Neutral Citation: [2016] IEHC 385

THE HIGH COURT

[2013 No. 2190 S]

BETWEEN

STAPLEFORD FINANCE LIMITED

(As substituted)

PLAINTIFF

AND

PETER LAVELLE

DEFENDANT

JUDGMENT of Ms. Justice Baker delivered on the 6th day of July, 2016.

1. The plaintiff seeks summary judgment against the defendant in the sum of close to €6 million, the precise amount of which will appear below. The defendant seeks to defend and claims that he has established sufficient argument and evidence to satisfy the tests established in the authorities such that the matter ought to be remitted to plenary hearing.

2. I already gave judgment in an application by the plaintiff to be substituted as plaintiff in lieu of IBRC in *Irish Bank Resolution Corporation Limited (in special liquidation) v. Lavelle* [2015] IEHC 321, affirmed on appeal by the Court of Appeal in *Stapleford Finance Limited (as substituted) v. Lavelle* [2016] IECA 104.

3. The motion for summary judgment is grounded on affidavits of Ruth Molphy and Jonathan Hanly, Mr. Lavelle swore a replying affidavit on 29th July, 2015, and Jonathan Hanly replied to that affidavit on 6th November, 2015.

4. The claim is made in respect of seven loans advanced to the defendant by five separate facility letters from Anglo Irish Bank ("Anglo") between 2nd June, 2006 and 14th December, 2007.

5. The defendant was employed as a trader in the City of London for 11 years and in the course of this time accumulated considerable wealth and held a sum of approximately €9 million on deposit with Anglo Irish Bank in a branch or branches in the Isle of Man. The defendant returned to live in Ireland with an intention to settle here sometime in 2005 and continued to be employed in the City, working mainly online. He established a relationship with Anglo Irish Bank, and in May 2006 obtained approval for a short-term bridging facility to fund a deposit for a house purchase. That loan facility was not drawn down.

6. The defendant conducted his personal banking with Anglo and Anglo's Wealth Management Division acted as his financial advisor. In the context of his wish to diversify his savings and put in place pension type investments to secure his and his family's future, he sought advice from Anglo Wealth Management and was introduced to Quinlan Private through which he invested in a number of commercial transactions promoted by that private investment fund. Based on tax advice he continued to retain a substantial cash fund on deposit with Anglo in the Isle of Man which he intended to keep there until he became ordinarily resident in Ireland in January, 2008. It was for that reason that, instead of directly investing his own funds, he borrowed monies from Anglo to fund certain investments as will appear below.

7. By the first facility letter dated 2nd June, 2006, Anglo offered to lend to the defendant the sum of €750,000 for the stated purpose of enabling the defendant to part fund an investment in the Mall of Sofia Shopping Centre, Sofia, Bulgaria, described as a Quinlan Private promoted investment. The loan was secured on the intended investment in the shopping centre, as well as on two equity funds of the borrower. The facility was a demand facility subject to repayment in full on or before 30th June, 2007. The defendant signed acceptance of this loan facility on 2nd June, 2006 and the monies were drawn down.

8. By the second facility letter dated 23rd August, 2006, Anglo offered to lend to the defendant the sum of €1 million for the stated purpose of fully funding an investment in the Baggot Street co-ownership, described as a Quinlan Private promoted investment. The loan was secured on the borrower's investment in the Mall of Sofia Shopping Centre, the subject matter of the first loan, and on the investment in the Baggot Street co-ownership. The offer was accepted by the defendant in writing on 24th August, 2006.

9. The first and second loan offers were made by documentation in a form suitable for use as a credit agreement regulated by the Consumer Credit Act, 1995.

10. By the third facility letter dated 3rd January, 2007, Anglo offered to lend to the defendant €1.5m stated as being in addition and not in substitution for previous facilities issued by the bank to the borrower, for the express purpose of fully funding an investment in that amount in Neumarkt Galerie, Cologne, Germany, described as a Quinlan Private promoted investment. Security was to be put in place inter alia, over the Sofia and Baggot Street investments. The borrower accepted this facility in writing on 3rd January, 2007.

11. In conjunction with the third facility the defendant executed a certificate that he was not acting as a consumer for the purposes of the Consumer Credit Act 1995, and the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995, and that as the facility was being advanced for the purpose of his trade, business or profession, he was not a consumer within the meaning of the Act or the Regulations. He also confirmed that he understood the effect and importance of the certificate and was advised to take and had been given the opportunity to take separate legal advice. No specific trade or business in which the defendant was engaged was expressly described.

12. By the fourth facility letter dated 9th May, 2007, Anglo offered to lend to the defendant a top up of the third facility in the maximum amount of €220,000 to further fund the Neumarkt Galerie, Cologne investment. This facility was accepted by the borrower in writing on 14th May, 2007, and he executed, on that day, a certificate for the purposes of confirming he was not a consumer in

similar terms to that executed for the purposes of the third facility.

