THE HIGH COURT

[3387/2017 P]

BETWEEN

PATRICK CRONIN

PLAINTIFF

AND

DUBLIN CITY SHERIFF AND TANAGER DAC

DEFENDANTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 17th day of October, 2017

The Nature of the Case

1. This is a case in which the plaintiff seeks an injunction to restrain the repossession of his family home, based upon points of European law, in circumstances where there have already been two sets of proceedings in connection with the matter. He also seeks, *inter alia*, a declaration that an order for repossession previously made by the High Court should not be enforced. The plaintiff seeks to rely upon Council Directive 93/13/EEC (5th April 1993), the "Unfair Terms Directive", which deals with unfair terms in consumer contracts. The plaintiff also seeks to rely upon the proportionality principle as articulated in the jurisprudence of the ECJ. There is an extensive jurisprudence from the ECJ concerning the Unfair Terms Directive, and it is submitted on behalf of the plaintiff that one of the conclusions of the ECJ is that the domestic courts have an obligation, when considering whether to enforce a consumer contract, including a mortgage contract between a customer and a bank (see *Aziz v Caixa d´Estalvis de Catalunya, Tarragona i Manresa*, Case C-415/11, EU:C:2013:164, 14th March 2013), to consider whether the contract may contain terms prohibited by the Directive; and that the obligation extends to raising the issue on the court's own motion, even if the parties have not done so. The plaintiff argues that notwithstanding that the point was not raised in either of the first two sets of proceedings (or more accurately, was not raised by anybody except him until the lodging of an appeal in the second set of proceedings), the obligation upon the courts in the previous proceedings was mandatory by reason of the ECJ's interpretation of the Directive, and that the normal principles as to the finality of judgment and *res judicata* do not apply in those circumstances. The application is vigorously resisted by the second defendant which has responded to the proceedings with a motion to dismiss on the principles of *res judicata* and abuse of process.

Council Directive 93/13/EEC of 5th of April 1993 – the "Unfair Terms Directive"

2. It may be helpful if I refer to the essential aspects of the Directive in question by way of context at this stage. Council Directive 93/13/EEC (5th of April 1993) on unfair terms in consumer contracts defines a consumer as any natural person who is acting for purposes which are outside of his trade, business or profession. Article 3 provides that a contractual term which 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 contracts, to the detriment of the consumer. It also provides that a term shall be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. Article 4 provides that the 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 as against the services and goods supplied in exchange. However, it also provides that the unfairness of a contractual term shall be assessed by taking into account the nature of the goods or services for which the contract was concluded and all the circumstances attending the conclusion of the contract. Article 5 provides that written terms must be drafted in plain, intelligible language, and that where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. Article 6 provides that member states shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms. The Annex to the Directive in paragraphs (a) to (q) sets out an "indicative and non-exhaustive list" of terms which may be regarded as unfair. The Directive was implemented in Irish law by the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, S.I. 27/1995 which replicates the essence of the above-mentioned provisions. The ECJ has considered the interaction between the Directive and the provisions of domestic law in a number of countries in a number of cases, the most important of which are discussed below.

Relevant Facts/Chronology

The first set of proceedings

3. In November 2008, Mr. Cronin entered into two loan agreements with the Bank of Scotland (Ireland) Ltd, involving loans of €600,000 and €450,000. Those loans were secured by a mortgage on premises in Dublin city ("the property"). He failed to meet his repayment obligations and went into significant arrears. He does not dispute that he defaulted on his loans. As of March 2013, he was €144,120.00 in arrears and on the 14th March, 2013, the Bank of Scotland Plc brought Circuit Court proceedings seeking possession of the property, the business of Bank of Scotland (Ireland) having been transferred to Bank of Scotland Plc with effect from 1st December, 2010. An order for possession was made by the Circuit Court on 28th January, 2014, subject to a stay of six months. While Mr. Cronin had entered an appearance and was apparently aware of the hearing date, he did not attend the hearing in the Circuit Court, for reasons which have not been explained to the Court. He did, however, appeal the order for possession to the High Court. In April 2014, while that appeal was pending, Bank of Scotland Plc assigned its interests in the relevant facilities to Tanager, and in June 2014, Tanager was substituted as the plaintiff in those proceedings. On the 29th February, 2016, following a full day's hearing at which Mr. Cronin was represented by solicitor and counsel, the High Court (Twomey J.) affirmed the order for possession, subject to a stay of three months. That concluded the first set of proceedings, being the proceedings initiated by the Bank. There was of course no legal limit to the arguments that could be raised on behalf of Mr. Cronin in those proceedings including, in particular, the issues of European law now sought to be relied upon in the present proceedings. They were not raised on his behalf in those proceedings.

