged that it had power to evaluate the terms of its own motion and to rule that the consumer was not bound by an unfair term. Consequently, the national court's role was not limited to a power to rule on the possible unfairness of a term, but also consisted of an obligation to examine the issue if it had available to it the legal and factual elements necessary for that task.

*Article 3*

80. Article 3 provides that a contractual term that has not been individually negotiated shall be regarded as unfair "*if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer*". A contract is not individually negotiated if, *inter alia*, it is based on a pre-formulated standard contract. "Good faith" is also referred to in the sixteenth recital, where it is stated that the requirement of good faith may be satisfied by the seller or supplier where he deals "fairly and equitably" with the consumer, whose "legitimate interests" he has to take into account.

81. An Annex to the Directive contains an indicative and non-exhaustive list of terms that may be regarded as unfair. Of these, it may be relevant to note subparagraph (e), which refers to terms that have the object or effect of requiring a consumer who fails to fulfil his obligations to pay a "disproportionately" high sum in compensation; and subparagraph (j), which refers to terms which enable the seller or supplier to alter the

terms of the contract unilaterally, without a valid reason specified in the contract. This latter subparagraph is stated to be without prejudice to terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer, or the amount of other charges for financial services, without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately. Further, the subparagraph does not apply to transactions where the price is linked to fluctuations in, *inter alia*, a financial market rate that the seller or supplier does not control.

82. In *Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa* (C-415/11, EU:C:2013:164), the CJEU responded to a request for clarification of the concept of an "unfair term" with reference to a mortgage agreement. It was noted that in each case it would be for the national court to decide whether a contractual term was actually unfair, and that the role of the CJEU was confined to giving guidance as the criteria that must be taken into account.

83. In summary, the question whether a term creates a "significant imbalance" within the meaning of the Directive should be assessed by asking whether the consumer has been placed in a less favourable position than would be the case, under the relevant provisions of national law, if the term was not there. This assessment should have regard to the means available to a consumer, under national law, to prevent continued use of unfair terms. The "good faith" assessment, in relation to a term, requires the court to ask whether a seller or supplier could reasonably assume that the consumer would have agreed to such a term if the contract had been negotiated individually.

*Article 4*

84. Article 4 is here set out in full:

> *"1. Without prejudice to Article 7* [not relevant here], *the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.*
>
> *2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language."*

*Article 4(1)*

85. The "circumstances attending the conclusion of the contract", as referred to in Article 4(1), include the consequences of the term in issue under the national law applicable to the contract (*Aziz*).

*Article 4(2)*

86. Article 4(2) has been held to represent a derogation, and is therefore to be interpreted strictly. Contractual terms falling within the notion of the "main subject-matter of the

contract" are those that lay down the essential obligations of the contract and, as such, characterise it (*Kasler and Kaslerne Rabai v. OTP Jelzalogbank Zrt* (C-26/13, EU:C:2014:282). Again, it is for the national court to decide whether a term comes within this category. It is also necessary to emphasise that such terms will only be exempt from an assessment as to fairness if they are written in plain and intelligible language. If they are not, the national court should assess them for unfairness accordingly.

87. In *Banco Primus v. García* (C-421/14, EU:C:2017:60), the referring court asked whether the quality/price ratio (exempt under Article 4(2)) could affect the review of the fairness of a term relating to the calculation of interest. The CJEU responded that if the national court found that a term relating to quality and price, although covered by Article 4(2), was not in plain intelligible language it should proceed to consider whether it caused a significant imbalance in the parties' rights and obligations. In so doing it should compare the method of calculation laid down in the term, and the total sum reached, with the statutory interest rate and the rates applied on the market, as of the date of conclusion of the agreement, for a loan of a comparable sum and term.

88. In *Aziz* the CJEU was asked for guidance in relation to, *inter alia*, an "acceleration" clause in a mortgage providing that the lender was entitled, on the expiry of a stipulated time, to call in the totality of the loan if the borrower had failed to fulfil his obligation to pay any part of the principal or interest. The CJEU held that the national court must assess whether the lender's right was conditional upon a failure of the borrower to comply with an obligation that was of essential importance in the context of the contractual relationship. The court must also assess whether the lender's right

arose in cases where the non-compliance by the borrower was "sufficiently serious" in the light of the term and amount of the loan – given the context, the implication here must be that the term may be unfair if it entitles the lender to call in the loan in the event of a trivial default.