13. By the fifth facility letter dated 14th December, 2007, Anglo offered to lend to the defendant the sums of €1,005,000, €755,000 and €1,005,000 (total €2,765,000) for the stated purpose of funding an investment of €1 million in a Quinlan Private Jury's Hotel deal, €750,000 for investment in four Davy promoted investments and a further €1 million for an Anglo investment to be decided. Security was to be put in place over the intended investments and over the investments the subject matter of the other four facilities. The defendant accepted the offer in writing on 20th December, 2007 and on the same day executed a certificate in identical terms to that executed by him for the purposes of the third and fourth facilities save that the purpose of the facility was identified specifically by reference to the three investment funds or instruments referred to above, and not in the general terms used for the earlier certificates.

14. The plaintiff claims that as of 31st May, 2013 the defendant was indebted to IBRC, which by then by statute had taken an assignment of the assets and liabilities of Anglo, in the aggregate sum of €4,023,047.55 representing principal and interest and by letter of 5th June, 2013 IBRC demanded payment of the entire of the said sum. The defendant made no payment on foot of the demand and the amount said to be owing as of 16th May, 2014 was 5,934,485.75.

15. The defendant does not dispute that he drew down the various amounts offered to be lent by the five facility letters, seven loans in total.

16. He seeks liberty to defend the proceedings and argues that he has established an arguable ground of defence in a number of respects as follows:

> a. That the claim of the plaintiff is statute barred because the order by which the current plaintiff was substituted for IBRC was made outside the six year statutory time limit in respect of the institution of claims in contract.
>
> b. That the plaintiff has not adequately established by proof that it has taken an assignment of the *chose in action* from IBRC such as to entitle it to maintain these proceedings.
>
> c. That he was for the purposes of all loans a consumer within the meaning of the consumer credit legislation and European law, and that the mandatory statutory requirements were not met.
>
> d. That the calculation made by the plaintiff in respect of accrued interest is incorrect.

17. Some grounds of defence raise matters of law, and some of mixed fact and law. I will deal with each asserted ground of defence in turn. First however, I briefly set out the jurisdiction of the court on a motion for summary judgment.

18. In order to be permitted to defend a claim for summary judgment a defendant must make out an arguable defence as explained by the Supreme Court in *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607 and in *Harrisrange Ltd. v. Duncan* [2003] 4 IR. 1, i.e. whether the defendant can show a reasonable probability of having a real or *bona fide* defence.

19. The courts have found in a number of cases that the determination of a legal question may be made at the stage of summary judgment.

20. In *Bank of Ireland v. Educational Building Society* [1999] 1 I.R. 220, Barron J. in one of three concurring judgments in the Supreme Court, said at p. 233:

> *"When the issue is solely one of law, then the court may determine that issue and give final judgment. Where, however, the court would be in a better position to determine the issue of law after a closer and fuller examination of the facts, the defendant should be given liberty to defend..."*

21. In *Harrisrange Ltd v. Duncan* [2003] 4 I.R. 1, McKechnie J. said the following at p. 7:

> *"(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."*

22. Clarke J. in *Chadwicks Ltd. v. P. Byrne Roofing Ltd.* [2005] IEHC 47 referred to different considerations arising in cases where defences are based on contentions of fact as opposed to law. In relation to the latter, he explained at pp. 7-8:

> *"Where the defence, at least in part, depends on an issue of law then it is a matter for the discretion of the court to determine whether that issue should be tried on the summary motion or remitted for further consideration at plenary hearing dependant, in the main, or whether the issue is sufficiently nett or straightforward to be easily determined within the confines of a summary judgment motion.*
>
> *Finally it may be observed that the defence may amount to a mixed question of law and fact in which case the court must exercise a judgment as to whether the factual matters in respect of which a credible dispute has been established combined with any legal issues which are not capable of being resolved on a summary judgment motion give rise to a fair or reasonable probability of the defendant having a real or bona fide defence."*

23. In *Danske Bank t/a National Irish Bank v. Durkan New Homes & Ors.* [2010] IESC 22 Denham J. at para. 20 added the following guidance:

> *"While a court may resolve questions of law there is no obligation to do so. The test, as stated previously, is whether the appellants have established an arguable defence."*

Clarke J approved that statement in *IBRC (in special liquidation) v. McCaughey* [2014] IESC 44

Is the claim of Stapleford arguably statute barred?

24. This is an argument that in my view is capable of being determined on a summary motion for judgment and raises a question of

pure law.

25. The defendant argues that the claim of Stapleford is statute barred in the following circumstances. Stapleford Finance Limited was substituted as plaintiff in place of IBRC by my order made on 4th June, 2015, affirmed on appeal by the Court of Appeal on 11th April, 2016. It is argued that the present proceedings are a new cause of action which are deemed to commence on the date the substitution order was made.

