Neutral Citation [2016] IEHC 752

THE HIGH COURT

[2014 No. 2662S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINIFF

AND

PETER COUNIHAN AND MARY COUNIHAN

DEFENDANTS

JUDGMENT of Mr Justice Max Barrett delivered on 21st December, 2016.

I. Introduction

1. Mr Peter Counihan is a farmer. Ms Mary Counihan is his wife; she is a homemaker and does not work outside the family home. AIB comes to court seeking to enforce summarily a loan agreement of 5th February, 2009, that was executed between it and Mr and Ms Counihan. The loan agreement appears to have been a refinancing of previous borrowings that were extended to enable the Counihans to buy additional frontage to their existing farmstead. It is contended by the Counihans that each of them was acting as a consumer within the meaning of the Consumer Credit Act 1995 when they executed the loan agreement.

II. The Consumer Credit Act

2. The loan agreement between AIB and the Counihans is documented as a business loan. Notwithstanding that it was executed with two parties, both of whom now claim to be consumers within the meaning of the Act of 1995, the loan agreement does not purport to comply with the requirements of that Act. So, for example, notwithstanding that the loan agreement appears to be a 'housing loan' within the meaning of the Act of 1995, the statement of important information required under s.129 and the Third Schedule of the Act is entirely absent. Such a breach, if it arises, may have consequences for AIB under s.12 of the Act. However, it does not appear that any direct consequences flow under the Act of 1995 as regards the enforceability of the loan consequent upon such a breach, if such a breach arises.

III. The Unfair Terms in Consumer Contract Regulations

i. Overview.

3. Where a bank's customer is a consumer, the provisions of the applicable banker-customer relationship fall to be construed, *inter alia*, by reference to the European Communities (Unfair Terms in Consumer Contracts Regulations) 1995, as amended. These Regulations were adopted in the first instance to implement into Irish law Council Directive 93/13/EEC of 5th April, 1993 on unfair terms in consumer contracts (O.J. L95/29, 21.4.1993). They apply, per reg. 3(2), "*to any term in a contract concluded between a seller of goods or supplier of services and a consumer which has not been individually negotiated*". A "*consumer*", per reg. 2 of the Regulations of 1995 is "*a natural person who is acting for purposes which are outside his business*", the term "*business*" being further defined, again in reg. 2, as including "*a trade or profession*".

4. Regulation 3(4) of the Regulations of 1995 provides that a term shall always be regarded as having not been individually negotiated where it has been drafted in advance and the consumer has not therefore been able to influence its substance, particularly in the context of a pre-formulated contract. Regulation 6(1) provides that an unfair term in a contract concluded by a seller of goods or supplier of services with a consumer is not binding on the consumer. However, under reg. 6(2) a contract containing an unfair term continues to bind the parties thereto if it is capable of continuing in existence without the unfair term.

5. The term "*services*" is not defined in the Regulations of 1995. However, the court finds it difficult to see how credit institutions, being among the principal actors in the financial services sector, could convincingly contend, if they sought to contend, and AIB has not sought so to contend in the within application, that in their retail deposit-taking and lending activities they are not providing services to their customers within the meaning of the Regulations.

ii. The Aziz *case.*

6. The court proceeds now to consider the *Aziz* case (*Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (Case C-415/11, Judgment of 14th March, 2013), to which it has been referred by counsel for Mr and Ms Counihan.

7. On 19th July, 2007, Mr Aziz concluded with Catalunyacaixa, a Spanish bank, a loan agreement secured by a mortgage on his family home. Clause 15 of the mortgage loan agreement, which made provision in relation to defaults, stated that Catalunyacaixa had the right to bring enforcement proceedings to reclaim any debt arising, and, for the purpose of those proceedings, could quantify the amount due by submitting an appropriate certificate. Mr Aziz defaulted on his loan obligations and, on 11th March 2009, Catalunyacaixa instituted recovery proceedings against him. Those proceedings were successful, Mr Aziz was sent an order for payment, but he neither complied with nor objected to this order. So matters moved to the enforcement stage, and now Mr Aziz took action. He applied to court for a declaration seeking (a) the annulment of cl. 15 of the mortgage loan agreement on the grounds that it was unfair (by reference to the applicable Spanish legislation implementing Directive 93/13/EEC), and (b) the consequent annulment of the enforcement proceedings.

8. The court before which Mr Aziz brought his application referred a number of questions to the Court of Justice for preliminary ruling. It is the first question that is of particular interest in the context of the within application, and the Court of Justice's comments and observations in the context of same, at paras. 43 to 46 of its judgment:

> *"43 By its first question, the referring court wishes to know, essentially, whether Directive 93/13 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a clause contained in a contract*

between a consumer and a seller or supplier, does not allow the court before which declaratory proceedings have been brought, which does have jurisdiction to assess whether such a clause is unfair, to grant interim relief in order to guarantee the full effectiveness of its final decision.

44 In replying to that question, it should be noted first that the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge….

45 As regards that weaker position, Article 6(1) of the directive provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them….

46 In that context, the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in its own way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task…" .

[Emphasis added].