89. The court must further consider whether the lender's right amounts to a derogation from the national legal rules that would otherwise apply, and whether the law provides an adequate means for the consumer "to remedy the effects of the loan being called in". These questions may involve consideration of the statutory rules governing mortgages, if the mortgage agreement stipulates that such rules are not to apply to the agreement or if they are otherwise adapted in the contract for the benefit of the lender and to the detriment of the borrower. Some remedies, such as rescission, may be available under common law contract principles. Others are available under statute and will be discussed in due course.

90. The Court of Justice was also asked about a term fixing a default rate of 18.5% in respect of any sum not paid when due. Again, it was said that the national court should assess what interest rate would have applied under national law if there was no such term. The contractual default rate should be compared with the statutory rate, in order to determine whether it is appropriate for attaining the objective sought to be achieved by it.

91. Again, in the Irish context the issue of interest has been the subject of some statutory regulation, while default interest may also be subject to the common law principles relating to "penal" interest. If a comparator rate is required, the rate applicable to judgment debts appears appropriate (i.e. "Courts Act interest").

*Article 6*

92. Article 6 requires Member States to lay down that unfair terms shall not, as provided for under national law, be binding on the consumer. The contract is, however, to continue to bind the parties if it is capable of continuing in existence without the unfair terms. The CJEU has held that Article 6 is a mandatory term. Further, Member States are obliged, by Article 7, to ensure that adequate and effective means exist to prevent the continued use of unfair terms in consumer contracts.

93. In *Banco Primus v. Garcia* the contract contained an acceleration clause permitting the lender to call in the totality of the loan in the event of failure to pay any monthly instalment. Spanish legislation, on the other hand, required a period of at least three months' default. The bank had, in fact, waited seven months before proceeding against the borrower. The Spanish referring court asked whether it could be precluded by the national legislation from declaring the clause to be invalid.

94. The CJEU noted that the wording used in the contract indicated an intention not to be bound by the statutory restriction. Accordingly, the clause fell within the scope of the Directive. However, it pointed out that by virtue of Article 6(1) the national court was merely required to exclude the application of an unfair term, so that it did not bind the consumer. The court was not empowered to revise the content of the contract, which was to continue in existence if such was legally possible after deletion of the unfair term.

95. The Court held that the obligations of Member States to ensure a dissuasive effect, required under Article 7, meant that the ruling of a court on the unfairness of a term could not be contingent upon the term having been actually applied. Further, the fact that a term was not invoked could not prevent the national court from drawing "appropriate inferences" from the unfair nature of the term.

*Procedural rules and appeals under the Directive*

96. In *Aziz*, the CJEU found that the Spanish procedural rules applicable at the time breached the principle of effectiveness and impaired the protection intended by the Directive. In brief, this was because of the very limited grounds upon which enforcement proceedings brought by the lender could be defended. It was possible for a court to find the terms of the contract to be unfair, but the court with jurisdiction to make that finding was unable to grant interim relief capable of staying or terminating the enforcement proceedings, and the remedy that it could grant by way of final order was inadequate in that the loss of the mortgaged property was irreversible. That consideration, according to the CJEU, was particularly relevant in the case of a family home.

97. In the light of the ruling in *Aziz*, the Spanish rules were amended to permit a consumer to defend enforcement proceedings on the basis that the contractual term upon which the proceedings were grounded was unfair. However, the debtor had no right of appeal against an unfavourable finding, while the lender could appeal against a finding of unfairness or a refusal to enforce. This gave rise to a further preliminary reference in *Morcillo and Garcia v Banco Bilbao Vizcaya Argentaria S.A.* (C-169/14, EU:C:2014:2099).

98. In this case the Court noted that, in the absence of harmonisation of national enforcement measures, the details of rules establishing a right of appeal against a decision on the legality of a contractual clause were matters falling within the domestic legal order of the Member States. It is, of course, necessary that such rules should comply with the principles of equivalence and effectiveness. There was no evidence in the case to suggest that the principle of equivalence had been breached.

