No. 2

O. 58, r. 18(1)

SUPREME COURT

Record No: S:AP:IE:2019:000015

Respondent's Notice

Part I

The information contained in this part will be published. It is the respondent's responsibility to also provide electronically to the Office a redacted version of this part if it contains information the publication of which is prohibited by any enactment or rule of law or order of the Court

1. **Title of the Proceedings:** *[As in the Court of first instance]*

JOSEPH SHEEHAN

PLAINTIFF

- and -

BRECCIA, IRISH AGRICULTURAL DEVELOPMENT COMPANY, BLACKROCK HOSPITAL LIMITED, GEORGE DUFFY, ROSALEEN DUFFY AND TULLYCORBETT LIMITED

DEFENDANTS

-v-

2. **Name of Respondent:** Breccia and Irish Agricultural Development Company

3. **Application to extend time:** **Yes** **No** [x]

If an application is being made to extend time for the filing of this Notice, please set out concisely the grounds upon which it is contended time should be extended.

N/A

4. Do you oppose the applicant's application to extend time:

Yes ☐ **No**

If an application by the applicant to extend time is being opposed please set out concisely the grounds on which it is being opposed.

N/A

5. Do you oppose the applicant's application for leave to appeal:

Yes ☒ ☐

6. Matter of general public importance:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is contended, that the matter does not involve a matter of general public importance. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that the matter involves a matter of general public importance.

This section should contain no more than 500 words and the word count should appear at the end of the text.

Penalty Clause.

1. The Appellants refer to the decision of the U.K. Supreme Court in *Cavendish Square v Makdessi* and ask this court to review (and overturn)

the established jurisprudence of this Court on penalty and surcharge interest clauses in light thereof. The Appellants contend that this Court should exercise its jurisdiction to allow a further appeal as the issue of the enforceability of penalty clauses is one of general public importance.

2. It was of course open to the Appellants to ask this court to exercise its jurisdiction to hear the appeal directly from the High Court in 2016. The *Cavendish* decision was delivered some 6 months previously and the divergence between the U.K. law (as represented by *Cavendish*) and the Irish law (as represented by the decision of this court in *Pat O'Donnell & Co v Truck and Machinery Sales [1998] 4 I.R. 191*) was immediately evident. If it is a matter of general public importance now, it was equally so at the time as their appeal was filed in the Court of Appeal and insofar as the Appellants wished to agitate for a departure from the *Pat O'Donnell* decision, the only court in which such an argument could be advanced was this court, as the Court of Appeal was clearly bound by that authority.

3. It is respectfully submitted that it is incumbent upon an Appellant to give due consideration to the appropriate venue for the ventilation of the issues that it seeks to address by way of appeal. It is invidious that an Appellant should use the limited resources of the Court of Appeal in a case where that court is, by virtue of the doctrine of binding precedent, unable to address the primary legal issue that the Appellant wishes to ventilate. In opting to bring their appeal before the Court of Appeal, the Appellants effectively restricted the appeal to the limited matters that court could properly deal with. They should not now be permitted to broaden their appeal simply because they were unsuccessful on those limited issues in the Court of Appeal.

4. The present case is a poor candidate for a test case for any exercise in reviewing the law of penalty clauses in this jurisdiction. The clause considered in the *Cavendish* decision was a highly sophisticated obligation arising in a bespoke contract - it was not an entirely standard surcharge interest clause appearing within a lender's General Terms & Conditions as in the present case. Another significant feature of *Cavendish* - the equality of bargaining power - is also absent from the present case. The fact that the impugned clause forms part of the General Terms & Conditions of what was once a significant financial institution reflects the fact that this is a term imposed by the stronger entity, albeit upon a commercial, rather than consumer, borrower.

Estoppel.

5. The appeal on the issue of estoppel is not of any general public importance - it is in effect latched on to the penalty clauses appeal on the basis that the Appellants need to have both issues heard and determined in their favour for their appeal to be of any practical value. The Appellants substantially acknowledge this- their reference to the *PWC v Quinn Insurance* decision confirms the point.

Word count - 540

7. Interests of Justice:

Please set out precisely and concisely, in numbered paragraphs, the grounds upon which it is alleged, that the interests of justice do not require an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended, that the interests of justice require an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

The Respondent refers to the submissions made hereinabove above at Part 6 of this Notice.

