



**THE SUPREME COURT
DETERMINATION**

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC

PLAINTIFF

AND

DEREK HENNESSEY AND LISA HENNESSEY

DEFENDANTS

Neutral Citation: [2021] IESCDET 16

Supreme Court record no: S:AP:IE:2019:000166

Court of Appeal record no: none

High Court record no: 2018 No. 187 CA

Date of Determination: Tuesday, 9th February 2021

Composition of Court: O'Donnell J., MacMenamin J., Charleton J.

Status: Approved

**APPLICATION FOR LEAVE TO APPEAL TO WHICH ARTICLE 34.5.4° OF THE
CONSTITUTION APPLIES**

RESULT: The Court does not grant leave to the Second Named Defendant / Applicant to appeal to this Court directly from the High Court.

REASONS GIVEN:

ORDER SOUGHT TO BE APPEALED

COURT: High Court
DATE OF JUDGMENT OR RULING: 15th July, 2019
DATE OF ORDER: 15th July, 2019
DATE OF PERFECTION OF ORDER: 30th July, 2019
THE APPLICATION FOR LEAVE TO APPEAL WAS MADE ON 15th August, 2019 AND WAS IN TIME.

Consideration

1. This determination relates to an application for leave to appeal directly to this Court from a decision of the High Court, (Meenan J.), in a judgment delivered on the 15th July, 2019, wherein he reversed the order of the Master, who had extended time for the purposes of bringing an appeal against an order of the

Circuit Court delivered on the 21st November, 2017. The order of the Circuit Court was granted with a six-month stay. It should be noted that the application is brought on behalf of Lisa Hennessy only. No application is brought by Derek Hennessy, who was a co-defendant, and who resides in the home the subject matter of the proceedings, as set out in the DAR transcript of the Circuit Court.

2. The general principles applicable by this Court in determining whether to grant or refuse leave to appeal, having regard to the criteria incorporated into the Constitution, as a result of the 33rd Amendment, have now been considered in a large number of determinations, and are fully addressed in both a determination issued by a panel consisting of all of the members of this Court in *B.S. v. Director of Public Prosecutions* [2017] IESC DET 134, and in a unanimous judgment of a full Court delivered by O'Donnell J. in *Price Waterhouse Coopers (A Firm) v. Quinn Insurance Ltd. (Under Administration)* [2017] IESC 73. The additional criteria required to be met in order that a so-called "leapfrog appeal", direct from the High Court to this Court, can be permitted were addressed by a full panel of this Court in *Wansboro v. Director of Public Prosecutions* [2017] IESC DET 115. It follows that it is unnecessary to revisit the new constitutional architecture for the purposes of this determination.
3. Furthermore, the application for leave filed, and the respondent's notice, are published, along with this determination, (subject only to any redaction required by law), and it is therefore unnecessary to set out the position of the parties.

Background

4. In an application for leave filed herein the applicant seeks to appeal against the judgment and order made by Meenan J. It is said the same issues arose in this case as in *Seniors Money Mortgages (Ireland) Limited v. Gately* [2018] IESC DET 193, wherein the Supreme Court granted leave to appeal on the basis that the appeal raised a question as to what matters a court should take into account in exercising its discretion whether or not to extend time to issue notice of appeal, in circumstances where, having regard to the three questions or principles identified in *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] I.R. 170, an applicant establishes that (s)he has an arguable ground or grounds of appeal, but does not satisfy the court of one or both of the remaining two limbs of the test. It is said that the Supreme Court also approved the same issues of general public importance in a determination issued on the 24th January, 2019, when granting leave to appeal in *Pepper Finance Corporation (Ireland) Designated Activity Company v. Cannon*. Judgment in *Gately* has now

been delivered on 4th February, 2020, (Supreme Court, Appeal No. 102/2018, O'Donnell, McKechnie, MacMenamin JJ.).