The second set of proceedings

4. In November 2016, Mr. Cronin commenced proceedings in this Court, asserting that he had made a binding agreement with Tanager according to which Tanager had agreed that it would not enter into possession provided that he made weekly payments of €600 to Tanager. In December 2016, Tanager applied to dismiss those proceedings on the grounds of *res judicata*/abuse of process. On the 14th February, 2017, the High Court (Twomey J.) made an order dismissing the proceedings on that basis. He also directed the vacation of a *lis pendens* that had been registered by Mr. Cronin. The court extended the stay on the execution of the order for possession for a further period of two months. Mr. Cronin was represented by solicitor and counsel at the hearing of that application. Again, the European law issues now sought to be relied upon were not raised on the plaintiff's behalf. On the 14th March, 2017, Mr.

Cronin filed a notice of appeal to the Court of Appeal against the High Court order of the 14th February, 2017. In his notice of appeal, and for the first time, arguments relating to the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (hereinafter "the Unfair Terms Regulations") and the Directive 93/13 ("the Unfair Terms Directive"), as well as arguments regarding proportionality under European law, were identified for the first time. The appeal has not yet been heard.

The third set of proceedings

5. On the 13th April, 2017, Mr. Cronin commenced the present proceedings against the Dublin City Sheriff and Tanager. He sought an injunction from the Court during the vacation and the court extended the stay on execution of the order for possession for a further period of two months, but adjourned the proceedings for legal argument. In those proceedings, brought by way of plenary summons, the plaintiff pleads that he was a consumer within the meaning of the Unfair Terms Regulations and Directive, and that the dispute fell within the scope of EU law and that the EU Charter of Fundamental Rights applies. It is pleaded that it is a requirement under the case law of the European Court of Justice, interpreting the Directive, that a judge in adjudicating the dispute between the parties is under an obligation to assess the terms of both contracts for fairness and to eliminate from the contracts any terms that were unfair. It is pleaded that the judge is also under an obligation to assess the terms of the contract for clarity and interpret any ambiguity in favour of the plaintiff. It is pleaded that no such assessment was carried out by any judge or county registrar involved in any of the proceedings to date and that this failure was a breach of EU law. The plaintiff seeks in the proceedings a declaration that the repossession order is unenforceable; an injunction preventing the first defendant from enforcing the repossession order until the determination of the proceedings, or the associated appeal to the Court of Appeal; and damages for alleged breach of the plaintiff's rights under European law.

6. By notice of motion dated the 8th May, 2017, Tanager sought an order pursuant to O. 19, r. 28 of the Rules of the Superior Courts and/or pursuant to the inherent jurisdiction of the court striking out or dismissing the plaintiff's action on the grounds that the claims made were *res judicata* and/or an abuse of process and/or that they are frivolous and vexatious and/or that they are bound to fail. They also sought an order restraining the plaintiff from instituting without prior leave of the High Court any further legal proceedings against the second defendant in connection with his right to possession of the property.

7. Both matters came on before me for hearing on the 3rd July, 2017. The Court indicated that it would sequence matters so that it would hear submissions in relation to the motion to dismiss first, and thereafter hear arguments in relation to the injunction sought. Full argument was heard from counsel on behalf of the plaintiff and the second defendant on both aspects of the case, and the European case-law was opened in full to the Court. The first defendant did not take part in the hearing.

Submissions of counsel on the motion to dismiss
Submissions on behalf of the second defendant

8. Counsel on behalf of the second defendant, Tanager, referred to a number of Irish authorities concerning the fundamental principle that a party should not be entitled to re-litigate matters or raise issues which have already been determined by a final judgment of a court of competent jurisdiction between the same parties. These included *Carroll v. Ryan* [2003] 1 I.R. 309, *A.A. v. Medical Council* [2003] 4 I.R. 302; and *Re Vantive Holdings* [2010] 2 I.R. 118. In *Carroll v. Ryan* [2003] I I.R. 309, Hardiman J. also discussed the rule in *Henderson v Henderson* (1843) 3 Hare 100 to the effect that a party may not bring proceedings to litigate a legal point which could reasonably have been foreseen and litigated in the first set of proceedings, and emphasised the public interest underlying this principle. He added that this public interest was reinforced by the current emphasis on efficiency and economy in the conduct of litigation in the interests of the parties and the public as a whole. However, Hardiman J. also cautioned against adopting too dogmatic an approach to what in his opinion should be:-

> "…a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all of the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

In *Re Vantive Holdings* [2010] 2 I.R. 118 at pp. 124-125 Murray C.J. described the rule in *Henderson v. Henderson* as one intended:–

> "..to promote finality in proceedings and to protect a party from being harassed by successive actions by another party when the issues between them either were or could have been determined with finality in the first proceedings. The rule in *Henderson v. Henderson* (1843) 3 Hare 100 is the policy of the need to protect the due and proper administration of justice from an abuse of process and to uphold the principle of finality in legal proceedings."

