

THE HIGH COURT

[2014 No. 1416 S.]

BETWEEN

BANK OF IRELAND MORTGAGE BANK

PLAINTIFF

AND

NIALL HADE AND JOYCE HADE

DEFENDANTS

JUDGMENT of Ms. Justice Faherty delivered on the 15th day of December, 2017

1. By notice of motion dated 28th April, 2017 in the within proceedings, the defendants seek "an order to hear the preliminary issue of law regarding the unfair terms of the Loan Contract and the Deed of Mortgage annexed thereto under Council Directive 93/13/EEC, said hearing pursuant to Order 25, rule 1 and/or Order 34, rule 2 of the Rules of the Superior Courts".

2. The relevant background to the application is as follows:

The plaintiff (hereafter "the Bank") seeks judgment against the defendants on foot of two loan facilities. It is alleged that by letter dated 22nd June, 2006 ("the First Facility Letter"), the plaintiff offered and the defendants accepted a loan facility ("the First Loan") in the total amount of €2,700,000 to re-finance loans in respect of a number of properties, as described in the Statement of Claim delivered 3rd April, 2017. The Bank obtained security for the loan by way of mortgages over the said properties. The Bank alleges that the defendants failed to meet their obligations under the First Facility Letter and as a consequence the loan went into arrears. By letter dated 1st September, 2011, the Bank demanded repayment of the loan. It is alleged that the loan was not repaid. By Deeds of Appointment dated 17th November, 2011, 9th January, 2012, 20th November, 2012 and 22nd February, 2013 respectively, the Bank appointed Michael McAteer of Grant Thornton as Receiver over the properties in respect of which the loan was advanced. The Bank claims that there is currently €2,085,708.67 due and owing in respect of the First Loan, together with interest accruing daily at a rate of €54.28.

3. The Bank also claims that by letter dated 7th September, 2007 ("the Second Facility Letter") it offered the first named defendant a loan facility in the sum of €1,237,000 (hereafter "the Second Loan"), which was accepted, to re-finance loans in respect of four units at 24 St. Maelruans Park, Old Bawn, Tallaght, Dublin 24. The Bank obtained security over this loan in the form of a Deed of Mortgage dated 30th October, 2007 over the said properties. It is alleged that the first named defendant failed to meet his repayment obligations under the Second Loan as a consequence of which the loan went into arrears. By letter dated 1st September, 2011, the Bank demanded repayment of the Second Loan. The Bank claims that it was not repaid. By Deed of Appointment dated 17th November, 2011, Michael McAteer of Grant Thornton was appointed as Receiver over the properties the subject of the Second Loan. By letters dated 6th May, 2014 and 14th May, 2014, the Bank again sought repayment of the said loan. The Bank claims that the first named defendant has failed, refused and/or neglected to pay the sum due in respect of the Second Loan which is said to currently be €1,354,346.62, together with interest accruing daily at a rate of €27.83.

4. In an affidavit sworn on the 13th April, 2017, grounding the within motion, the first named defendant avers that the facilities/loans which are the subject of the within proceedings are "Home Loans" and come under the Consumer Credit Act 1995. He avers that the terms of the said Home Loan facilities and the Mortgage Deed are unfair and contrary to Council Directive 93/13/EEC. He seeks a trial of this preliminary issue and it is averred that it will save both time and costs "as it will determine the enforceability of the within proceedings".

5. Specifically, the first named defendant avers that the preliminary issue to be tried is that of the unfairness of three contractual terms namely:

- (i) The unfairness of clause 4(a) of the loan contract;
- (ii) The unfairness of clause 6.02 of the Mortgage Deed providing for the power to appoint a Receiver; and
- (iii) The unfairness of clause 7.02 of the Mortgage Deed which provides that in the event of any irregularity regarding the sale of the properties by the Receiver, a remedy shall lie in damages only.