99. With reference to effectiveness, the Court noted that it had previously held that where the question arose as to whether a national procedural provision made the application of EU law "impossible or excessively difficult", the case must be analysed by reference to the role of that provision in the process, viewed as a whole, before the various national bodies. In that context, it is necessary to take into account, where relevant, the principles which lie at the basis of the national legal system such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.

100. The judgment goes on to point out that the principle of effective judicial protection in EU law protects the right to a court or tribunal but does not guarantee a right of access to a second level of jurisdiction. The fact that Spanish law provided a remedy to the consumer at only one jurisdictional level was not, of itself, contrary to EU law.

101. However, the Court criticised a number of other features of the Spanish procedural system. In particular, it noted that the amendments introduced after *Aziz* conferred a discretion on the court hearing enforcement proceedings to examine the fairness of the contractual clauses upon which the claim for enforcement was based,

but did not oblige it to do so of its own motion. Any such assessment was required, under the legislation, to be carried out and determined within a very short period of time. Further, it remained the case that other defences that the borrower might have had were to be dealt with in separate proceedings, that could result in compensation but could not have the effect of staying or terminating the enforcement proceedings.

102. The lack of a right of appeal for the borrower was considered at this point, as one of a number of procedural matters that placed the consumer in a weaker position as regards judicial protection than the lender. The attainment of the objectives of the Directive was put at risk, since the procedural imbalance accentuated the existing imbalance between the parties to the contract. This was contrary to the principle of equality of arms, an integral element of the principle of effective judicial protection, and was liable to jeopardise the protection intended by the Directive.

103. Spanish procedures were again in issue in *Finanmadrid EFC SA v. Zambrano* (C-49/14, EU:C:2016:98). The subject-matter of this case was an 84-month car loan. The borrower ceased to make payments after about 55 months. The lender terminated the contract some months later. It then applied to the Secretario judicial of the local court to open enforcement proceedings against the borrower and his guarantors in respect of the balance due. In accordance with the applicable rules, the Secretario judicial had power only to decide whether the documents submitted constituted *prima facie* evidence of the claim and to then order the defendants to either pay the money, with interest, or appear before the court to explain why they were not liable. They did neither, so the Secretario judicial closed that stage of the procedure and issued a direction to the lender to seek an enforcement order from the court. Such a direction,

given by way of reasoned decision, was an "enforceable procedural instrument with the force of *res judicata*".

104. The simple making of an application sufficed for the purpose of seeking a court order and no evidence was required. It seems that under the applicable rules the court could not refuse an order unless either the debtor contested the order for payment proceedings or the Secretario judicial reported that the amount claimed was incorrect. The defendants did not engage with a request by the court for submissions on the fairness of the contract terms and the appropriateness of the procedural rules. The court, nonetheless, doubted the compatibility of the process with the Directive, and referred a number of questions to the CJEU.

105. The Court stated, as it had previously in *Banco Espanol de Credito v. Camino* (C-618/10, EU:C:2012:349), that national law could not preclude a court from determining, of its own motion, *in limine litis* (at or before the commencement of the case) or at any other time, whether a contract was unfair, even if the consumer had not lodged an objection. A procedural arrangement such as the one in question was liable to undermine the effectiveness of the protection intended by the Directive, which required a court to be permitted to check of its own motion whether the terms of the contract were unfair. The Secretario judicial did not have the power to make such an assessment, and since the decision at that stage had rendered the order for payment proceedings *res judicata* it was impossible to check the terms at the enforcement stage.

106. The Court observed that there was a significant risk that consumers would not lodge the objection required by the rules, given the very short time period allowed, the risk of legal costs, possible ignorance of their rights and the limited amount of

information submitted by the lender. It concluded that the rules in issue ran counter to the principle of effectiveness.

107. *Banco Primus v. Garcia*, already referred to above, also raised the issue of *res judicata*. The background was a transitional legislative measure, brought into force in 2013, which applied to all pending cases where mortgage repossession cases had been instituted but not concluded. The defendants in such cases were given one month, from the date on which the measure came into force, to lodge objections to the enforcement proceedings on the basis of the alleged unfairness of the contractual terms.