9. More recently, the above authorities were discussed in detail in the judgment of the High Court (Costello J.) in *Morrissey v. IBRC* [2015] IEHC 200. Having referred to the principle of *res judicata*, Costello J. said that the courts had also long recognised that there may be abuse of process outside the relatively confined limitations of the *res judicata* rule, and that the courts had always been prepared to balance the rights of parties to have their cases heard and determined by the courts with the right of the opposing parties to fair procedures in the conduct of litigation and, where necessary, to strike out proceedings if they amount to an abuse of process. She said (at p.3):-

> "In addition to the private rights of litigants, there is a public policy interest in ensuring finality of litigation and preventing vexatious litigants from subjecting the same parties to multiple lawsuits on the same issue."

It is thus clear under Irish law that if the point could have been raised in the original proceedings, and was not, the Court would be entitled to strike out the most recent proceedings as an abuse of process, even if the strict parameters of *res judicata* do not apply.

10. Counsel on behalf of the second defendant also referred the Court to a number of authorities to illustrate that the principle of finality was equally well entrenched in EU law, and submitted that the jurisprudence of the ECJ did not provide any reason to depart from the position as established in Irish law. The first of these cases was Köbler *v. The Republic of Austria*, Case C-224/01 (30th September 2003). The case arose in circumstances where the relevant court of final determination in Austria had determined an issue of EU law in an erroneous manner. Additionally, it had not referred the legal question to the CJEU on a preliminary reference as it should have done. Thus, the domestic court had engaged in both a substantive error and a procedural error, from the EU law point of view. Mr. Köbler was a university professor in Innsbruck and was appointed with the salary of an ordinary university professor, increased by a "*normal length of service increment*". He applied for a "*special length of service increment*" for university professors, and claimed that although he had not completed fifteen years of service as a professor at any Austrian universities, as required, he had completed the requisite length of service if the duration of his service in universities of other member states of the European community were taken into consideration. He claimed that the condition of completing fifteen years of service solely in Austrian

universities amounted to indirect discrimination which was unjustified under Community law. This led to court proceedings in which, initially, an Austrian court referred a request for a preliminary ruling to the ECJ. However, it subsequently withdrew its request for a preliminary ruling and dismissed his application on the ground that the special length of service increment was a loyalty bonus which objectively justified a derogation from the Community law provisions on freedom of movement for workers. Mr. Köbler then brought an action for damages against the Republic of Austria for reparation of the loss which he allegedly suffered as a result of the non-payment to him of a special length of service increment. He maintained that the domestic court judgment infringed Community law as interpreted by the ECJ. The issue before the ECJ was whether the State could be liable for the domestic court's breach of EU law or whether this would infringe the principles of certainty and finality. In holding that the State could be liable, the ECJ upheld the principle of finality in court proceedings but drew a clear distinction between the re-opening of concludedproceedings and the rendering of a State liable for an error made by the court. In the course of its judgment, it made the following comments which are indicative of strong support for the principle of finality in domestic litigation:-

> "34. It must be stressed, in that context, that a court adjudicating at last instance is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the State liable in order in that way to obtain legal protection of their rights…
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> 37. Certain of the governments which submitted observations in these proceedings claimed that the principle of State liability for damage caused to individuals by infringements of Community law could not be applied to decisions of a national court adjudicating at last instance. In that connection arguments were put forward based, in particular, on the principle of legal certainty and, more specifically, the principle of *res judicata*, the independence and authority of the judiciary and the absence of a court competent to determine disputes relating to State liability for such decisions.
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> 38. In that regard the importance of the principle of *res judicata* cannot be disputed (see judgment in Eco Swiss, cited above, paragraph 46). 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.
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> 39. However, it should be borne in mind that recognition of the principle of State liability for a decision of a court adjudicating at last instance does not in itself have the consequence of calling in question that decision as *res judicata*. Proceedings seeking to render the State liable do not have the same purpose and do not necessarily involve the same parties as the proceedings resulting in the decision which has acquired the status of *res judicata*. The applicant in an action to establish the liability of the State will, if successful, secure an order against it for reparation of the damage incurred but not necessarily a declaration invalidating the status of *res judicata* of the judicial decision which was responsible for the damage. In any event, the principle of State liability inherent in the Community legal order requires such reparation, but not revision of the judicial decision which was responsible for the damage.
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> 40. It follows that the principle of *res judicata* does not preclude recognition of the principle of State liability for the decision of a court adjudicating at last instance."