26. The question of the Statute of Limitations seems to have been argued to some extent in the appeal before the Court of Appeal, and Costello J. in her judgment at para. 23, recites the submission of counsel for Mr. Lavelle that as a matter of law it was possible to assign a chose in action but not an existing *cause of action,* and that following the assignment of a *chose in action* an assignee must start new proceedings. At para. 27 of her judgment, Costello J. pointed to the *"startling gravity of the implications"* of that argument, but did not need to expressly decide the point.

27. The argument in the present case engages a consideration of the effect of an order substituting a party in proceedings, when what is relied on is an assignment of a cause of action by IBRC pursuant to s. 12 of the Irish Bank Resolution Corporation Act, 2013 by which the now plaintiff took an assignment of the interest of Anglo/IBRC from its special liquidators. Section 12(2) of the Act provides that on the sale or transfer of any cause of action:

> (2) On the sale or transfer of any cause of action or proceedings by IBRC, acting through a special liquidator, or by a special liquidator where such cause of action has, or proceedings have, vested in the special liquidator, to any person—
>
> (a) that person assumes all of the rights and obligations in relation to the cause of action or proceedings which IBRC had immediately before that sale or transfer, other than the obligations of IBRC to which paragraph (b) relates,"

28. As Costello J. said in her judgment in the Court of Appeal in reference to the argument that IBRC could not as a matter of law assign an existing action:

> *"The legislative intent of s. 12 will likewise be defeated the Rules of the Superior Courts do not permit the purchaser of the "cause of action or proceedings" to be substituted as plaintiff in those proceedings." (para. 22)*

29. She also referred in her judgment to the provisions of the Supreme Court of Judicature (Ireland) Act 1877 and the provisions of O. 17, r. 4 of the Rules of the Superior Courts as the basis of the power to assign.

30. I consider that the provisions of s. 12(2) of the Act of 2013 are clear and as a result of a sale by the special liquidators pursuant to that statutory power, as a matter of law there occurred an assumption of the rights and obligations in the cause of action or proceedings which IBRC had immediately before that sale or transfer.

31. The matter was considered in the more broad context by the Court of Appeal of England and Wales in *Yorkshire Regional Health Authority v. Fairclough Building Limited* [1996] 1 W.L.R. 210. Costello J. giving the judgment of the Court of Appeal in the substitution application quoted from a dicta at p. 215 of the judgment of Millett L.J. in which he refers to the historical evolution in that jurisdiction of the power to transmit or devolve a cause of action. Later in the judgment, in a paragraph not quoted by Costello J., Millett L.J. said the following by reference to Ord. 15, r. 7 of the then applicable Rules of Court:

> *"Ord. 15, r. 7 does not contain, and none of its predecessors ever has contained, any reference to limitation. This is as it should be, since the circumstances in which the rule may be invoked do not give rise to any question of limitation. Even though the rule permits a new party to be substituted for an original party, this does not involve a new cause of action; the new party is substituted because he has succeeded to a claim or liability already represented in the action and sues or is sued in respect of the existing cause of action. The substitution of the successor does not deprive the defendant of an accrued limitation defence. There is no good reason why the substitution should not be made at any stage of the proceedings and whether a relevant period of limitation has expired or not; the expiry of the limitation period is completely irrelevant."*

32. I adopt this statement of principle from the judgment of Millett L.J., and consider that the defendant is incorrect in his argument that the cause of action now subsisting is a fresh cause of action in respect of which he has an arguable defence under the Statute of Limitations. Stapleford has taken an assignment of the various rights of IBRC, and those rights included the present existing cause of action. In taking that assignment, Stapleford stepped into the shoes of IBRC for all purposes related to this cause of action and took the benefit and burden of these proceedings, including the burden for example of any pleas in defence then existing. The assignee is not in a better position than the assignor of the *chose in action*, but equally cannot be said to be put in a worse position.

33. The Court of Appeal in its decision in the substitution application also quoted from the decision of Mance J. in the English High Court in *Industrie Chimiche, Italia Centrale and Another v. Alexander G. Tsavliris & Sons Maritime Co. & Anor*. [1996] 1 W.L.R. 774, (at p. 782) as follows:-

> *"In all situations, of which death is only the most striking it seems self evident both that any existing proceedings, properly constituted within the limitation period, should be allowed to continue for or against the party to whom the relevant right or obligation has been transferred in law; and this should be permitted whether the transfer occurs before or after the expiry of the limitation period."*

34. Costello J. referred to that decision of Mance J. more by way of authority for the proposition that the power to substitute a plaintiff existed before the enactment in England and Wales of the Supreme Court of the Judicature Acts in 1875, but it is a useful statement of law as to the effect of an assignment of a cause of action.