9. A number of points appear to the court to arise from the above-quoted text.

10. First, the Court of Justice's observations appear to contemplate a court, even in an adversarial system of justice, acting in an inquisitorial manner.

11. Second, counsel for AIB suggested that the above-mentioned duty ought to be construed by reference to the particular facts of *Aziz*. However, it appears to the court that this, with respect, cannot be so. As is apparent even from the above-quoted text, *Aziz* is but the latest case in which the above-mentioned duty has been iterated. So the duty is clearly of more general application.

12. Third, a summary application for debt seems to the court to afford a classic example of proceedings in which the potentially ruinous consequences for a consumer of the court's judgment (Mr and Ms Counihan have indicated that the effect of judgment against them at this time would render them all but destitute) on the basis of relatively limited argument, requires that the above-mentioned task be undertaken if consumers are to be protected in the manner contemplated by Directive 93/13/EEC (as now implemented).

13. Fourth, given the low threshold identified, for example, in *Aer Rianta* (considered below) for sending matters to plenary hearing and the limited form and scope of summary proceedings generally, it seems to the court that to conform with, *inter alia*, the decisions in *Aer Rianta* and *Aziz*, a three-part version of the task identified in *Aziz* necessarily arises whereby (i) the court faced with the summary application should identify whether it sees any terms of the loan agreement which may be unfair for the purposes of the Regulations of 1995, as amended, and which were they to be proven unfair and so not binding would, to borrow from the phraseology of *Aer Rianta*, yield an arguable defence to the summary claim presenting, (ii) to the extent that the court identifies any potential arguable defence which has not been the subject of argument at the summary application, it should invite the parties to make any further submissions that they may have to make concerning same, and (iii) assuming that (a) the answer to (i) is that there are one or more such potential arguable defences and (b) after hearing any further submissions as are referred to at (ii) it appears to the court that such potential arguable defences as it has posited to arise do in truth present, the matter ought to go to plenary hearing, it then being for the court at plenary hearing to decide, *inter alia*, (I) whether such terms as are identified by the court at summary hearing or other terms ('or other terms' because the court at plenary hearing likewise operates in the shadow of *Aziz*) are unfair, and (II) what consequences, if any, such a finding has as regards the debt recovery application before it.

14. Fifth, of some concern when it comes to the application of *Aziz* is how the task identified by the Court of Justice falls to be discharged in a common law system grounded upon, *inter alia*, the rules of precedent. If, for example, the court at summary hearing reviews particular terms and conditions and identifies clauses A, B, and C as potentially unfair, is a later court of equal or lesser jurisdiction precluded from finding that clauses X, Y and Z in the same terms and conditions present a difficulty in this regard? It seems to this Court that they could reasonably be contended not to be so bound because (a) each case will be decided to a great extent on its own facts, and/or (b) ultimately even the demands of precedent must yield to the supremacy of European Union law, where applicable, and/or (c) because of the precedential weight to be ascribed a judgment following summary hearing, as opposed to a judgment given after full plenary hearing.

iii. What is 'unfair'?

15. Regulation 3(2) of the Regulations of 1995 provides that a contractual term shall be regarded as unfair if, "*contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer, taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.*"

16. Under reg. 3(3), in determining whether a term satisfies the requirement of good faith, regard must be had to the matters specified in Schedule 2 to the Regulations, viz. (i) the strength of the bargaining position of the parties, (ii) whether the consumer had an inducement to agree to the term, (iii) whether the goods or services were sold or supplied to the special order of the consumer, and (iv) the extent to which the seller or supplier has dealt fairly and equitably with the consumer whose legitimate interests must be taken into account.

17. In essence, the requirement of good faith mandates fair and open dealing, with the result that contractual terms must be expressed fully, clearly, and legibly by a seller/supplier, with suitable prominence being given to any disadvantageous terms, and all concealed pitfalls and traps avoided, in effect adherence to what might be described as good standards of commercial practice. A significant issue arising in this regard is whether a seller/supplier, dealing fairly and equitably with a consumer, could reasonably assume that the consumer would have agreed to an impugned term in individual contract negotiations. As for fair and equitable dealing, what this requires in effect is that a seller/supplier should not take advantage of, *inter alia*, a consumer's necessity, indigence, inexperience, unfamiliarity with the subject-matter of a contract, or like characteristics or traits, and must take a consumer's legitimate interests into account.

18. One challenging issue that arises, and which is not answered in the Regulations, is whether a term is to be adjudged unfair merely because it operates prejudicially in particular circumstances, or whether something more is required before it is imbued with the quality of unfairness for the purposes of the Regulations. The court does not have to resolve this issue in the within application. It must merely decide whether or not to send the within application to plenary hearing. In this context it appears to the court that it is most consistent with the low threshold for referring matters to plenary hearing that is identified *e.g.*, in *Aer Rianta*, for it to apply what might be styled the 'lesser' test of prejudice and thus to consider simply whether there is a term that appears to operate prejudicially in the context of the particular circumstances presenting, and not to look for anything more.

iv. The 'grey list'.