11. In *Kapferer v. Schlank* and *Schick GmbH*, Case C-234/04 (16th March 2006), the ECJ was asked by way of preliminary ruling whether a national court is obliged to review and set aside a final judicial decision if the latter infringes Community law. The matter arose in the context of judicial proceedings relating to mail order prizes. The court again confirmed that attention should be drawn to the importance both for the Community legal order and national legal systems of the principle of *res judicata*. It said:-

> "In order to ensure both the 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 the expiry of time-limits provided for in that connection can no longer be called into question."

Referring to the Köbler case, it confirmed that:-

> "Community law does not require a national court to disapply domestic rules of procedures conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue".

12. In *Fallinento Olimpiclub*, Case C-2/08 (2009), the question was whether the determination of an administrative agency in relation to the status of an agreement about a tax year should be given binding effect for another tax year. The ECJ said that the domestic decision could not be re-opened, but that it was not of binding effect in relation to another year if it was in breach of EU law. The Court reaffirmed that Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if such disapplication would make it possible to remedy an infringement of Community law on the part of the decision in question. The Court referred to the principles of equivalence and effectiveness, saying that the rules implementing the principle of *res judicata* must not be less favourable than those governing similar domestic actions (the principle of equivalence), nor may they be framed in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law (the principle of effectiveness). In the present case, it was not compatible with the principle of effectiveness to have a situation where the interpretation of *res judicata* was that in tax disputes, where a final judgment in a given case concerned a fundamental issue common to other cases, it had binding authority as regards that issue even if its findings were made in relation to a different tax period. An interpretation of that kind prevented a judicial decision that had acquired the force of *res judicata* from being called into question even if it entailed a breach of Community law. Further, it also prevented any finding on a fundamental issue common to other cases from being called into question in the context of judicial scrutiny of another decision taken by the relevant tax authority relating to a different tax year in respect of the same taxpayer. If the principle of *res judicata* was applied in that manner, the effect would be that, if ever the judicial decision that had become final were based on an interpretation of the Community Rules which was wrong, those rules would continue to be misapplied for each new tax year, without it being possible to rectify the interpretation. Such extensive obstacles to the effective application of the Community rules on value added tax could not reasonably be regarded as justified in the interests of legal certainty and must therefore be considered to be contrary to the principle of effectiveness.

13. None of the above cases concerned the principle of finality in the context of matters arising in connection with the Unfair Terms Directive. Of particular relevance to the present case is the decision in *Asturcom Telecomunicaciones*, Case C-40/8 [2009] ECR I-9579, relied upon by counsel for both the plaintiff and the second defendant, in which the ECJ did consider the interaction between the principle of *res judicata* and Directive 93/13, the Unfair Terms Directive. The case concerned an arbitration clause in a mobile telephone contract, which required that any dispute under the contract was to be referred for arbitration, which arbitration was to take place in a particular location (Bilbao). The company initiated arbitration proceedings and received an award of €669.00. The consumer did not participate in the arbitration and did not subsequently initiate proceedings for annulment of the arbitration award.

As a result, the award became final under Spanish law. The company then brought court proceedings for enforcement of the arbitration award. At this stage, the court considered the arbitration clause in question to be unfair, on the basis that the costs incurred by the consumer in travelling to the location would be greater than the amount at issue in the dispute in the main proceedings, together with the fact that Bilbao was at a considerable distance from the consumer's place of residence and it was not indicated in the contract that this would be the location of any arbitration. However, under domestic law, the court did not have jurisdiction to examine the fairness of the contractual term. Accordingly, the court sought a preliminary ruling from the ECJ, asking whether the protection given to consumers by the Directive required the court to determine of its own motion whether the arbitration agreement was void and to annul the award if it found that the arbitration agreement contained an unfair arbitration clause to the detriment of the consumer.