5. But, additionally, in her application the applicant now seeks to raise a substantial range of other issues regarding whether any, and/or all, of the "boiler plate mortgage clauses" employed by the respondents, and employed in almost all residential mortgages in Ireland, are compatible with what is referred to as "the substantial body of E.U. law" comprising the European Law Consumer Protection Acquis Communautaire. It is said there are conflicts between the "private autonomy" of financial institutions, and "the effective protection of the weaker party", viz. vulnerable consumers, in Irish financial consumer law. The applicant raises questions as to the respondents' title to the premises.
6. The applicant, Ms. Hennessy, also has informed the Court of the fact that, unfortunately, she has been unwell, and has been undergoing medical treatment. She states that the High Court case before Meenan J. was adjourned until 15th July, and that she was ill then, and had notified "the High Court, the acting solicitor" that she would not be able to attend due to ongoing health issues, and that she would be meeting medical practitioners on 17th July. She states that the case wrongly proceeded in her absence, and the judge ruled against her on the day by striking out her appeal. In addition to the foregoing, the applicant seeks that the matters which are raised in the application for leave should be referred to the Court of Justice of the European Union.
7. The response filed on behalf of the respondents is very detailed, noting that, at the time of the filing, neither the *Seniors Money Mortgages*, nor *Pepper Finance*, decisions had been decided. Judgment in *Senior Money Mortgages* has now been determined. ([2020] IESC 3).
8. The respondents note that, in his decision, Meenan J. held, first, that the applicant had already had an adjournment of the application on the grounds of ill-health, and that due process did not require a further adjournment, in the circumstances where insufficient material evidence had been provided to justify a further adjournment; second, that the appellant had not identified an arguable ground of appeal against the order for possession of the Circuit Court; third, that the applicant had probably not made the decision to appeal the Circuit Court order within time permitted; and fourth, as a consequence, that the Master had erred in deciding to grant the applicant an extension of time to appeal the order for possession.
9. The respondent goes on to state that the High Court judgment *only* set aside the Master's order, granting the appellant an extension of time within which to file a

notice of appeal, and struck out the appeal which had been lodged by the applicant in the High Court against the order for possession granted by the Circuit Court. (Linnane J.). The judgment did not purport to address any other issue. The respondent states the applicant did not ask this Court to set aside the order of the High Court refusing her an extension of time, and striking out the appeal. Rather, the orders sought, at least at one section of the notice of appeal, seemed directed to asking the Supreme Court to refer questions to the Court of Justice of the European Union, and/or to declare s.39 of the Court of Justice Act, 1936 unconstitutional, or incompatible with the European Convention on Human Rights. The respondents submit that the applicant is not entitled, under the guise of an appeal from an order refusing an extension of time, to request the Supreme Court to enter onto a series of matters that were not raised before the High Court. This is incorrect.

10. The respondents' case is that, aside from a challenge to the refusal of the High Court to grant an adjournment of the hearing of the respondent's motion, the focus of the applicant's appeal is on entirely new issues not canvassed by her before any of the lower courts.
11. Consequently, the respondents' case is that, even in the event that this Court were to issue a determination that the applicant was entitled to leave to appeal the order of Meenan J., any such appeal could properly be confined only to the issue of whether the applicant was entitled, on the applicable legal principles, to an extension of time within which to appeal the order of the Circuit Court. In such an event, even if the Court were to grant the application for leave, the matter should be remitted to the High Court, so that the substantive appeal from the order for possession might be heard and determined. There has been no rehearing on the substance of the appeal to the High Court. The respondent has yet to set out its defence of the appeal. The respondents' case is that the applicant's notice of appeal to the High Court is a standard form, with no details by which the High Court could have determined the matter without the matter being listed for hearing. The respondent also submits that, in the event that this Court were to grant leave to appeal, and in the further event that *Gately* has not been determined by the time of this appeal, it might be necessary to address the issue regarding s.39 of the Courts of Justice Act, 1936. The respondents' position is that the applicant had a right to appeal the order of the High Court, refusing an extension of time, (and consequently setting aside the order of the Master), to the Court of Appeal. In the light of the respondents' position not contesting that the applicant had a right to appeal to the Court of Appeal, it is said the

applicant could properly have appealed the decision of Meenan J. to the Court of Appeal, which she failed to do.