35. My view is that the defendant has no arguable grounds to advance the argument that once Stapleford acquired by assignment the *chose in action* comprising, inter alia, the existing cause of action against Mr. Lavelle, a new action was required to be commenced, or was deemed thereby to come into existence. I consider that the transfer by virtue of s. 12 had the effect, as a matter of law that Stapleford assumed all the rights and obligations in relation to the cause of action and the proceedings already commenced by IBRC in this case. As no argument is being made that those proceedings were statute barred, and as the benefit of the proceedings is now vested in Stapleford, the argument that the cause of action is now statute barred seems to me, to be tantamount to arguing that the cause of action is an a different one from that already commenced by IBRC. On the transfer to Stapleford of the IBRC debt, the action did not thereby become extinguished, but was capable of being continued by the person to whom it had been assigned.

36. I reject that argument that defendant is entitled to defend the proceedings on this ground.

Proof of assignment to Stapleford
37. The defendant argues that the plaintiff has not put before the court sufficient evidence to establish it is the successor in title of IBRC for the purposes of the proceedings. After some argument it was, in principle, accepted by counsel for the plaintiff that the fact that the substitution order was made by me on the interlocutory application and affirmed on appeal by the Court of Appeal does not, of itself, prevent a defendant from requiring proof of assignment.

38. The evidence before me is that on or about 28th March, 2014, IBRC acting through its special liquidators entered into an agreement with Stapleford for the absolute transfer, transmission and assignment to it of its rights in the facilities, the subject matter of these proceedings. The document described as a "loan sale deed" was exhibited and while it is described as a deed, it is, in substance, an agreement to sell to Stapleford the assets therein set out.

39. The documents exhibited contains a significant number of redactions but do identify to my satisfaction loan accounts of the defendant as part of the list of assets or borrowers in respect of which the agreement was made. The agreement was performed by the execution of a deed of transfer on 23rd May, 2014, by which the assets were assigned to Stapleford.

40. I am satisfied as to the proofs and the affidavit evidence is in conformity with O. 37 R1 as explained by the Supreme Court in *Ulster Bank Ireland Ltd v O'Brien & Anor* 2015 IESC 96.

Does the defendant have an arguable defence that he was a consumer?
41. The defendant argues that he has put sufficient facts before me to be permitted to defend the summary proceedings on the grounds that he was a consumer, and therefore entitled to the special protection afforded to a consumer under the Consumer Credit Act 1995, and the European Communities (Unfair Terms in Consumer Contracts) Regulations.

42. The factual nexus on which he relies may briefly be stated. The plaintiff was at all material times employed as a financial trader and the loans in respect of which this claim is brought were not loans obtained by him for the purposes of that business. Rather, the plaintiff says on affidavit that on account of tax advice he intended retaining substantial funds out of Ireland until he established residence in Ireland in early 2008, that he borrowed monies in Ireland so as to invest in "safe pension type investments to secure my family's future".

43. There have been a number of recent High Court decisions which deal with the question of whether a borrower is or could be said to be a consumer for the purposes of the legislation. Certain themes emerge from these which it is convenient to identify separately. Broadly these are:

(a) The relevance of the characterisation put on the loans by the parties at the time of the advance;

(b) The scale of the borrowing;

(c) Borrowing for personal investment purposes outside a business;

(d) Whether the court should construe the definition of a consumer strictly.

I deal now in sequence with these themes.

The characterisation of the loans by the parties
44. The two first loans advanced to Mr. Lavelle were each made subject to the general conditions then operated by Anglo in respect of consumer loans. The documentation comprising the offer contained a single page document headed up "Credit Agreement, regulated by the Consumer Credit Act, 1995", and identified the amount of credit advanced, the period of the agreement, the number and amount of instalments, the total amount repayable, the cost of credit, the APR and the arrangement fee. In bold print there was stated that the borrower could withdraw from the agreement at any time within 10 days of receiving the agreement and that legal advice should be taken before it was signed. The borrower signed an acceptance in standard form and on a separate page by which he waived the 10 day cooling off period under ss. 30 and 50 of the Consumer Credit Act, 1995.

45. The second facility letter also contained a similar document and the borrower, by his signed acceptance, also waived the cooling off period.

46. The third, fourth and fifth facility letters did not include the one page document identifying the credit terms in a manner intended to satisfy the Consumer Credit Act, and there was no part of the document by which the borrower could waive or seek the benefit of the 10 day cooling off period. The borrower instead signed a certificate confirming that the facility was to be advanced to fund an identified investment, and that the provisions of the Act did not apply "as the facility is being advanced for the purposes of my trade, business or profession", and the certificate contained the following at para. 3:

> "None of the provisions of the Consumer Credit Act, 1995 (the "Act") apply to the Facility as the Facility is being advanced for the purposes of my trade, business or profession and I am not therefore a "consumer" within the meaning of the Act."

The document also confirms that the provisions of the European Communities (Unfair terms in Consumer Contracts) Regulations, 1995 did not apply for the same reason.

47. The fourth and fifth facility letters were in broadly similar terms.

48. Accordingly, of the five facility letters, seven loans, two were expressly contained in documentation which expressly made reference to the provisions of the Consumer Credit Legislation.