Word count - 15

8. Exceptional Circumstances Article 34.5.4.:

Where it is sought to apply for leave to appeal direct from a decision of the High Court pursuant to Article 34.5.4, please set out concisely, in numbered paragraphs, the grounds upon which it is contended that there are no exceptional circumstances justifying such an appeal. If the application is not opposed please set out precisely and concisely the grounds upon which it is contended that there are exceptional circumstances justifying such an appeal.

This section should contain no more than 300 words and the word count should appear at the end of the text.

N/A

Word count -

9. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please set out in the Appendix attached hereto the Respondent's grounds of opposition to the Grounds of Appeal set out in the Appellant's Notice of Appeal.

10. Cross Application for Leave:

If it is intended to make a cross application for leave to appeal please set out here precisely and concisely, in numbered paragraphs, the matter(s) alleged to be matter(s) of general public importance or the interests of justice justifying a cross appeal to the Supreme Court.

If it is sought to make a cross application for leave to appeal direct from a decision of the High Court, please also set out precisely and concisely, in numbered paragraphs, the exceptional circumstances upon which it is contended that such a course is necessary.

This section should contain no more than 500 words and the word count should appear at the end of the text.

N/A

Word count -

11. Additional Grounds on which the decision should be affirmed and Grounds of Cross Appeal

Please set out in the Appendix attached hereto any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court and / or the grounds of cross appeal that would be relied upon if leave to appeal were to be granted.

12. Priority Hearing: **Yes** [x] **No** [ ]

If a priority hearing is sought please set out concisely the grounds upon which it is alleged that such a hearing is necessary.

This section should contain no more than 100 words and the word count should appear at the end of the text.

Word count:

13. Reference to CJEU:

If it is contended that it is necessary to refer matters to the Court of Justice of the European Union, please identify the matter, and set out the question or questions which it is alleged it is necessary to refer.

This section should contain no more than 100 words and the word count should appear at the end of the text.

N/A
Word count:

Part II

The information contained in this part will not be published.

14. Respondent's Representatives:

If not provided in the application for leave to appeal please identify the solicitor and counsel for the respondent, with contact details for the solicitor dealing with the matter including an email address for the solicitor and lead counsel or in the case of a respondent in person please provide contact details including telephone and email.

15. Legal Aid:

In the case of an application by the DPP from an order in a criminal trial please confirm that a Legal Aid (Supreme Court) certificate has been granted by the Court below and please provide a copy of same.

Signed:

Dublin 2

Please file your completed Notice in:

The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin 7

Appendix

Grounds of Opposition (and Cross Appeal)

1. Title of the Proceedings: *[As in the Court of first instance]*

JOSEPH SHEEHAN

PLAINTIFF

- and -

BRECCIA, IRISH AGRICULTURAL DEVELOPMENT COMPANY, BLACKROCK HOSPITAL LIMITED, GEORGE DUFFY, ROSALEEN DUFFY AND TULLYCORBETT LIMITED

DEFENDANTS

2. Respondent's grounds for opposing an appeal if leave to appeal is granted:

Please list concisely in numbered paragraphs, the Respondent's ground(s) of opposition to the grounds of appeal set out in the Appellant's Notice of Appeal.

1. In respect of Ground 1, the High Court and the Court of Appeal correctly held that Clause 5.1 of the original lender's General Terms & Conditions was an unenforceable penalty clause.
2. In respect of Ground 2, the existing jurisprudence of this court on the issue of penalty clauses is the decision in *Pat O'Donnell & Co* referred to hereinabove. The Appellants contend that *Pat O'Donnell* must now be abandoned and that this court should tow the line adopted by the U.K. Supreme Court in the *Cavendish* decision *"absent strong principled reasons"* for not doing so. It is submitted that this contention does not properly reflect the circumstances in which this court should review its prior decisions. The court is not beholden to changes in U.K. law in the manner

that the Appellants suggest.

3. In Director of Public Proscutions v J.C. [2015] IESC O'Donnell J considered the circumstances in which this court would review its prior decisions. He stated :

"As I conceive, it is part of the proper function of this Court to adjust its prior decisions in the light of developments in the law, experience, and analysis. I am confident that every argument that can be marshalled in favour of the decision in Kenny has been advanced in this case. Having carefully considered the issue, I conclude, with great respect to my colleagues present and past who take or took a different view, that I do not believe that the decision in Kenny can withstand scrutiny. It is, in my view, plainly wrong. It is long past time that it was addressed and, so far as it is possible for us to do so, corrected."