108. In Mr. Garcia's case a court had already found the acceleration clause in his mortgage to be unfair, but had upheld the lawfulness of the contract in circumstances where the bank had not invoked the clause against him and had waited for seven months before issuing proceedings. As already noted, Spanish legislation provided that the total amount of principal and interest could be claimed if the borrower was in default for a period of not less than three months. After the 2013 measure was enacted Mr. Garcia lodged a further objection, based on the same clause, but did so after the month had passed. At that point the court dealing with the enforcement process referred questions to the CJEU asking, in effect, whether it could be precluded from examining the contract of its own motion by reason of *inter alia* the fact that there was an earlier decision that was final under national procedural law.

109. The Court referred again to its previous analysis of Article 6(1) – that it is a provision of equal standing to such national rules as rank, within the domestic legal system, as rules of public policy. It went on to re-emphasise the importance, both for the EU legal order and for national legal systems, of the principle of *res judicata.* The

Court also stated clearly that consumer protection is not absolute. EU law does not require a national court to disapply domestic rules of procedure that confer finality on a decision, even if reopening the decision would make it possible to remedy an infringement. The Directive did not, therefore, preclude rules that had the effect of prohibiting a national court from examining of its own motion the fairness of the terms of a contract where a ruling has already been given on the lawfulness of the terms of the contract, taken as a whole, in a decision that has become *res judicata*.

110. However, the Court went on to hold that this principle did not apply where the first national court had limited itself to examination of only one, or some, of the terms. Where, in subsequent enforcement proceedings, a consumer had properly lodged an objection, a national court dealing with those proceedings was obliged, either at the request of the parties or of its own motion, to assess the potential unfairness of other terms of the contract.

111. It may need to be emphasised that this latter obligation arises in the context of an application that is properly before the national court. The CJEU did not alter the position that a court cannot be required to act outside its powers under the applicable rules, even if to do so would enable the rectification of an infringement of a party's rights under EU law.

**The Irish legislation and authorities**

112. The Directive was implemented in Irish law by the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 (S.I. 27/1995, as amended in 2000 and 2013 in relation to matters not relevant here). The Regulations are, more

or less, an exact reflection of the Directive insofar as the core principles and indicative list of terms that may be regarded as unfair are concerned. Schedule 2 sets out brief guidelines for the application of the test of good faith – regard is to be had to the strength of the bargaining positions of the parties; whether the consumer had an inducement to agree to the term in question; whether the goods or services were sold or supplied to the special order of the consumer; and the extent to which the seller or supplier has dealt fairly and equitably with the consumer whose legitimate interests he has to take into account.

113. Article 8 of the Regulations confers a power on an authorised body (the Central Bank, the Competition and Consumer Protection Commission, or an authorised consumer organisation) to apply to either the Circuit Court or High Court for a declaration that any term drawn up for general use in contracts concluded by sellers or suppliers, or any similar term used or recommended by any seller or supplier, is unfair. The Court may grant an order prohibiting the further use of such a term. Injunctive relief is available ancillary to this jurisdiction, which does not appear to have been widely invoked. The power is without prejudice to the right of a borrower to rely upon the Regulations.

114. *AIB v Counihan* [2016] IEHC 752 was the judgment referred to before the County Registrar in this case. The matter before the High Court (Barrett J.) was an application for summary judgment, and the question to be determined, therefore, was whether the defendants were entitled to a plenary hearing. The defendants ultimately succeeded on this issue, on a point not relevant here, but in the course of the judgment Barrett J. considered the Regulations in the context of the lending activities of credit

institutions. Having cited the CJEU judgment in *Aziz*, he made the following observations on the obligations of a court applying the Regulations:

> *"10. First, the Court of Justice's observations appear to contemplate a court, even in an adversarial system of justice, acting in an inquisitorial manner.*
>
> *11. Second, counsel for AIB suggested that the above-mentioned duty ought to be construed by reference to the particular facts of Aziz. However, it appears to the court that this, with respect, cannot be so. As is apparent even from the above-quoted text, Aziz is but the latest case in which the above-mentioned duty has been iterated. So the duty is clearly of more general application.*
>
> *12. Third, a summary application for debt seems to the court to afford a classic example of proceedings in which the potentially ruinous consequences for a consumer of the court's judgment (Mr and Ms Counihan have indicated that the effect of judgment against them at this time would render them all but destitute) on the basis of relatively limited argument, requires that the abovementioned task be undertaken if consumers are to be protected in the manner contemplated by Directive 93/13/EEC (as now implemented).*
>
> *13. Fourth, given the low threshold identified, for example, in Aer Rianta (considered below) for sending matters to plenary hearing and the limited form and scope of summary proceedings generally, it seems to the court that to conform with, inter alia, the decisions in Aer Rianta and Aziz, a three-part version of the task identified in Aziz necessarily arises whereby (i) the court faced with the summary application should identify whether it sees any terms of the loan agreement which may be unfair for the purposes of the Regulations of 1995, as amended, and which were they to be proven unfair and so not binding would, to borrow from the phraseology of Aer Rianta, yield an arguable defence to the summary claim presenting, (ii) to the extent that the court identifies any potential arguable defence which has not been the subject of argument at the summary application, it should invite the parties to make any further submissions that they may have to make concerning same, and (iii)*

*assuming that (a) the answer to (i) is that there are one or more such potential arguable defences and (b) after hearing any further submissions as are referred to at (ii) it appears to the court that such potential arguable defences as it has posited to arise do in truth present, the matter ought to go to plenary hearing, it then being for the court at plenary hearing to decide, inter alia, (I) whether such terms as are identified by the court at summary hearing or other terms ('or other terms' because the court at plenary hearing likewise operates in the shadow of Aziz) are unfair, and (II) what consequences, if any, such a finding has as regards the debt recovery application before it.*

*14. Fifth, of some concern when it comes to the application of Aziz is how the task identified by the Court of Justice falls to be discharged in a common law system grounded upon, inter alia, the rules of precedent. If, for example, the court at summary hearing reviews particular terms and conditions and identifies clauses A, B, and C as potentially unfair, is a later court of equal or lesser jurisdiction precluded from finding that clauses X, Y and Z in the same terms and conditions present a difficulty in this regard? It seems to this Court that they could reasonably be contended not to be so bound because (a) each case will be decided to a great extent on its own facts, and/or (b) ultimately even the demands of precedent must yield to the supremacy of European Union law, where applicable, and/or (c) because of the precedential weight to be ascribed a judgment following summary hearing, as opposed to a judgment given after full plenary hearing."*

115. It seems to me that this is an accurate summary, so far as it goes, of the obligations of a court considering whether to grant an application for summary judgment or send the matter for plenary hearing. As far as the application of the doctrine of precedent is concerned, I am not sure that the question posed by Barrett J. gives rise to any real difficulty – the findings of one court in respect of A, B and C will not bind a subsequent court dealing with X, Y and Z. Further, it is not necessary in this context to consider the supremacy of EU law over what would otherwise

constitute a binding precedent – the CJEU has made it clear that it is for national courts to determine whether or not particular terms are unfair.

116. It seems to me that a finding by a superior court that a particular term is fair or unfair may be binding. This will to some extent depend on the circumstances. Thus, a finding that a term used in a standard form contract is unfair is likely to be binding unless the supplier can, in a subsequent case, distinguish it on the facts. Similarly, a finding that a term is a "main term" of the contract, and in principle exempt, will be binding in respect of all standard form contracts where a term of like effect is to be found. However, the court will still be obliged to assess the language of the term as expressed in the contract under consideration, for plainness and intelligibility. If it is found to be unclear the assessment for fairness must follow.

117. In any event, I note that Barrett J. did not in fact conduct an assessment of the fairness of the contract in question, apparently because counsel for the defendants indicated a view that the terms were not unfair. It may be open to question whether, in the light of the CJEU jurisprudence, a court is entitled to rely on the view of the legal representatives of a consumer on this issue. The implications of the jurisprudence in an adversarial system such as ours is a matter that has not been fully debated, and I think it best not to go further for the moment than to say that in my view a decision by a legal representative not to take issue with the fairness of any contractual term may be taken, to at least some extent, as a reasonable indication that it is not unfair. It must be borne in mind that the purpose of the "own motion" assessment is to redress the imbalance between the parties, and the presence of legal representation can certainly be seen as a significant factor in that context.