49. The first argument made by the defendant is that he was treated as a consumer by Anglo for the purposes of the first two loans, nothing changed in his personal circumstances between the first two loans and the later loans, and all of the loans were taken out by him for the same general purpose, namely to make pension or long term investments to secure his family's future.

50. Stapleford submits that all seven loans must be characterised as non-consumer loans and that the inclusion of certain documentation which suggests a characterisation of the first two loans as consumer loans is not determinative.

51. It is established as a matter of law that the question of whether a person is a consumer is a matter to be determined objectively and irrespective of the characterisation that the parties might have applied to the loan. In *ACC Loan Management Ltd. v. Browne* [2015] IEHC 722 on which both parties relied in support of the proposition, it was stated by me that the label or characterisation that the parties themselves "may be deemed to have put on a loan is not determinative", although the characterisation put by the parties themselves may be of some benefit to that analysis. The point is not controversial and is established in the authorities.

52. Apart from that general proposition however, Stapleford asserts that the documents sent by Anglo with the first two loans do no more than suggest that the Bank proceeded as if the loans were regulated by the Consumer Credit Act 1995, and do not of themselves comprise an acknowledgement on the part of the Bank that Mr. Lavelle was a consumer. I accept that proposition and I do not consider that the documentation sent by the Bank of itself contains an acknowledgement or assertion on the part of the Anglo that Mr. Lavelle was a consumer, and that the Bank did no more than conduct its business so as to ensure that it did not fall foul of the legislation.

53. Equally however it seems to me that Stapleford is incorrect in asserting that the statement by Mr. Lavelle in the documents that accompanied his signature of acceptance on the third, fourth and fifth facility letters amount to an acceptance or acknowledgment by him that he was not a consumer, and while Mr. Lavelle can be assumed to have personal knowledge of the purpose of his borrowings, his own characterisation of the transaction is not determinative. The documents executed by Mr. Lavelle might in suitable circumstances have the legal effect of an estoppel by representation, but no argument has been made in this case that this is so, and no evidence of reliance by the Bank is made out.

54. However correspondence has been exhibited which might amount to an acknowledgment by IBRC that Mr Lavelle was a consumer for the purpose of the first two loans, especially a letter of 5th June, 2013 from Messrs. Arthur Cox & Co. Solicitors to Mr. Lavelle which contains an express recognition that the first two facility letters were governed by the Consumer Credit Act, 1995.

55. Before this, by a letter sent from IBRC to Mr. Lavelle on 2nd April, 2012 and in express reply to correspondence from Mr. Lavelle the following statement is made by reference to a letter of 1st March, 2012 from IBRC to Mr. Lavelle:

> "Paragraph 1.4 of this IBRC letter acknowledges that the CCA applies to the June 2006 facility letter. Although this is clear in the response by IBRC we confirm this again. For the avoidance of any doubt, we confirm again that the CCA applies to the facility letter dated 23 August, 2006."

56. The letters referred to are the first two facility letters.

57. It seems clear that the purpose of the later loans was broadly similar to the purpose of earlier loans, and Mr. Lavelle has made out an arguable defence that he could have been a consumer for at least the first two loans, and that Anglo had no reason to treat him differently for the purposes of the third, fourth and fifth facilities. The advances in January and May of 2007 were top-ups on the earlier loans, and may require to be characterised in conjunction with those loans to which they are subsidiary. Finally the last facility letter of 14th December, 2007 was accepted by Mr Lavelle at a time when the investment in respect of which he was making the borrowings had not yet been specified or determined and that it cannot be clear in that context what the purpose of the loans was.

58. All of these factors persuade me that the characterisation of the loans is difficult to resolve at summary hearing.

59. Mr. Lavelle argues that the loan agreements in each case breach the requirements of s. 30 and/or s. 54 of the Act as amended. Breach of s. 30 makes a loan unenforceable. The plaintiff denies any such breach but of itself the mere assertion by Mr. Lavelle of an alleged breach would not be sufficient to prevent the determination of this factual dispute on a summary hearing. However, Mr. Lavelle makes specific averment on affidavit that he signed the documents for the first loan (2nd June, 2006) on the first tee of an identified golf course. He said he was not handed copies of any of the relevant paperwork on that day nor was he subsequently sent or given any signed copies. He explained how and why he is aware of this and a degree of embarrassment he met when he was unable to provide copies to his accountant some time later. He says also that the document was not signed at his home, albeit that this appears on the document itself. He makes similar averments with regard to the second facility letter of 23rd August, 2006, namely that he was not sent or given a copy of the signed agreement, the facility accepted by him on 3rd January, 2007 and that of 14th May, 2007.

The scale of the borrowing

60. The second theme to emerge in recent jurisprudence regarding the status of a person as a consumer arises from a decision of Barrett J. in *Ulster Bank Ireland Ltd. v. Healy* [2014] IEHC 96, whether the amount or scale of a borrowing may be determinative or relevant to the characterisation of a transaction.