14. The ECJ (at para. 35 onwards) again drew attention to the importance of the principle of *res judicata* both for the Community, legal order and for national legal systems. It pointed out that it already observed on a number of occasions that it was important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after the expiry of time-limits provided to exercise those rights can no longer be called into question, and re-iterated that Community law did not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would make it possible to remedy an infringement of a provision of Community law, regardless of its nature, on the part of the decision at issue. It said that in the absence of Community legislation in the area, the rules implementing the principle of *res judicata* were a matter for the national legal order, in accordance with the principle of the procedural autonomy of the Member States, provided that the rules were not less favourable than those governing domestic actions (the principle of equivalence) nor framed such as to breach the principle of effectiveness. Turning first to the question of 'effectiveness', the court said, in a passage which I consider to be important:-

> "As regards, first, the principle of effectiveness, the Court has already held that every case in which the question arises as to whether a national procedural provision makes the application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national bodies. For those purposes, account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure (Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 14, and *Fallimento Olimiclub*, paragraph 27).

15. The court went on to say that it was not incompatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty and that in the present case, the two-month time limit was not inconsistent with the principle of effectiveness since it was not likely to make it virtually impossible or excessively difficult to exercise any rights which the consumer derived from the Directive. The court also immediately followed this conclusion by saying, at para. 47:-

> "In any event, the need to comply with the principle of effectiveness cannot be stretched so far as to mean that, in circumstances such as those in the main proceedings, a national court is required not only to compensate for a procedural omission on the part of a consumer who is unaware of his rights, as in the case which gave rise to the judgment in *Mostaza Claro,* but also to make up fully for the total inertia on the part of the consumer concerned who, like the defendant in the main proceedings, neither participated in the arbitration proceedings nor brought an action for annulment of the arbitration award, which therefore became final."

16. The court held that in light of the foregoing, the procedural rules laid down by the Spanish system for the protection of consumers against unfair terms in contracts did not make it impossible or excessively difficult to exercise the rights conferred on consumers by the Directive.

17. The court then went on to consider whether the domestic law was in accordance with the second relevant principle, the principle of equivalence, and to this end, engaged in a discussion of the purpose of the Directive. It described it as a measure essential to the accomplishment of the tasks entrusted to the European Community and, in particular, to raising the standard of living and the quality of life throughout the Community. It said that accordingly, in view of the nature and importance of the public interest underlying the protection which the Directive confers on consumers, article 6 of the Directive must be regarded as a provision of equal standing to national rules which rank, within the domestic legal system, as rules of public policy. It followed from this that inasmuch as the national court is required to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it was also obliged to assess of its own motion whether that clause was unfair in the light of Article 6 of that Directive. The Spanish Government had submitted that a court responsible for enforcement of an arbitration award which had become final did have jurisdiction to assess of its own motion whether an arbitration clause in the contract was contrary to national rules of public policy; it followed that a court would also be entitled to assess of its own motion whether the contract was in accordance with the Directive.

Submissions on behalf of the plaintiff

18. In response to the defendant's submissions on the motion to dismiss, it was argued on behalf of the plaintiff that an essential element of *res judicata* was absent in the present case, in that, it was submitted, the subject matter of the third set of proceedings was not the same as that in previous proceedings. However, it was accepted on behalf of the plaintiff that the jurisdiction under the rule in *Henderson v. Henderson* was broader than the issue of *res judicata* or estoppel, but it was submitted that the essence of this common law rule was fundamentally irreconcilable with the inquisitorial type of assessment required by the CJEU in relation to contracts falling within the scope of the Directive.

19. In this regard, counsel relied upon the ECJ authorities to demonstrate the importance placed by the ECJ upon the role of the court in raising of its own motion the issue of the fairness of contractual terms of its own motion. In earlier cases, it appears that the matter was viewed as a question of whether the domestic court had a 'power' to do so. In *Oceano Grupo Editorial v. Quintero,* Case C-240/98, (2000), which concerned a contractual term in a contract for purchase by instalment of an encyclopaedia conferring jurisdiction in respect of disputes under the contract in the court of the territory of the place of the seller's place of business, the ECJ discussed the power imbalance between the consumer and seller/supplier and its relationship with the Unfair Terms Directive. The court held that that the domestic courts had the power to determine of their own motion whether a contractual term was unfair, saying that "the aim of the Directive…would not be achieved if the consumer himself were himself obliged to raise the unfair nature of the terms" and that "there is a real risk that the consumer, particularly because of ignorance of the law, will not challenge the term pleaded against him". It said that "effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion" (para. 26, *Oceano Grupo*, emphasis added). In *Mostaza Claro*, Case C-168/05, [2006] ECR I-10421, which concerned a contractual term in a mobile telephone contract requiring that arbitration take place in a particular location, this power on the part of the court was stated to be "necessary for ensuring that the consumer enjoys effective protection, in view in particular of the real risk that he is unaware of his rights or encounters difficulties in enforcing them" (para 28). In *Pannon GSM Zrt*., Case C-243/08, (2009) I-4713, the court took matters a step further by describing the court's relationship to the assessment of the fairness of contractual terms as one of *obligation*, and not merely of power, on the part of the

domestic court; i.e. an "obligation to examine that issue of its own motion, where it has available to it the legal and factual elements necessary for that task".