118. The parties have referred to a number of subsequent judgments of the High Court dealing with the Directive. In *EBS Limited v. Kenehan* [2017] IEHC 604, Barrett J. allowed an appeal against an order for possession made in the Circuit Court in circumstances where the documentation placed before the court by the lender did not contain all of the terms of the contract (despite the fact that the appellants had raised the issue on affidavit). Barrett J. held that, since the court was unable to perform the task imposed upon it by the Directive and associated jurisprudence, the order could not be allowed to stand.

119. *Cronin v. Dublin City Sheriff and Tanager DAC* [2017] IEHC 685 concerned an application for an injunction to restrain the repossession of a family home, on the basis that there had been no assessment of the fairness of the mortgage. An order for possession had initially been made in the Circuit Court. The plaintiff had not appeared at the Circuit Court hearing but had appealed the order and was represented in the High Court, where the order was affirmed. No argument relating to the Directive had been raised in those proceedings. The judgment turns primarily on the application of the principles of *res judicata* and the broader considerations set out in the *Henderson v. Henderson* line of authority, including the judgment of this Court in *Carroll v. Ryan* [2003] 1 I.R. 309. Ní Raifeartaigh J. concluded that the jurisprudence of the CJEU on the Directive did not require an exception in circumstances where the matters now sought to be raised could have been raised in the original proceedings.

**Conclusions**

120. The *Éire Continental* principles are the subject of detailed discussion in *Seniors Money* and I do not propose to repeat here the analysis set out in that judgment.

121. The question before the Circuit Court judge and, on appeal, the High Court judge, was whether or not an extension of time should be permitted. That required them to consider the strength of a potential defence based upon the unfairness of any term of the contract which, if found to be unfair and therefore unenforceable as against the appellants, would have required a court to refuse to grant possession to the lender.

122. In my view the High Court judge in the instant case erred insofar as he saw *Éire Continental* as setting a "test" with three "requirements" that had to be met, in holding that a mistake as to law could not be sufficient to satisfy the "arguable grounds" criterion and in determining that, since the appellants failed to meet the other two requirements, the existence of arguable grounds could not be sufficient to justify an extension. Extension of time within which to appeal is a matter for the discretion of the court, the exercise of which will in most cases be guided by the three factors identified in *Éire Continental* but which is not the subject of rigid rules. As Geoghegan J. said in *Brewer v. Commissioners of Public Works* [2003] 3 IR 539, it is not to be assumed either that an extension will be granted if all three are satisfied or that it will be refused even if an applicant fails in respect of all three.

123. Noonan J. assumed, for the purposes of his decision, that the appellants had arguable grounds for an appeal. He therefore found it unnecessary to consider the case

proposed to be made. The issue has taken a rather more central role in this appeal, as has the factual question as to what transpired before the County Registrar.

124. In *Seniors Money v. Gately* I have expressed the view that a significant delay in seeking an extension of time within which to appeal requires correspondingly strong grounds for the appeal, going beyond the merely arguable, such that a very long delay may need to be counterbalanced with a strong case to the effect that the order made in the lower court was unjust. I do not consider that the appellants have made out a sufficiently strong case to outweigh the significant delay in this case.

125. The order was made by the County Registrar on the 19th January 2017, with a stay until the 1st August 2017. The correspondence indicating an intention to appeal commenced just days before the expiry of the stay, in late July 2017, and the necessary notice of motion was not issued until the 4th October 2017. This period of time has to be considered in the context of the fact that the applicable time-limit was 10 days from the date of the order.

126. The case sought to be argued by the appellants commences with what happened or did not happen in the hearing before the County Registrar. The question whether or not the Registrar actually conducted an assessment of the terms of the mortgage cannot, in my view, be answered definitively by this Court on the basis of the information put before us. The averment by the first named appellant that he does not recollect it taking place is insufficient for a finding that it did not. It seems to me that an appellant generally bears the onus of proof where it is claimed that some legal impropriety occurred at first instance, and in this regard I find it surprising that there is no evidence of any attempt to procure an account of the hearing from the legal

representatives acting at the time. There is, in fact, no indication at all as to the case made on behalf of the appellants in the hearing before the County Registrar. Instead, the appellants have in effect sought to reverse the burden by arguing that the respondent has adduced insufficient evidence that the Registrar did conduct an assessment. This seems to me to be unsatisfactory.