6. Clause 4(a) of the loan contract provides:

"Unless otherwise stated herein or agreed by the Bank in writing the repayment of the Loan shall be by monthly instalments in arrears by direct debit and the Borrower must effect and maintain a suitable direct debit mandate with the Borrowers Bank or other financial institution. For an annuity, or other repayment loan, repayments shall be comprised of principal and interest and other amounts payable and for an endowment loan shall comprise of interest and such other amounts only. The due dates for repayment of the Loan are those dates that are from time to time set by the Bank. The amounts of such repayments and the due dates for payment thereof will be determined by the Bank at its absolute discretion."

7. The first named defendant avers, at para. 6 of his affidavit, as follows:

"I say that the Plaintiff called in the accounts, namely the joint account of Niall Hade and Joyce Hade (No. 40520254) and sole account Niall Hade (No. 78345877) by letter of Mr. Stephen Healy September, 1st 2011, said accounts being the First Facility and the Second Facility. I say that the joint account was called in one month early at a time when the account was not in arrears. I say that the date of the call in was contrary to the clear terms of the loan contract... I say that Mr. Stephen Healy wrongly averred in his grounding affidavit of July 3rd 2014 that arrears on the joint account *"had reached €27, 901. 32 which sum was accumulated arrears of interest only"*. I say that said amount included the capital repayment applied one month early.

8. It is averred that the early application of the capital amount and the call in one month early "by the Bank at its absolute

discretion" is unfair and contrary to Council Directive 93/13/EEC. It is also averred that clause 4 (a) is not binding and renders the call in of 1st September, 2011 void. It is thus averred that as a consequence of the wrong and unfair call in of 1st September, 2011, the proceedings are unenforceable due to the unfairness and the non-binding nature of a clause 4(a). Reliance is placed on the judgment of Barrett J. in *AIB v. Counihan* 21st December, 2016.

9. With respect to clause 6.02 of the loan contract, which provides for the appointment of a receiver, the first named defendant avers that the Bank wrongfully appointed a Receiver over the properties. Reliance is placed by the first named defendant on the judgment of the European Court of Justice in *Aziz v. Caixa d'Estalvis de Catalunya, Tarragona I Manresa-Case c-415/11*.

10. With regard to Clause 7.02, the first named defendant avers, *inter alia*, as follows:

"I say that the Mortgagee has appointed a receiver who has acted negligently and contrary to my interests. I say that the properties sold have been at undervalue, that the receiver has evicted tenants and left the remaining properties for the most part unrented and I say that the Receiver has allowed very significant damage to accrue to the four Maelruans properties."

11. The first defendant also claims that the Receiver has been overused by the Bank and that the Receiver has managed the properties in a negligent fashion.

12. It is further averred, in reliance on para. 60 of the opinion of Advocate General in *Aziz*, that clause 7.02 "is unfair and not binding under the Consumer Credit Act, 1995 implementing [C]ouncil Directive EEC/13/93." It is further averred that the Receiver has sold the properties without orders for possession or sale and that clause 7.02 cannot cure illegality. It is averred that, further to the decision of the Court of Justice in *Aziz*, that damages are inadequate and that "the only remedy... is the dismissal of the within... proceedings taking into consideration the separate and cumulative effects of the unfair terms 4(a) and 6.0 and 7.02 of the Mortgage Deed."

13. In their Defence delivered 9th June, 2017, the defendants plead, *inter alia*, the following:

"Insofar as the Plaintiff ("the Bank") seeks judgment in the within proceedings the Defendant (sic) is not entitled to the said relief or any relief as the Plaintiff does not have jurisdiction for the judgment sought within, in that all loans were Home Loans. The Defendants claim the Plaintiff took none of the actions required of it at common law or under statute in respect of executed contracts for Home Loans, said contracts containing a clear term of being bound by the Consumer Credit Act 1995."

14. It is further pleaded:

"Without prejudice, the loan contracts within contain terms which are unfair and said unfairness falls to be considered as a preliminary matter under Council Directive 93/13/EEC and Order 25, rule 1 and/or Order 34, rule 2..."

15. The defendants also counterclaim against the Bank for damages for abuse of process, negligence, breach of duty (including statutory duty), breach of contract, misrepresentation and breach of the defendants' constitutional right to their good name.