4. Accordingly, it is respectfully submitted that the position is the polar opposite to that suggested by the Appellants and that this court should properly adhere to its prior decisions unless it is established that those decisions cannot withstand scrutiny or are plainly wrong. This court is of course entitled to consider changes in the jurisprudence of the U.K. courts (and other courts), but decisions of those courts should be viewed as an aid to this court and should not dictate to it as the Appellants suggest.

5. The Appellants have also set out a somewhat abbreviated formulation of the test applied by the U.K. Supreme Court in *Cavendish*. The full test was stated as follows :

"The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter."

6. The test accordingly introduces a dichotomy between *"primary obligations"* and *"secondary obligations"* that the Appellants do not appear to acknowledge - the impugned surcharge interest clause in the present case is undoubtedly a *"secondary obligation"* within this categorisation. The clause

impugned in the *Cavendish* decision was clearly identified as a *"primary obligation"*.

7. The Appellants suggest that *Cavendish* is preferable because it focuses on the effect of the clause rather than its purpose. This ignores the fact that the effect of a clause will also depend upon extraneous factors : would this lead to a situation where a clause could be deemed to be enforceable one day and not enforceable the next? By way of illustration, a clause such as the present surcharge interest clause, providing for a 4% uplift, would perhaps be considered proportionate in circumstances where prevailing interest rates were 20% but would not be considered proportionate where prevailing interest rates were 2%. The Appellants further suggest that the *Cavendish* approach is more conceptually coherent and easier to apply in practice than the classic interpretation of Lord Dunedin's principles - that suggestion is easily made but cannot be substantiated. It must also be noted that the proper interpretation of Lord Dunedin's test was itself the subject of detailed consideration by the U.K. Supreme Court, as referred to hereunder.

8. It is also incorrect to suggest that the application of the *Cavendish* approach would result in Clause 5 of the General Terms & Conditions becoming enforceable. The evidence adduced at trial confirmed that the detriment imposed upon the borrower by the clause was wholly unrelated to any legitimate interest of the lender. The evidence further indicated that the imposition of the surcharge interest clause would exponentially increase the amount of interest payable on the loan. Furthermore, as Finlay Geoghegan J pointed out in her judgment in the Court of Appeal, Clause 14 of the General Terms & Conditions provided an express indemnity in respect of

actual loss suffered by the lender as a consequence of default - in such circumstances, the additional obligation imposed by Clause 5 bore no relevance to any actual loss sustained and could only be *in terrorem* of the borrower.

9. In respect of Ground 3, the Court of Appeal did not err in its application of the test set out and approved in *Pat O'Donnell*. It is also incorrect to characterise the *"extravagant or unconscionable"* test as a *"principle"* emanating from the *Dunlop* decision. As Finlay Geoghegan J pointed out at paragraph 36 of her judgment, it is not a principle, it is simply one of a number of tests that may be useful in assisting a court to determine whether an impugned clause is an agreement for the payment of liquidated damages. She further stated at paragraph 39 :

"It does not follow in my view that a party contending that the clause is a penalty must establish that either of the above thresholds is met. The relationship between probable damages and the sum agreed to be paid is a relevant factor and part of the circumstances which the court must take in to account when construing the contract. It is however not a rigid threshold which must be met nor is it the only matter to be taken into account when construing the probable functional effect of the clause from the terms of the contract in its relevant factual matrix."

10. In respect of Ground 3.2 , this ignores the formulation of the test applied and approved in *Pat O'Donnell*. In respect of Ground 3.3, the formulation of this Ground indicates that the Appellants themselves have fallen into a trap that the U.K. Supreme Court identified in *Cavendish* - the court stated that it was unfortunate that many of the cases that followed on from the *Dunlop* case represented *"little more than a detailed exegesis of application of [the four tests of Lord Dundedin] with a view to discovering whether the clause*

in issue can be brought within one or more of them" - the court stated that such a formulaic approach was not intended by Lord Dundein nor did it reflect the reasons of the majority for reaching their decision in *Dunlop*. It is to be noted that the careful judgment of Finlay Geoghegan J in the Court of Appeal clearly eschews this sort of formulaic approach and represents the proper and effective application of the *Dunlop* test in a manner that the judges in *Cavendish* believed to be absent from most U.K. decisions.