127. On the other hand, I think that the respondent is seeking to persuade the Court to draw unjustifiable inferences from very slight evidence. The affidavit goes no further than to state that the attention of the County Registrar was drawn to *AIB v. Counihan*. The submission, on the basis of this evidence alone, that she was aware of her obligations and considered the papers in the light of the relevant CJEU case law, simply goes too far. It is, moreover, common case that the Registrar made no reference to the Regulations or Directive in giving her decision. While she is not to be expected to give detailed written rulings, the gist of the reasons for a decision should always be given.

128. However, even if it were to be assumed that the required assessment was not carried out, I would nonetheless take the view that the extension of time should not be granted. This is largely because I do not find any grounds for belief that an appeal on the grounds indicated could succeed.

129. The appellants have not challenged any of the main terms of the agreement. In the case of a standard mortgage I take these to be the borrower's obligation to repay the loan and to provide security for it, and the lender's right to take possession of the security in the event that the loan is not repaid. In contending that they have a strong appeal, the appellants focus in particular on the "price variation" clause (that is, the provision that the interest rate would vary at the lender's discretion), the

"acceleration" clause (that is, the provision entitling the lender to demand early repayment of the principal and accrued interest in the event that any repayment was not made on the due date), the power to enter into possession of the property in the event of a missed payment or other breach on the part of the borrower and the "transfer of rights" clause (that is, the entitlement of the lender to sell on all or part of the security without notice to the borrower).

130. In assessing the any given contractual term for unfairness, it should be remembered, firstly, that the primary consequence of a finding that it is unfair is that it becomes unenforceable as against the consumer. The contract remains in being provided it can exist without the unenforceable term. Secondly, where an impugned clause was not in fact invoked against the borrower, it is examined only for the purpose of drawing such inferences as may be appropriate if it is found to be unfair. Such inferences must, it seems to me, relate to the question whether the lender has dealt with the borrower in good faith as defined by the regulations and Directive. Thirdly, the requirement to consider all of the circumstances means that the assessment of fairness should take into account *inter alia* any relevant EU provisions and any relevant aspects of the national regulatory regime with a view to the remedies against unfairness available to the consumer under national law. There is now in existence a wide range of consumer protection legislation which may apply to mortgages, and the following discussion should not be seen as exhaustive.

131. On the face of it, the interest variation clause comes within the exemption in Article 2(b) of the Regulations (which relates to subparagraph (j) of the Annex to the Directive), permitting a supplier of financial services to reserve the right to alter the interest rate without notice where there is a valid reason, provided that the supplier is

required to inform the other contracting party at the earliest opportunity and that the latter can dissolve the contract immediately. Of course, dissolving the contract will not extinguish the debt, which may limit the practical desirability of this option from a borrower's point of view. However, there are other relevant considerations.

132. Prior to 2016 the primary information that had to be furnished to consumers entering into mortgage agreements was set out in the Consumer Credit Act 1995. This included a statement of the total cost of the credit being provided, and also a calculation of the effect of an increase in the interest rate of 1%. This information was provided to the appellants. The obligations in respect of information are now largely dealt with in the European Union (Consumer Mortgage Credit Agreements) Regulations (S.I. 142/2016), which, in addition to the information requirement already discussed, stipulate that the borrower must be informed of the change in the interest rate and of the consequent change in the payment instalments. As a result it may be that, depending on the circumstances, a failure to inform the borrower in due course would result in a court refusing to find that the extra sums claimed were due.

133. Another consideration is that if a lender were to attempt to apply an increased interest rate to sums due where a payment is late, then if such a rate is set at a level that is not fairly related to the costs of the lender, the clause is likely under Irish law to be found to constitute an unenforceable penalty by reference either to common law or to Article 29(2) of the European Union (Consumer Mortgage Credit Agreements) Regulations 2016.

134. It appears that in this case the lender reduced, rather than raised, the interest rate after the expiry of the fixed rate period. The consequence was that the monthly instalments were reduced from a figure in excess of €4,800 to c. €3,700. I cannot see

that any inference of lack of good faith can be drawn from this, and nor does it support the contention that the total sum claimed might not have been due and owing. The appellants have not, therefore, put anything before the Court that could lead to a finding that they can make out any defence in relation to the interest variation clause.