16. In its Reply to Defence and Defence to Counterclaim, the Bank pleads, *inter alia*, as follows:

"2. By way of special reply to paragraph 1 of the Defence it is denied that the Defendants have at all material times dealt with the Plaintiff under the Consumer Credit Act, 1995.

3. By way of special reply to paragraph 2 of the Defence it is denied that the Plaintiff does not have jurisdiction for the judgment sought. It is further denied that all the loans were home loans. It is further denied that the Plaintiff took none of the actions required under common law or under statute. It is further denied that the Plaintiff is bound by the Consumer Credit Act, 1995".

17. In his replying affidavit of 23rd June, 2017 to the within motion, Mr. Hugh Kane, solicitor for the Bank, avers as follows:

"Mr. Hade's affidavit is a grounding affidavit to a notice of motion wherein the Defendants seek the hearing of a preliminary issue. While it is not entirely clear from the notice of motion, it would appear that the Defendants are seeking the trial of a preliminary issue on the basis that they claim that the loans, the subject matter of these proceedings, are unfair and therefore unenforceable.

I say and believe that the application which has been brought by the Defendants is misconceived. It is clear from Mr. Hade's affidavit that the Defendants are relying on a number of key facts to justify their application, however, those facts are in dispute between the parties and can only be determined at trial. For example, in his affidavit Mr. Hade claims that he and his wife were consumers. Consequently, he seeks to rely on the Consumer Credit Act, 1995 and on Council Directive 93/13/EEC ... which is the European Union Directive on Unfair Terms and Consumer Contracts. However, the Bank does not accept that the defendants are consumers. Therefore, the issue as to whether or not the Defendants are consumers is an issue which must be determined at the trial. Therefore, even if this Honourable Court was to reach a determination that the terms are unfair (at the conclusion of the hearing of a preliminary issue) the trial would still be necessary as a Court would have to reach a determination as to whether or not the Defendants were consumers or not. Therefore, I say and believe it is wholly inappropriate for a preliminary issue to be ordered as it will not in fact determine these proceedings.

In addition, in paragraph 7 of his affidavit, Mr. Hade claims that the loan, the subject matter of these proceedings, was called in early. This fact is also disputed by the Bank and therefore once again this is an issue which ought to be determined at trial." (at paras.3-5)

18. At paras. 7 and 8, Mr. Kane goes on to state:

"Throughout his affidavit Mr. Hade makes numerous references to the judgment of the European Court of Justice in *Aziz* ... In that judgment the ECJ determined that certain Spanish legislation was unlawful under EU law. As Mr. Hade points out in paragraph 12 of his affidavit, one of the reasons for this, is that the Spanish Court could not stay mortgage enforcement proceedings pending the determination of declaratory proceedings brought by the borrower. The position in this jurisdiction (as is evidenced in this case) is quite different. Mr. Hade applied for an order staying the actions of the

Receiver pending the determination of these proceedings. The Court heard and determined that application on its merits.

The next matter complained of by Mr. Hade is that the mortgage, the subject matter of these proceedings, allows for the appointment of a receiver and the mortgage goes on to provide that if there is any irregularity in the appointment of the receiver that the remedy for the borrower stands in damages only. Mr. Hade claims in his affidavit that the Receiver has acted negligently and sold properties at an undervalue and has allowed other properties to be damaged by vandals. Once again, all of these factual matters are disputed by the Bank and the Receiver and these issues will ultimately be determined at the trial of the action. Furthermore, one of the differences between this case and the Aziz case is that in the Aziz case the mortgage in question dealt with the applicant's home. In contrast, the Receiver was appointed over a number of buy to let properties that are owned by Mr. Hade and/or by the Defendants jointly. If the Defendants are correct in what they say, they can be adequately compensated by damages. The Receiver has not been appointed over Mr. Hade's home."