20. Counsel on behalf of the plaintiff laid emphasis upon *Aziz v. Caixa d'Estalvis de Catalunya, Tarragona I Manresa*, Case C-415/11, which related to the enforcement of a mortgage in respect of a family home. Essentially, the domestic legal position was that if the creditor chose mortgage enforcement proceedings for the purposes of execution, the possibilities for the debt to allege that one of the clauses of the loan agreement was unfair were very limited, and indeed those possibilities were deferred to later declaratory proceedings which lacked suspensory effect and would not prevent the house repossession. The court held that this regime did impair the protection sought by the Directive, because while it would enable the consumer to obtain subsequent protection, this would be of a purely compensatory nature and would not constitute either an adequate or effective means of preventing the continued use of the unfair contractual term, contrary to Article 7 (1) of Directive 93/13/EEC. The court went on to say at para. 61:

> "That applies all the more strongly where, as in the main proceedings, the mortgaged property is the family home of the consumer whose rights have been infringed, since that means of consumer protection is limited to payment of damages and interest and does not make it possible to prevent the definitive and irreversible loss of that dwelling."

21. With regard to the *Köbler* case relied upon by the second defendant in the manner described above, it was argued on behalf of the plaintiff that it was distinguishable on the basis that the domestic court had engaged in an error of substantive law, whereas the present situation involved a procedural error of a much more fundamental nature, namely the domestic courts' failure to observe its obligation under the Directive to assess the contract for fairness prior to enforcing it against the consumer.

22. With regard to the *Asturcom* case also relied upon by the second defendant, reliance was placed by the plaintiff's counsel upon the passage, set out above, in which the ECJ laid emphasis on the 'inertia' of the consumer in that case. This was sought to be contrasted with the position of Mr. Cronin who had contested the first set of proceedings (if only at appeal stage), had also fully contested the second set of proceedings, and had now brought a third set of proceedings. Counsel also referred the Court to *Kusionova v. Smart Capital*, Case C-34/13 (10th September, 2014), where at para. 56 of its judgment, the court said that the need to comply with the principle of effectiveness could not be stretched so far as to make up fully for total inertia on the part of the consumer concerned, citing the *Asturcom Telecommunications* case in this regard, and said that the position of the plaintiff in the present case had been far from one of "inertia". Counsel pointed out that in the *Kusionova* case, in which, *inter alia*, Article 7 of the Charter of Fundamental Rights of the European Union (which includes respect for home and family life) had been raised in connection with the interpretation of the Directive in its application to mortgage enforcement proceedings, the ECJ said (paras. 62-3): -

> "It is necessary to give particular attention to the fact that the property at which the procedure for the extrajudicial enforcement of the charge added in the main proceedings is directed is the immovable property forming the consumer's family home."

Referring to para. 61 of its judgment in *Aziz*, the Court continued as follows:

> "The loss of a family home is not only such as to seriously undermine consumer rights… but it also places the family of the consumer concerned in a particularly vulnerable position."

The ECJ then noted that the European Court of Human Rights had held that the loss of a home was one of the most serious breaches of the right to respect for the home and that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed. This in turn led counsel to draw attention to the authorities of the ECHR in relation to infringements of the right to a home and, in particular, to its decision in *Yordanova v. Bulgaria Application* no.25446/06 (24th April 2012), where the Court said that since the loss of one's home was the most extreme form of interference with the right under Article 8 to respect one for one's home, and that any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8. That statement was made in the context of proceedings concerning the eviction of a group of Roma families squatting on public land. Counsel on behalf of the plaintiff argued that his client's proceedings raised many questions as to the extent of the fundamental right to accommodation guaranteed by Article 7 of the Charter of Fundamental Rights in EU law and that it might indeed be necessary for this Court to refer questions to the CJEU for clarification of certain matters.

23. In the course of his submissions, Counsel also referred to a decision of the High Court (Barrett J.) in *AIB v. Counihan* [2016] IEHC 752. In this case the plaintiff had sought an order of summary judgment against the defendants for non-payment of loan facilities advanced to them to refinance previous borrowings. The High Court refused to grant an order for summary judgment and directed that the matter should go to plenary hearing because there was a factual dispute between the parties as to whether there had been a representation on the part of the bank that there would be no enforcement in the event of default. In the course of its judgment, in what appears to be an obiter passage, Barrett J. considered the *Aziz* case and commented that it appeared to contemplate a court, even in an adversarial system of justice, acting in an inquisitorial manner, and he described the duty imposed on the court as wide-ranging. He went to consider how the duty might be discharged by an Irish court in the context of a summary application for judgment and set out what he considered to be an appropriately sequenced approach in that regard.