61. In *Ulster Bank Ireland Ltd. v. Healy*, Barrett J. who was hearing an application for summary judgment in which Mr. Healy asserted that he was a consumer, permitted the defendant to defend on the grounds that he considered it arguable that Mr. Healy was a consumer when he borrowed monies for the stated purpose of purchasing investment properties in the United Kingdom to hold as long term pension type investments for the benefit of his own retirement or for the benefit of his family. Mr. Healy was an employee in a company that manufactured construction materials and he had no established or identified business of investment or property purchase. Barrett J. considered that a borrowing for the purposes of providing for a retirement income, or in the hope of funding a better quality of life either in retirement or for one's family, of necessity did not make the borrower a professional investor or property investor. He went on to say:

> *"Of course there must come a point when a person crosses the Rubicon from consumer to professional. However, it could be contended that a man such as Mr. Healy who has invested not insignificant but not extravagant sums in property in order to provide for his retirement and to benefit his family has not necessarily crossed this line."*

62. Barrett J. considered the judgment of the European Court of Justice in *Benincasa v. Dentalkit* (Case C-269/95) [1997] E.C.R. 1-03767 and quoted from the judgment of Kelly J. in *Allied Irish Banks Plc. v Higgins & Ors*. [2010] IEHC 219 at para. 28 as follows:

> *"The European Court of Justice clearly envisaged that the concept of the consumer was confined to a person acting in a private capacity and not engaged in trade or professional activities… Only contracts concluded for the purpose of satisfying an individual's needs in terms of private consumption are protected by the Directive."*

63. Having regard to the low threshold that a defendant must satisfy in order to be permitted to defend, Barrett J. determined that it was arguable that Mr. Healy was a consumer as he never had the business of property investor and that he had made a stateable argument that this was so.

64. The Rubicon identified by Barrett J. is said by counsel for the plaintiff to play a part in his later judgment in KBC Bank Ireland Plc. v. Osborne [2015] IEHC 795 where he rejected the contention that Mr. Osborne was a consumer and took the view that what was involved was clearly business lending, and that the loans were "*business loans issued to a businessman in respect of a business park*"

65. Barrett J. did not in fact expressly say that the scale of Mr. Osborne's lending of approximately €3.26m was such that he did cross the Rubicon, but the plaintiff suggests that it was implicit in his decision. I disagree with that proposition.

66. The finding of Barrett J. in *KBC Bank Ireland Plc. v. Osborne* related to the purpose of the loan, identified by him as a loan for the purposes of the refinance an existing debt secured on certain industrial units located in Gorey Business Park, Co. Wexford, and another loan taken out for development works on that facility. It is clear from the recital of facts in the judgment of Barrett J. that Mr. Osborne was himself actively engaged in the refurbishing of certain units in the business park and was in receipt of rents from some or all of those units. I do not regard the judgment of Barrett J. in that case as being one in which he identified the quantum or scale of the loan as being determinative or even relevant to the question of whether a borrower was a consumer.

67. Both the plaintiff and the defendant agree that the test for a court in determining the characterisation of a borrower is not one in respect of the scale or quantum of borrowing plays a part. I agree and the starting point must be the definition of a consumer for the purposes of the Consumer Credit Act, 1995 and the way in which the definition has been treated in subsequent judgments of the Irish and European courts, all of which point to purpose and not scale as the defining factor.

68. Longmore J. in *Standard Bank London Ltd. v. Apostolakis (No. 1)* [2002] C.L.C. 933, pointed to an obvious reason why the question of scale could not be determinative of the status of a contract as follows:

> *"Difficult questions would arise as to where one would start to draw lines. One could hardly apply that to what I have called the umbrella agreement when it was made. It could only be applied retrospectively. The requirement that one looks to the purposes for which the contracts were made seems to me to militate against looking at a general consequence or a scale of value in the context of both the Convention and the Regulations."*

69. I consider the statement of Barrett J. that there might exist a Rubicon which could determine the characterisation of a consumer contract in *Ulster Bank Ireland Ltd. v. Healy* to be obiter, and to not find support in the authorities, and not binding on me. He did not rely on a test of the scale of the borrowings in his later judgement. Furthermore it is my view that the case law identifies the purpose of the loan as being the defining or identifying characteristic and not the quantum of the loan. This is also a position which is consistent with common sense and it is perfectly possible for a person to borrow a very substantial amount of money, an amount similar to or even greater than that borrowed by Mr. Lavelle, for the purposes of acquiring a private residence or a holiday home for personal use and in that circumstances such a person would readily be identified as a consumer.