12. On the issue of the refusal to grant the adjournment, the respondents submit the following matters are relevant. First, that on the 17th January, 2019, the respondents' motion to set aside the Master's order was assigned a hearing date of the 1st April, 2019. The applicant did not attend the hearing date on grounds of ill-health. The hearing was adjourned until the 16th July, 2019. On the 16th July, 2019, the applicant failed to appear, but there was correspondence that she had sent to the court, and to the respondents' solicitors, concerning her health situation. On the 16th July, 2019, however, counsel for the respondent informed the court that almost identical documentation had been submitted by the applicant at the original hearing, over three months previously, and the matter had been adjourned accordingly. Counsel for the respondent applied for the hearing to proceed, noting that the applicant had been informed that application to proceed would be made. It is said that Meenan J. noted that the applicant had already benefited from an adjournment of the application, on the basis that she was in ill-health, and held that due process did not require a further adjournment on the same basis. It is said the applicant was on notice of the hearing, and of the intention of the respondent to proceed.
13. The response also deals with a claim that the respondent did not have title to the charge in question. This issue was not the subject of argument in the High Court, although raised in the Circuit Court. The respondents submit that, on the basis of the established jurisprudence of this Court, the applicant is not entitled to raise a new matter that has not been dealt with in the court which made the order under appeal. (*KD v. MC* [1985] I.R. 697; *Lough Swilly Shellfish Growers v. Bradley* [2013] 1 I.R. 227). Further, it is said that the applicant's notice of appeal to the High Court contains a number of inaccuracies. It is not necessary to deal with these at this stage, as the essential question for determination is as to the decision of the High Court judge to proceed with the matter.

Decision

14. The Court takes into account that the applicant has, unfortunately, suffered from ill-health. But, in the view of this Court, the application is misconceived. It is accepted by the respondents that the applicant would have been entitled to appeal to the Court of Appeal, rather than to this Court. There is no basis outlined whereby a direct appeal to this Court, rather than to the Court of Appeal, is warranted to deal with any issues actually properly raised. The only potential questions would be, (a) whether the High Court judge was correct to

proceed, and (b) whether he had correctly applied the law. Applications for leave to appeal directly to this Court are granted only in exceptional circumstances. It has not been shown that exceptional circumstances exist in this case. This Court simply notes that, in deciding to proceed, the High Court judge was acting within an area of discretion, having been informed that the medical evidence which had been adduced before him was largely, if not entirely, in the same form as had been adduced in a previous application for an adjournment, when an application had been granted.

15. This Court will not entertain an application to appeal directly to this Court, where the appeal should and could be dealt with by the Court of Appeal. Absent any other factor, this would be sufficient to refuse leave to appeal to this Court. Moreover, this Court notes that, on the face of things, the learned High Court judge was exercising a matter of discretion as to whether or not to proceed in the circumstances outlined.
16. Leave will only be granted to appeal to this Court when it can be shown that issues of general public importance arise, or when it is in the interests of justice. Insofar as matters of general public importance are now raised in this application, the Court cannot entertain them, as they have not been dealt with in the High Court.
17. Additionally, it is the view of this Court that a more appropriate course of action the applicant should have adopted at the time was either to apply to Meenan J. in the High Court to set aside his order and judgment, on the basis that there he had erred in proceeding to deal with the matter; or to appeal to the Court of Appeal. The legal criteria concerning extensions of time to appeal, are now set out in the judgment of this Court in *Seniors Money Mortgages (Ireland) DAC v. Derek Gately and Anor.* [2020] IESC 3, to which the applicant is referred.
18. This is not an appropriate matter in which to grant leave to appeal to this Court. Neither of the constitutional criteria are satisfied. Insofar as the application raises more general legal issues, this Court cannot entertain them, as they have not been considered by the High Court. It has not been shown that the applicant is entitled to leave in applying to this Court in the interests of justice. In the circumstances, therefore, this Court must refuse the application for leave to appeal to this Court.

AND IT IS HEREBY SO ORDERED ACCORDINGLY.