Reply on behalf of the second defendant

24. In reply, counsel on behalf of the second defendant submitted that what was being contended for on behalf of the plaintiff was the very antithesis of the finality principle. It was submitted that the plaintiff's submissions were purely theoretical insofar as he had failed to give any concrete illustration of an unfair term in the mortgage contract in issue. It was submitted that, for the purposes of *res judicata*, in reality the same issue had arisen in all three proceedings, namely whether Tanager had a right to possession of the property in question. It was argued that the submission being made by the plaintiff was precisely that which had been made in the EU cases, namely that if there has been a breach of EU law by virtue of a final judicial decision, there is a requirement to set it aside if doing so would remedy the breach; and the European court had repeatedly answered this question in the negative. It was argued it was not plausible that a significant difference between those cases and the present case was that the present case involved a fundamental procedural requirement, as an alleged procedural breach could not possibly be, in principle, more serious than a breach of EU law which resulted in a substantively wrong result in a case. Further, it was submitted, in the *Köbler* case, the supposed distinction did not arise in any event because both types of error had arisen insofar as the court of final decision had failed to refer the matter to the ECJ by way of preliminary reference (a procedural flaw) and had also got the law substantively wrong (a substantive flaw), and nonetheless the European court declined to set aside the final decision. As regards the *Asturcom*, case, Counsel submitted that there was no difference in principle between a consumer who did not bother to bring annulment proceedings at all and a borrower such as Mr. Cronin who did not raise the issue in proceedings against him in which he otherwise played an active role, on the basis that there was no qualitative difference between their respective positions.

25. Counsel also submitted that if the logic of the plaintiff's position was correct, the High Court would be entitled to set aside or declare unenforceable a decision of the Supreme Court if the circumstances were such that the Supreme Court had ruled on an appeal concerning a mortgage and had failed to consider the Unfair Terms Directive, a potential outcome described as patently absurd. Counsel also referred to the decision in the *Counihan* case by Barrett J., and submitted that his comments relating to the directive were *obiter* as the case was in fact remitted for plenary hearing under the estoppel ground argued.

Decision on the Motion to Dismiss

26. Needless to say, the present proceedings are most unusual in that the plaintiff's ultimate aim is to obtain an order declaring unenforceable a previous order of the High Court, on appeal from the Circuit Court, ordering the repossession of his family home. I have set out above at paras. 4 and 5 the history of the first two sets of proceedings which preceded the present proceedings.

27. I have no doubt but that under Irish law, even if *res judicata* did not apply in the strict sense, the present proceedings fall foul of the principle in *Henderson v. Henderson* as approved in the subsequent Irish authorities referred to above at paras. 9 and 10. The legal points based upon EU law which are now sought to be raised could have been raised in the earlier proceedings. There was no legal or other impediment to this being done. Therefore the only new question posed by the present case is whether the normal Irish principles concerning finality of proceedings and abuse of process require adaptation in the present circumstances by reason of ECJ law requirements, in particular by reason of the ECJ jurisprudence, described above, concerning the Unfair Terms Directive and the importance of the family home under the Charter.

28. As seen above, the principles of finality and certainty have been emphasised repeatedly in the ECJ authorities, including the cases discussed at paragraphs 11-19 above, in particular *Kobler v. Republic of Austria*, Case C-224/01, *Kapferer v Schlank and Schick,* Case C-234/04, and *Fallimento Olimpiclub*, Case C-2/08. In those cases, although there had been misapplication of EU law by the domestic courts, the ECJ did not consider it necessary that the domestic courts should re-open proceedings which had been concluded at the domestic level; on the contrary, any remedy for the breach lay in, for example, rendering the State liable for the breach of EU law committed by the courts (as for example in *Kobler*) or by limiting the future effect of the decision (as for example in *Fallimento Olimiclub*). Incidentally, I am not persuaded by the attempted distinction of the *Kobler* case on the basis that the authorities concerned errors of substantive law ; in the first instance, one of the errors made by the domestic court in the *Kobler* case was the procedural error of failing to make a preliminary reference to the ECJ; but more importantly, I fail to see how it could be, in principle, of greater significance that an error was procedural rather than one of substantive law.