19. Schedule 3 to the Regulations identifies what, per reg. 3(7), is an "*indicative and non-exhaustive list of the terms which may be regarded as unfair*". This is sometimes referred to as the 'grey list', a phrase borrowed from the case-law of our neighbouring jurisdiction (see *Office of Fair Trading v. Abbey National plc* [2010] 3 W.L.R. 1215). It is important to note that the so-called 'grey list' is non-exhaustive. Indeed, in *Aziz*, the Court of Justice, in referring to Art. 3(3) of Directive 93/13/EEC, the provision that generates the annex from which the so-called 'grey list' derives, emphasised this point, stating, at para. 76 of its judgment that:

> *"Article 3(3) of the directive must be interpreted as meaning that the annex to which that provision refers contains only an indicative and non-exhaustive list of terms which may be regarded as unfair."*

20. So the 'grey list' needs to be treated with caution: it is helpful, but it is neither definitive nor complete. Of the classes of term referred to in the 'grey list', class (a) seems unlikely to be of much relevance in the consumer credit context. Of especial relevance in the context of the within proceedings is 'grey listed' term (g):

> *"enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so".*

21. This term is not, per para. 2(c) of Schedule 3 to the Regulations of 1995, 'grey-listed' when it applies to certain categories of transaction of which the transaction in issue in the within proceedings is not one. Nor, per para. 2(a) of Schedule 3 to the Regulations of 1995, is it grey-listed where "*a supplier of financial services reserves the right to terminate unilaterally a contract of indeterminate duration without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof immediately*". [Emphasis added].

IV. Consideration of the Contract at Hand

22. If one or each of the Counihans is a "*consumer*" within the meaning of the Regulations of 1995, are there any terms of their loan arrangement with AIB which, it appears to the court in undertaking the task identified in *Aziz*, may offend against the Regulations of 1995, as amended? The court respectfully agrees with counsel for the Counihans that, on the facts presenting, the answer to this last-posed question is 'no'. Separately, so far as there is any (if any) breach of the Act of 1995, for example under ss. 128 and/or 129 of same, such breach is punishable under that Act and does not yield a further difficulty under the Regulations of 1995.

V. Estoppel?

23. Mr Counihan has averred in his affidavit evidence that he believes AIB to be estopped from enforcing the loan against him. He maintains that he was advised by certain management-level employees of AIB that the full debt owing by himself and his wife would not be enforced, specifically that AIB would not seek to enforce such security as it enjoys over the Counihans' family home. Mr Counihan maintains that he and his wife relied on these representations in their dealings with AIB. He wishes to argue that a promissory, *High Trees House*-style estoppel now exists between AIB and him that prevents AIB from asserting its full contractual rights against him. Nor is this claim to estoppel some wild flight of fancy. Mr Counihan avers, *inter alia*, in his affidavit evidence under the heading "*Issues of fact to be determined*":

> *"19. Central to our defence to the plaintiff's claim are the statements by Mr David Brosnan, the manager of the Airside branch of AIB in Swords and those of Mr Gerry Fanning. Both men represented to me that my wife and I would not lose out home, yet the effect of the plaintiff's application in this case would be just that. I have been advised by my legal advisors that I have the defence of estoppel against the plaintiff.*
>
> *20. Further, Mr Fanning represented that the plaintiff would accept about €1 million to settle the debt.*
>
> *21. If Mr Brosnan had not represented to me that I would not lose my home, and if this had not been repeated by Mr Fanning in addition to his other representations our approach to negotiations with the plaintiff over the past number of years would have been very different. In order to fully raise this defence I need to give oral evidence under oath and have both Mr Brosnan and Mr Fanning give oral evidence.*
>
> *22. My financial advisor, Mr Jacob, rang Mr Fanning on or about the 5th day of October 2015 and during that conversation Mr Fanning confirmed that he did in fact make these representations. I do not know if the plaintiff accepts or rejects that these representations were in fact made."*

24. It may turn out the above is eventually proved to have involved but the ebb and flow of banker-customer negotiations which did not reach fruition. But, having regard to the above averments, the court cannot say that Mr and Ms Counihan do not, to borrow from the wording of Hardiman J. in *Aer Rianta* (considered below) have even an arguable defence by virtue of the alleged promissory estoppel arising.

VI. The Test for Summary Relief

25. The hurdle to be surmounted by Mr and Ms Counihan as regards having this matter sent to plenary hearing is a low one. As Hardiman J. stated in the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607, 623:

> *"[T]he fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"*

26. In *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1, at 7, McKechnie J. summarised the relevant principles when a court approaches the issue of whether to grant summary judgment or leave to defend:

"(i) the power to grant summary judgment should be exercised with discernible caution;

(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case…

(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff…

(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) where, however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?'…

(viii) this test is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the bona fides of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment is the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally;

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

VII. Conclusion

27. As the court has reached the conclusions that it has reached under heading V above, it considers, having due regard to the principles identified in *Aer Rianta* and *Harrisrange*, that the within application ought to go to plenary hearing. As a result, the court respectfully declines to grant the reliefs sought of it at this time by AIB.