11. In respect of Grounds 3.4 & 3.5, the Court of Appeal did not err in the interpretation of Lordsvale or ACC v Friends First : rather, it is submitted that Finlay Geoghegan J at paragraphs 41 - 44 provides an exemplary explanation of where those cases fit in to the *Dunlop/Pat O'Donnell* line of authority. She referred to the decision of Charleton J in *Durkan New Homes v Minister for the Environment Heritage & Local Government [2012] IEHC 265*. Charelton J had cited the following passage from *Trietel* :

"A clause is penal is it provides for a 'payment of money stipulated as in terrorem of the offending party', or, as it has been put more recently, if the contractual function of the clause is 'deterrent rather than compensatory'.

12. Finlay Geoghegan J stated :

"I would respectfully agree that expressing the question to be determined as to whether 'the clause is a genuine attempt by the parties to estimate in advance the loss which will result from the breach' may be a better way of putting the question. This approach permits the courts to uphold a clause which is a genuine attempt by the parties to estimate in advance the loss which will result from the breach but where by reason of the uncertainty of the loss it may be a sum which differs from the actual loss anticipated."

13. It is submitted that the foregoing once more represents the correct and purposeful application of the *Dunlop/Pat O'Donnell* test and that it avoids the formulaic interpretation that was decried in *Cavendish.*

14. Ground 3.6 boasts that the lender's surcharge interest rate was lower than that of certain of its competitors and lower than the previously applicable rate of Courts Act interest - it is respectfully submitted that this is not relevant to the proper categorisation of the clause as a penalty clause.

15. The Court of Appeal did not err in the interpretation of certain aspects of the contract as alleged at Ground 3.7.

Estoppel.

16. The Court of Appeal and High Court did not err in concluding that the first Appellant was estopped from recovering surcharge interest which accrued before 19th June 2015 (the date identified in the Judgment of Hogan J is the 19th June, 2015, rather than the 9th June 2015).

17. The decisions of the Trial Judge and of the Court of Appeal on the estoppel issue represent the proper and accurate application of the tests mandated by this court in *Doran v Thompson.* This is so in relation to the identification of the representations made by the original lender and by the Appellants, in the finding that there was an intention that the Respondent should rely upon such representations and in the further finding that the Respondent did rely thereon to his detriment.

18. In respect of Ground 5.3, both courts were entitled to find that the Respondent's funding requirements were framed by reference to the sums identified as being outstanding and that the Respondent relied thereon in his efforts to obtain funding.

19. In respect of Ground 5.4, this is premised on a wholly unsound interpretation of what this court said in the *Doran* decision. A material change in position is to be found by looking at the actions of a party rather than in querying whether those actions achieved the result that party set out to achieve. Equally, the matter set out at Ground 5.5 was a finding of the Trial Judge, rather than a mere inference.

20. In respect of Ground 6, both the High Court and the Court of Appeal clearly considered the causal link between the representations made and the detriment asserted. Equally, each court assessed the extent of detriment by reference to the justice of allowing the representations to be disregarded - Hogan J considered this issue in some detail at paragraphs 46-52 of his judgment and clearly held that it would be both unjust and inequitable to allow the first Appellant to resile from the representations made by both itself and by the original lender.

21. In respect of Ground 7, the Court of Appeal did not err in failing to overturn findings of the High Court in respect of reliance and/or detriment. It is further the case that neither of the issues identified by the Appellants could be considered to be fundamental to the decision of either court.

22. In respect of Grounds 8 & 9, the Court of Appeal did not err in either manner alleged. It shall in particular be noted that Hogan J specifically confirmed that the reservation of rights contained in correspondence was not effective to defeat the representations separately made. He stated at paragraph 47 :

"Still less am I impressed with Breccia's entirely fanciful contention that the formal saver of rights contained in the letter ought to have conveyed such to Mr Sheehan. If

Breccia really intended to charge surcharge interest and thereby to change the course of dealing which had obtained for four years between Mr Sheehan on the one hand and Anglo/IBRC, one must then ask why the letter did not expressly say as much."

23. The Appellants' appeal should be dismissed by this court on all grounds.

3. Additional grounds on which the decision should be affirmed:A

Please set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court respectively, on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court.

N/A

4. Cross Appeal

Please set out in numbered paragraphs the Grounds of Cross Appeal relied upon if leave to cross appeal were to be granted.

N/A

5. **Order(s) sought**

Please set out in numbered paragraphs the order(s) sought if the Cross Appeal were to be successful.

The Respondent prays that the court will dismiss the appeal with costs in favour of the Respondent.

Shannon & O'Connor Solicitors.