29. In *Kapferer*, as set out at para. 13 above, the ECJ specifically said that Community law did not require a national court to disapply domestic rules of procedures conferring finality on a decision, even if to do so would enable the national court to remedy an infringement of Community law. Having regard to *Kobler, Kapferer* and *Fillimento Omniclub*, it might be argued, the matter begins and ends; the ECJ's own interpretation of the finality principle makes it clear that it is not necessary to disapply domestic rules on finality merely because there has been a misapplication of EU law.

30. However, the plaintiff's main argument was that the finality principle had to be read in light of ECJ's unique emphasis on protecting the consumer under the Directive, which had led the court to the make the unusual requirement of domestic courts to act of their own motion in order to compensate for the weak position of the consumer; counsel allied this unusual step to the jurisprudence emphasising the importance of the family home, suggesting that the combination of matters required an exception to the finality principle. I think it is fair to say that there it was not suggested that there any ECJ authority *directly* suggesting that an exception to the principle of finality should be made in this context; rather the plaintiff's argument was, in essence, that such an exception should be implied from the jurisprudence.

31. In considering this argument, it seems to me that the cases of *Asturcom Telecommuniciones* and *Aziz* are the most relevant cases cited to me because they both concern the Unfair Terms Directive, while *Aziz* additionally contains the feature that that mortgage enforcement proceedings were in issue.

32. In *Aziz*, discussed above, the court held that the Directive's protection was impaired in a situation where Spanish law greatly restricted the plaintiff's ability to challenge the repossession of his family home. This may be contrasted with the situation in Ireland, where a person facing enforcement proceedings in respect of a family home mortgage is entitled to present any and all arguments, including those founded upon EU law, in the course of enforcement proceedings, whether before the Circuit or the High Court at first instance, or on appeal. The court itself in such proceeding has no limits placed upon its jurisdiction to entertain such arguments. In the present case, the plaintiff had the opportunity to raise points of European law in the original Circuit Court proceedings but failed to attend, or participate in, those proceedings at all; he had another opportunity on appeal to the High Court, but while he participated in those proceedings and did so with the benefit of legal representation, he did not raise the arguments founded upon EU law. It therefore seems to me that in that regard the present situation is nothing like that which arose in *Aziz*. Nor does *Aziz* seem to me to suggest in any way suggest an exception from the principle of finality for proceedings in respect of family homes.

33. As regards *Asturcom Telecommuniciones*, I accept that the plaintiff in the present proceedings did not display "total inertia" in the face of the seller/supplier's steps for recovering the debt due, as had the consumer in that case. He did participate in the original proceedings even if he did not raise the EU law points now relied upon. However, it will be recalled that the background to the *Asturcom* case was that there was, under domestic law, a two-month time limit within which a consumer could challenge an arbitration award made under a mobile phone contract. The court held that the two-month limit did not breach the principle of "effectiveness" as it was not likely to make it virtually impossible or excessively difficult to exercise any rights which the consumer derived from the Directive. It said this after having made strong comments about finality and certainty, as set out above at para. 16 above, I find it difficult to accept that an ECJ decision upholding the validity of a two-month time limit, after which an award became finally enforceable, could be interpreted as support for the proposition now put forward, namely that there is an exception to the principle of finality derived directly from the fact that the court has (or may have) an obligation to raise the "unfair terms" issue of its own motion. Further, while the plaintiff was not "totally inert" in the sense that he did not simply sit back and allow matters to proceed without any input, he was "inert" in relation to the raising of points of EU law, despite having the benefit of legal representation in the proceedings and having had ample legal 'space' in which to do so. It seems to me that this is of significance in an adversarial system such as the Irish one, particularly having regard to the ECJ's comment in *Asturcom* that account must be taken, where appropriate, of the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure.

34. Accordingly, I am of the view that the application to dismiss the proceedings should be granted and that this third set of proceedings should not be allowed to proceed any further. The matters now sought to be raised could have been, but were not, raised in the first set of proceedings, and accordingly, the principle in *Henderson v. Henderson* applies; further, in my view, the jurisprudence of the ECJ concerning the Unfair Terms Directive does not require an exception to this principle in the present circumstances.

35. I should perhaps note that this judgment does not, and I do not consider it necessary to, decide the question of the extent of any obligation placed upon the Irish courts in house repossession cases by virtue of the Directive (as interpreted by the ECJ) in cases which are still "live." The present case is one where the repossession proceedings had been concluded and the basis for my decision is limited to a conclusion it would be an abuse of process to allow the plaintiff to maintain the present proceedings in those circumstances.