135. The "acceleration" clause was also not in fact invoked against the appellants until they had been in default for approximately five years. A clause of this type might well be found to be unfair, if it were to be construed by the courts as permitting the lender to call in the entirety of the debt and enforce the security in the event of a single late or missed payment. However, there are a number of measures that prevent such a result.

136. A series of Codes of Conduct issued by, firstly, the Financial Regulator and, in more recent years, the Central Bank, under the terms of s.117 of the Central Bank Act 1989, as amended, have imposed various obligations on lending institutions dealing with consumers. One primary obligation, which came to the fore during recent years as a result of the number of borrowers falling into arrears during the recession, is to refrain from seeking repossession of a dwelling until a specified period has elapsed. Breach of a Code is a regulatory offence, but for some years there was doubt about the effect of a breach on the enforceability of the contract as between the lender and the borrower. In 2015 this Court held that a court could not properly consider and facilitate an application for an order for possession brought before the moratorium period was over (see *Irish Life & Permanent v. Dunne* [2015] IESC 46). This position is now entrenched by statute – under the terms of the European Union (Consumer Mortgage Credit Agreements) Regulations 2016 the creditor must exercise reasonable

forbearance before initiating possession proceedings and shall, at a minimum, comply with the provisions of any Code or similar measure put in place by the Central Bank.

137. There have been further developments, not directly relevant to the facts of this case given the dates, but informative in relation to the concept of fairness. For example, certain provisions of the Land and Conveyancing Law Reform Act 2009 have the effect, in respect of mortgages created after the 1st December 2009, of preventing a lender from standing on any purported contractual right to take possession without a court order. On the making of such an application, the court has a broad discretion to consider the ability of the mortgagor to pay any arrears if given a reasonable time and to direct an adjournment accordingly.

138. On the evidence in this case, the lender implemented the requirements of the Code of Conduct in place at the time and sought to engage with the appellants in an attempt to find a sustainable solution. The problem, however, was that their income had dropped to a point where they could not service the mortgage. I appreciate that they have continued to make payments, but the scale of payment that they have been able to afford was simply unrealistic given the scale of the debt. They did not avail of the other options pointed out to them at the time. The lender did not attempt to take possession without a court order and did not issue proceedings until late in 2014, in circumstances where the appellants had been in substantial default since March 2009. I can see no indication of bad faith on the part of the lender. The issue of proportionality, while raised in written submissions, has not been the subject of any analysis in this appeal but it seems to me that, given the facts of the case, the forbearance on the part of the lender was sufficient to close off the possibility of arguing disproportionality as a defence to possession.

139. Similarly, there has been little reference to the final issue raised, in respect of the "transfer of rights" clause. There has been no engagement with the considerable number of decisions endorsing the views expressed by Peart J. in *Wellstead v Judge White & Featherstonehaugh* [2011] IEHC 438) that such clauses are neither unusual, mysterious nor unlawful. No case has been cited where the operation of such a term was found to adversely affect the rights or interests of the borrower. The consumer's rights are as set out in the original contract, and the appellants have not given any indication as to how the clause in this case could be found to have been unfair to them.

140. In conclusion, I think it should be pointed out that there has been no discussion in this appeal of the particular position of a County Registrar dealing with a matter of this kind. The jurisdiction under s.34 of the Act is confined to cases where there is no appearance or defence. Order 5B, r. 7(2) of the Circuit Court Rules obliges the Registrar to transfer a case to the Judge if an affidavit lodged by the defendant discloses a *prima facie* defence. It seems to me that it might raise difficult constitutional issues if the Registrar, who is not a judge appointed under the Constitution, were to be called upon to make findings that particular terms in a contract were unfair and thus unenforceable. The appropriate approach, in my view, would be for the Registrar to consider the contract by reference to the relevant EU jurisprudence, for the purpose only of deciding whether there is a potential defence to the lender's claim. This should be done whether or not the defendant appears, or raises any particular objection. If there is a potential defence, the matter should proceed in the judge's list.

141. In the circumstances I would dismiss the appeal.