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) DESIGNATED ACTIVITY COMPANY

Plaintiff/respondent

-and-

BRIAN CANNON AND CHRISTINA CANNON

Defendants/appellants

Ruling of the Court delivered on the 26th January 2021

Introduction

1. The substantive judgment in this matter was delivered on the 4th February 2020 . Thereafter, the appellants applied to the Court to vary or rescind the judgment. That application was refused without the necessity to hear oral argument. The parties and the Attorney General have now filed written submissions on the question of costs.

Submissions

2. The appellants submit that they are entitled to the costs (or a substantial portion thereof) of this appeal and of the High Court and Circuit Court proceedings. The principal argument made in this respect is that the respondent had at all times resisted the application of any test (for the extension of time within which to appeal) other than that based on an interpretation of *Éire Continental* which this Court has found to be erroneous. The appellants submit that they have to that extent overturned the decision of the High Court, and further, that if the respondent had not resisted their argument on this issue in the High Court, there might have been no appeal.

3. Separately, the appellants assert that they are entitled to their costs, in part as against the Attorney General, in relation to the jurisdictional issue. This point arises from the fact that the decision under appeal was made by the High Court when dealing with an appeal from the Circuit Court. It is submitted that the appeal provided the Court with an opportunity to clarify a point of public importance as to the impact of the 33rd Amendment to the Constitution.

4. Finally, the appellants say that the judgment has resulted in a significant development of the law insofar as it accepted, in principle, the requirement that courts should carry out an "own motion" assessment under the terms of the Unfair Contract Terms Directive and the Irish transposing regulations.

5. The respondent argues that the ordinary rule should apply and that costs should follow the event. The claim by the appellants that the respondent "resisted" their contention in the High Court that the *Éire Continental* test was too rigid is not accepted – it is asserted that it was counsel for the respondent that drew the attention of the trial judge to *Goode Concrete v CRH* [2013] IESC 39 and *Tracey v. McCarthy* [2017] IESC 7, thereby highlighting the obligation of a court to balance justice between the parties in applications of this nature. In written submissions lodged in the High Court, the respondent had expressly accepted that the *Éire Continental* test was not "a rigid and immovable one". Its case was that the appellants had not met any of the criteria identified in the test. It also contended that an appellant who failed to meet the first two criteria had to demonstrate that their grounds of appeal went further than passing the threshold of mere arguability.

6. On the jurisdictional issue, the respondent points out that it had agreed with the appellants that this Court had jurisdiction, although arguing that the circumstances in which leave to appeal could be granted should be rare. The "fundamental" point made on its behalf is that it is a private entity, not responsible for ensuring that matters of general public importance are litigated, and that it should not be the subject of a costs order in circumstances where it was successful in opposing the appeal.

7. The respondent says that it never disputed the existence of the requirement for an "own motion" assessment, and that the Court's acknowledgment of such a requirement, originally recognised by the Court of Justice of the European Union and discussed in a number of High Court judgments in this jurisdiction, is not a significant development.

8. The Attorney General had made submissions only for the purpose of opposing the appellant's proposal that he should be responsible for some proportion of their costs. He points out that Ireland was not a party to the proceedings, and that his participation in the appeal was on foot of an invitation from the Court. He had, by order of the Court, been joined as an *amicus curiae.* Before that order was made, his office had entered into correspondence with the parties and the appellants' solicitor had expressly confirmed (by letter dated the 20th May 2019) that costs would not be sought against the Attorney General. In the event, his submissions on the jurisdictional issue had not been disagreed with by either party and his participation had not caused either of them to incur any additional cost or expense.

Discussion and conclusion

9. Firstly, the Court considers it to be clear that no order for costs should be made against the Attorney General. Quite apart from the fact that this aspect of the appellants' submissions runs contrary to their position as stated in correspondence with the Attorney General's Office, it is difficult to envisage circumstances in which it could be proper to make such an order against a person or body invited by the Court to act as an *amicus curiae*. There is no question here of his involvement having

caused any delay or expense, and indeed at the hearing of the appeal the parties were largely content to adopt his submissions.

10. As far as the position between the parties is concerned, the Court considers it necessary to point out that the question in issue was whether the Circuit Court and, on appeal, the High Court, should have granted an extension of time within which to appeal. It is correct to say that this Court found that the High Court judge had applied an overly-rigid interpretation of *Éire Continental*. However, in this case the application for an extension was made almost nine months after the original order of the County Registrar, in circumstances where the relevant time limit was 10 days. The Court concluded, for the reasons discussed in the judgment, that the appellants had not made out a sufficiently strong case to outweigh this significant delay. Thus, they failed in their appeal despite the more nuanced assessment afforded by this Court.

11. In the circumstances the Court considers that costs should follow the event.