

Appendix FF

Order 58, rule 15

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from
<input type="checkbox"/> The Court of Appeal <input checked="" type="checkbox"/> The High Court

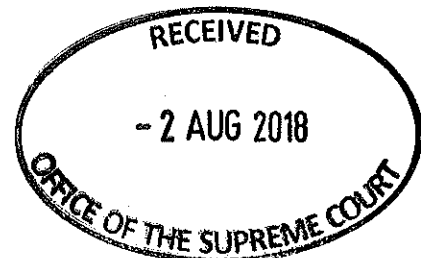
[Title and record number as per the High Court proceedings]

Pepper Finance Corporation (Ireland) DAC	V	Brian Cannon and Christina Cannon
High Court Record Nr	2018/81 CA	Court of Appeal Record Nr
Date of filing		
Name(s) of Applicant(s)/Appellant(s)	Brian Cannon and Christina Cannon	
Solicitors for Applicant(s)/Appellant(s)	FP Logue Solicitors 8/10 Coke Lane Smithfield Dublin 7	
Name of Respondent(s)	Pepper Finance Corporation (Ireland) DAC	
Respondent's solicitors	Eversheds Sutherland One Earlsfort Centre Earlsfort Terrace Dublin 2	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
If yes, give [Supreme Court] record number(s)		

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
If Yes, please explain why	

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Noonan J
Date of order/ Judgment	Order of 17 July 2018



Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	Pepper Finance Corporation (Ireland) DAC
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Original status	<input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant	Is this party being served with this Notice of Application for leave?		
	<input type="checkbox"/> Applicant	<input checked="" type="checkbox"/> Respondent			
	<input type="checkbox"/> Prosecutor	<input type="checkbox"/> Notice Party			
	<input type="checkbox"/> Petitioner				
Yes		<input checked="" type="checkbox"/>	No	<input type="checkbox"/>	<input type="checkbox"/>

Solicitor			
Name of firm	Eversheds Sutherland		
Email	info@eversheds-sutherland.ie		
Address	Eversheds Sutherland	Telephone no.	01 6644 200
	One Earlsfort Centre	Document Exchange no.	
	Earlsfort Terrace Dublin 2	Ref.	
Postcode	D02 X288		

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/> Document Exchange	<input checked="" type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

Counsel			
Name	Ian Boyle Harper BL		
Email	ian.boyleharper@lawlibrary.ie		
Address	Law Library	Telephone no.	086 349 9086
	Four Courts Inns Quay Dublin 7	Document Exchange no.	816708
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

Has this party agreed to service of documents or communication in these proceedings by any of the following means?

<input type="checkbox"/> Document Exchange	<input type="checkbox"/> E-mail
<input type="checkbox"/> Post	<input type="checkbox"/> Other (please specify)

5. Reasons why the Supreme Court should grant leave to appeal

- 5.1 It is common case that the applicants were consumers for the purposes of this loan contract, that the respondent was acting in the course of a business, and that both the loan agreement and the mortgage contained non-individually negotiated terms. As such, both the loan and mortgage are governed by Council Directive 93/13/EC on Unfair Terms in Consumer Contracts (“**the Directive**”), as implemented by European Communities (Unfair Terms in Consumer Regulations) 1995, as amended (“**the Regulations**”).
- 5.2 It is a well-settled principle of EU law, derived from a clear and consistent line of authority from the Court of Justice of the European Union (CJEU)(eg, Aziz, Case C-415/11, ECLI:EU:C.2013;164), that when a court or tribunal is adjudicating on a dispute between a business and a consumer, the Court must consider, of its own motion, the terms of the contract for fairness (“the Own Motion Assessment”). Any unfair terms are not enforceable against the consumer. It appears that the County Registrar, in this case, did not carry out an Own Motion Assessment, although her obligation to do so was brought to her attention by solicitors for the respondent. Had the County Registrar carried out this assessment, she would have found that terms essential to the application for possession were unfair (“the Terms”).
- 5.3 The applicants contend that the learned trial judge, in refusing the application to extend time, failed to give sufficient weight to the merits of the applicant’s case when considering the application of the *Eire Continental* test to the proposed appeal or failed to consider departing from *Eire Continental*.
- 5.4 Notwithstanding the provisions of the Courts of Justice Act 1936, an appeal should be permitted in this case. This is not a “leapfrog” appeal in circumstances where no appeal is available to the Court of Appeal. Accordingly, exceptional circumstances exist which warrant an appeal directly to this Court insofar as no other appeal is available.
- 5.5 While the applicants’ proposed appeal is one against an interlocutory order, it is nonetheless an order which fully determined the proceedings and accordingly was final in its effect.
- 5.6 The appeal raises a matter of general public importance which is the weight to be given to clear breaches of EU law when exercising a discretion such as that at issue in this case, i.e. whether to extend time.
- 5.7 The Own Motion Assessment which the Courts and/or County Registrar are required to carry out is an obligation recognised in EU law designed to protect the applicants fundamental right to a home pursuant to the Charter of Fundamental Rights and the European Convention on Fundamental Rights.
- 5.8 An appeal to this Court will allow a determination of the extent to which the weight to be afforded to the merits of an appeal should be taken into account in respect of any extension of time for an appeal from the Circuit Court to the High Court, in particular

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

6.1 The learned High Court judge failed to properly balance justice on all sides.

Noonan J failed to consider the merits of the applicants' grounds for appeal. He accepted that the case met the arguability threshold but beyond that did not consider the merits of the applicants' case. It is submitted that a proper consideration of the merits would lead to the following prima facie conclusions:

- a. An Own Motion Assessment should have been conducted and was not.
- b. There were terms in the contract between the parties that were obviously unfair ("the Terms"). The Terms have been considered by the CJEU and struck down by the Spanish courts.
- c. The Terms were relied upon by the respondent in its application for possession.
- d. One of these terms (8.01) purported to give the respondent a right to possession without a court order, something that is unconstitutional.
- e. The respondent was entirely responsible for the existence of the Terms and relied on them to its advantage, to the clear detriment of a consumer.
- f. The respondent should have, redrafted its contract to eliminate the Terms once the Regulations were in force (in 1995).
- g. The existence of these Terms had an anti-competitive effect on the market in that they gave the respondent an unfair advantage over rival lenders who were compliant with consumer protection obligations.
- h. The County Registrar was not provided with any assistance in relation to the performance of the Own Motion Assessment.
- i. A declaration that the Terms were unfair would have been a defence to the respondent's claim for possession.
- j. The applicants' right to a home, protected by the Charter and the European Convention of Human Rights and the Constitution, was at stake.

6.2 The *Eire Continental* test seeks to balance the rights of the parties and this balance can only be struck if there is some appropriately calibrated assessment of the merits of the grounds for appeal, which was not done in the instant case.

6.3 In the alternative, the learned High Court judge failed to consider if this case was an exception to the *Eire Continental* test or that the latter test should be adjusted to take account of the EU law genesis of the substance of the case.

incompatible with the Convention

Are you asking the Supreme Court to:

depart from (or distinguish) one of its own decisions?

Yes

No

If Yes, please give details below:

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

Yes

No

If Yes, please give details below:

The issues raised in this appeal relate to the interaction between domestic rules of procedure and EU law rights. As such it may be necessary to consider a reference to the CJEU depending on the views of the Court and the submissions of the parties.

Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

This case involves an order for possession of the applicants' family home.

Signed: _____

(Solicitor for) the applicant/appellant

Please submit your completed form to:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.

This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.