70. I do not consider that the scale of the borrowings can be determinative.

Borrowings for personal investment purposes

71. The defendant borrowed for the purpose of investing in commercial property funds or investment instruments in all cases managed by a firm of investment managers, Quinlan Private. That investment company managed the funds on behalf of investors and the investors did not come as a result of the investments to acquire title to any of the real property acquired by the funds, and took instead an interest in an investment instrument.

72. The authoritative judgment of Kelly J. in *Allied Irish Banks Plc. v Higgins & Ors.* considered whether the defendants had made out an argument that they had contracted a loan from AIB as consumers within the meaning of the Act. The loan in respect of which the claim was brought was made for the stated purposes of a partnership formed for the purpose of acquiring and developing lands in Duleek, Co. Meath. The Court accepted that property investment was not the principal or main business of any of the defendants. Rather, the money was borrowed "*to invest it in promoting another business with a view to a profit".* Central however to the finding of Kelly J. was that the defendants acted as partners in a partnership *"with a view to investing in property and its development for profit".* He held, in those circumstances, that they engaged in business and that they had made out no arguable or triable issue that they were engaged as consumers.

73. *Allied Irish Banks Plc. v Higgins & Ors*. can be distinguished from the present case in one important respect. The defendants in that case were a partnership and borrowed the relevant monies qua partners. Kelly J. made express reference to this in his judgment, and pointed to the clear legal proposition that a partnership is engaged in a business. Further, the partnership comprising the defendants in *Allied Irish Banks Plc. v Higgins & Ors*. itself engaged in the business of acquiring and developing the lands. Kelly J. held that a person may have more than one trade, business or profession, and that a person cannot be characterised as a consumer merely on account of the fact that borrowings were made in respect of a business or a trade which was not that person's main, primary, or even established, business. It is noteworthy that the partners did not seek to argue that they were personal borrowers outside the partnership.

74. I accept the argument of the defendant that, *prima facie* at least, Mr. Lavelle's borrowings may be distinguished from those the subject matter of the judgment of Kelly J. in *Allied Irish Banks Plc. v Higgins & Ors.* in that Mr. Lavelle was borrowing monies not to himself purchase or develop property, but so that he could invest in a fund which would own or manage property investments. He was not involved in purchasing business properly or in the business of investment. While Mr. Lavelle was employed as a trader, there was no evidence before me that he was personally involved in the business of investment, nor was there any suggestion that he personally engaged in the evaluation or management of the investments. The evaluation, choice and management of the investments were to be done by Quinlan Private and Mr. Lavelle was a client of that firm.

75. Mr. Lavelle was borrowing monies to invest in an investment fund or financial instrument and was not therefore borrowing to invest directly in any property or commercial transaction in which he would directly benefit. I accept that it is arguable that this factor distinguishes Mr. Lavelle from the partnership which comprised the defendants in *Allied Irish Banks Plc. v Higgins & Ors*., and also from the defendant in *KBC Bank Ireland Plc. v. Osborne.*

76. The CJEU in *Benincasa v. Dentalkit* made the following statement which has been quoted with approval in a number of Irish decisions:

> *"17. Consequently, only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that*

an activity is in the nature of a future activity does not divest it in any way of its trade or professional character."

Kelly J. quoted that extract with approval in *Allied Irish Banks Plc. v Higgins & Ors*. and, at p. 28 of the judgment, repeated the phraseology in respect of which the defendant makes argument in the present case, namely:

> *"Only contracts concluded for the purpose of satisfying an individual's needs in terms of private consumption are protected by the Directive."*

77. Mr Lavelle argues that the uncontroverted evidence is that he was not engaged in the business of investing in the identified properties in Cologne, Baggot Street or Sofia. He has put forward evidence that he was investing for personal purposes and for those of his family, and was not engaged in the underlying businesses in respect of which his investments were made, and took no part in managing or choosing the investments. He chose to invest through Quinlan Private, and Quinlan did the management and evaluation of the products. Indeed, he points to the fact that at the time of the last facility letter, the last three of the seven loans, some of the precise investments were not identified.

78. In *Allied Irish Banks Plc. v. Fahy* [2014] IEHC 244 O'Malley J. quoted *Benincasa v. Dentalkit* and the later case of *Gruber v. Bay Wa AG* (Case C-464/01) and determined the question before her on the evidence and took the view that the loan was for "*unquestionably business purposes"*, that the defendant was the full beneficial owner of two property companies and was engaged in the property business through them and in her own personal capacity. The monies were borrowed for the purposes of the business property transactions, either through the company or by herself personally. O'Malley J. also noted that the funds advanced were as a matter of fact paid to the companies and that the defendant was at all times seeking a business facility.

79. The judgement of O'Malley J. does not deal with a borrowing in respect of an investment made personally and not through a company. She also does not deal with the question that arises centrally in the present case where the loans were for the acquisition of investment instruments to be managed and operated by an entity not controlled or owned by the borrower whether through a partnership or a company.