19. In response to Mr. Kane's affidavit, the first named defendant swore a further affidavit on 26th September, 2017 in which he avers, *inter alia*, as follows:

"I say that the within motion seeks the trial of an identifiable issue of law as a preliminary matter. The facts are simple and in agreement between the parties in that monies were borrowed by the Defendants as claimed and it is agreed that a receiver was appointed as stated and over the properties as outlined ... There is no dispute about the material facts and for the purposes of this motion and for the trial of the preliminary issue the Defendants accept the facts as pleaded by [the] plaintiff in its Statement of Claim. It is submitted that it is the interest of justice, fair procedures and convenience to narrow the issues and to deal with a discrete question of law preliminary to both sets of linked proceedings." (at para. 2)

20. The first named defendant also states:

"I say that the preliminary issue to be tried is a pure question of law namely the hearing and determination of the unfairness of ... three contractual terms under the unfair terms the Loan Contract and the Deed of Mortgage ... under Council Directive 93/13/EEC.

...

[T]he trial of this preliminary issue will save both time and costs as it will determine the enforceability of the loan contracts and be dispositive of the within matter. I further say that said determination will also be determinative and largely dispositive of the other linked proceedings *Niall Hade v. Bank of Ireland Mortgage Bank and Michael McAteer 2014/4328P*." (at paras. 5-6)

21. In the course of his affidavit, the first named defendant also avers that "the issues of law are readily capable of being determined in isolation and do not require a consideration of the facts of the case. The contracts in issue are for Housing/Home Loans which were executed under the Consumer Credit Act, 1995, between the Bank and Niall Hade and Joyce Hade as consumers. I say that Mr. Kane is being vexatious as he purports to refute the clear terms of said contracts which the Bank itself drew up and had us agree." In this regard the first named defendant points to the provisions of "The General and Special Conditions" which comprised part of the defendants' contract with the plaintiff, in particular those parts of the contracts wherein reference is made to the Consumer Credit Act and to the defendants being obliged, in respect of both loan facilities, to acknowledge that they read and fully understood the Consumer Credit Act notices as set out in the contract. Accordingly, it is the defendants' contention that they constitute consumers under the Consumer Credit Act, 1995 and that that being the case, clauses 4(a) of the loan contract and clause 6.02 and clause 7.02 of the Mortgage Deed constitute unfair terms, which, as a matter of law can be determined by the court on a trial of a preliminary issue.

The parties' submissions in respect of the a trial of a preliminary issue

22. At the outset, counsel for the Bank points to the Reply to Defence wherein it is set out that the defendants are not consumers. It is submitted that in as much as the first named defendant accepts the Bank's pleadings, this must be taken as an acknowledgement that the Bank's position is that the defendants are not consumers. Accordingly, given the issue that is between the parties, there should be no trial of a preliminary issue as canvassed by the defendants. It is submitted that for the purposes of the question of whether there should be a trial of a preliminary issue of law, that question must be determined having regard to the pleadings. As matters stand, the Bank's position is that there are factual issues in respect of which the parties are not *ad idem*, namely the issue of whether the defendants were consumers.

23. Counsel for the bank also contends that the defendants' reliance on Aziz is misplaced and that the defendants' circumstances are far removed from the circumstances which pertained in that case. In *Aziz*, Mr. Aziz had no opportunity to challenge the mortgage enforcement proceedings as the Spanish Court could not stay such proceedings pending the determination of declaratory proceedings brought by Mr. Aziz. As averred to by Mr. Kane, the defendants availed of an opportunity to apply to the court to restrain the Receiver and that application was determined on its merits.

24. It is further contended that all of the defendants' issues in the within proceedings are core issues for determination at the trial, including their assertion that they are consumers for the purposes of the Consumer Credit Act 1995. It is submitted that whatever way one looks at it, a trial on a preliminary issue as to the unfairness of the terms being challenged by the defendants will not result in there being no trial as it will still fall to be determined if the defendants are consumers for the purposes of the Consumer Credit Act 1995.

25. In his oral submissions, the first defendant maintained his position that the defendants' status *vis-à-vis* their dealings with the Bank were as consumers.

Considerations

26. As put by Delaney and McGrath, Civil Procedure in the Superior Courts, (3rd Ed. Round Hall) (at pp. 526-527), issues of law may arise in pleadings which lend themselves to being determined by means of the trial of a point of law as a preliminary issue. Provision for this is made in the Rules of the Superior Courts. Order 25, r. 1 provides that, by the consent of the parties, or by order of the court, on the application of either party, any point of law may be set down for hearing and disposed of at any time before the trial. Order 25, r. 2 goes onto to provide that if, in the opinion of the court, a decision on this point substantially disposes of the action or any distinct cause of action, ground of the defence, counterclaim or reply, the court may dismiss the claim or make such other order as may be just. Order 34, r. 2 further provides that if it appears to the court that any question of law arises which it would be

convenient to have decided before any evidence is given or any question or issue of fact is tried, it may direct such question of law to be raised for the opinion of the court, either by special case or in such other manner as the court may deem expedient and such further proceedings as the decision of such question of law may render unnecessary can be stayed.

27. The purpose behind the trial of a preliminary legal issue is to save time and costs. A trial of a preliminary issue will only be ordered in limited circumstances where a discrete issue or issues arise(s) in proceedings that can conveniently be tried by reference to agreed facts the determination of which dispose or substantially dispose of the entire action or is otherwise likely to lead to a substantial saving in time and costs. It is the Bank's contention, in opposing the defendants' motion, that what is canvassed for by the defendants does not meet the requirements for a trial of a preliminary issue. The Bank's contention is that the Court must take, at its height, the Bank's pleading in this case, namely that the defendants are not consumers, and that the Consumer Credit Act 1995 does not apply to the contracts which the defendants entered into with the Bank. It is submitted that it will be a matter for the trial of the action as to whether or not the defendants are consumers.

28. It is well established that a preliminary issue cannot be tried *in vacuo* (*Dempsey v. Minister for Education* [2006] IEHC 183 and *Fitzharris v. O'Keeffe* [2008] IEHC 435 refers). In *Tara Mines v. Minister for Industry and Commerce* [1975] I.R. 242, O'Higgins C.J. considered the operation of O. 34, r. 2, in the following terms:

"Looking at the five questions as a whole and at the matters pleaded in paragraph 14 of the statement of claim as being in dispute between the parties, I am not satisfied that it would be possible to answer all of these questions without some additional factual information as to the significance and possible effect of the terms and conditions in dispute between the parties. Order 34, r. 2, can only apply to questions of pure law where no evidence is needed and no further information is required. For example, in dealing with these questions, a judge may find it necessary for his decision to get evidence as to matters such as the share capital of the plaintiff company, the terms of its articles of association, and the nature of the clauses that are normally found in commercial agreements for the protection of minority interests. Once this is so, r. 2 of Order 34 cannot apply, for such are matters of fact. In my view, therefore, the defendant's application cannot succeed and this appeal should be dismissed."

29. In *Kilty v. Hayden* [1969] I.R. 261, Ó Dálaigh C.J. described the procedure provided for by O. 25 as follows:

"When Order 25 is contrasted with Order 36 it becomes clear that Order 25 is not providing for the separate trial of issues which are partly of fact and partly of law, but for the separate trial of a net point of law dissociated from issues of fact, that is to say, the point of law must arise on the basis of the facts being as the opposing party in his pleadings alleges them to be. That is not so in this case." (Emphasis added)

30. Applying the test set out in the aforesaid jurisprudence to the circumstances of this case, it is clear to the Court that the point of law does not arise on the basis of the facts as alleged by the Bank in this case. The issue of law upon which the first defendant relies is that as consumers the defendants have the protection of the Unfair Terms Directive. The Bank clearly takes the view that the defendants were not consumers. As to whether the defendants were consumers, this is a matter that will have to be litigated in due course. As the Unfair Terms Directive afford certain protections to consumers, it cannot be established that there is a discrete point of law upon which the Court can pronounce at this juncture, in the absence of agreement as to the defendants' status as consumers. Accordingly, the finding of the Court that there cannot be a trial on a preliminary issue given the factual dispute between the parties as to the defendants' status in the context of their engagement with the Bank is determinative of the within motion. The relief sought by the first defendant is denied.