80. The defendant says the facts are close to those dealt with by Longmore J. in the English High Court in Standard Bank *London Ltd. v. Apostolakis (No. 1)* also referred to by O'Malley J. in Allied Irish Banks Plc. v. Fahy where she noted that Longmore J. had distinguished *Benincasa v. Dentalkit* on the basis that the factual situation was very different and,

> *"He doubted whether the Court of Justice had intended to substitute the words "for the purpose of satisfying an individual's own need in terms of private consumption" for the definition in the Directive."*

81. Longmore J. was giving judgment in the English Commercial Court on a preliminary issue of whether a contract between the defendants, a Greek married couple, a civil engineer and a lawyer, and a bank. The loan had been entered into as a result of which the bank was to purchase ECUs to the value of €7million on their behalf in exchange for drachmas and Longmore J. held that the borrowings were consumer transactions. He considered that it was not part of the trade of the defendants as a civil engineer or a lawyer respectively, to enter into foreign exchange contracts and that they were not engaging in the trade of foreign exchange contracts as such but were rather "*disposing of income which they had available*". As he put it:

> *"They were using the money in a way which they hoped would be profitable but merely to use money in a way one hopes would be profitable is not enough, in my view, to be engaging in trade. This is all the more so if one looks at the purpose of the contracts as Article 13 of the Convention invites one to do. These contracts were made by Mr. and Mrs. Apostolakis for the purpose of using their income in what they hoped would be a profitable manner. They were not trading in foreign exchange contracts in the sense that a bank or dealer can be said to trade. The evidence is all to the effect that it was outside their trade or profession that the contracts were being made."*

82. Longmore J. distinguished *Benincasa v. Dentalkit* on its facts in that Senor Benincasa had made the contract to buy equipment to set himself up as a dentist in Munich using Dentakit's trademark, and held that the factual context was different in that the needs of Mr. and Mrs. Apostolakis were for private consumption, and the investment was an "*appropriate use for their income*". He described the investment as a private use of their private income, or that the defendants had "privately consumed their income" for the purposes of acquiring the foreign exchange product

83. I find the reasoning of Longmore J. difficult and I am not quite clear as to how he distinguished the judgment of the European Court in *Benincasa v. Dentalkit*. However his judgement has persuasive authority, and his finding that the use by Mr. and Mrs. Apostolakis of their own income or funds as sufficient to constitute them consumers of the financial instruments, that they were not themselves engaged in the trade of foreign exchange contracts was given in the context of European legal principles.

84. Further, this is the same result as was reached by Barrett J in *Ulster Bank Ireland Ltd. v. Healy,* in a decision which is binding on me, although he did not expressly rely on the judgement of the English High Court in his reasoning.

85. From the authorities in which a difference of approach is apparent, it is in my view at least arguable that the defendant is correct that he was acting as a consumer and the case law relied on by the plaintiff is not authority for the broad proposition that a person who borrows money to make a personal investment cannot be a consumer for the purposes of the legislation. I consider for that reason that the question may not readily be determined on a summary hearing. This is more evident when one looks at the two decisions of the CJEU on which reliance is placed and to the proposition advanced by the plaintiff that the test of whether a person is a consumer must be strictly construed. I turn to consider this proposition.

A strict construction?

86. The CJEU in *Benincasa v. Dentalkit* was hearing a reference for a preliminary ruling from an Italian court. The first question considered by the Court was whether a plaintiff who had concluded a contract with a view to pursuing a future trade or profession may be regarded as a consumer for the purposes of the Article 14 of the Brussels Convention of 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as amended by the Accession Convention of 1978. The Court considered that the Convention affected only a *"private final consumer, not engaged in trade or professional activities".* It then went on to say the following:

> *"It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned. As the Advocate General rightly observed in point 38 of his Opinion, the self-same person may be regarded*

as a consumer in relation to certain transactions and as an economic operator in relation to others.

87. The test identified in *Benincasa v. Dentalkit* was further considered by the CJEU in *Gruber v. Bay Wa AG* on a preliminary ruling from the courts of Austria, again on the interpretation of the Convention on Jurisdiction. Express reference was made to the earlier judgment of the Court in *Benincasa v. Dentalkit* and the reasoning of the Court related to the fact that the provisions of Art. 13 of the Convention were a derogation from the basic rules of jurisdiction and that the requirements of legal certainty, as well as the fact that a provision which derogated from a general rule should be interpreted strictly, suggested that a contract for mixed private and professional purposes did not come within the special rules.

88. A difficulty is immediately apparent in relying on either *Benincasa v. Dentalkit* or the judgment of the court in *Gruber v. Bay Wa AG*, in that in both cases the Court was considering a provision which was a derogation from a general rule of jurisdiction. It is not readily apparent that the provisions of the Directive (Council Directive 87/102/EEC of 22nd December, 1986 as amended by Council Directive 90/88/EEC of 22nd February, 1990) or of the Irish consumer credit legislation ought to be construed as a derogation from any general rule. Rather, they are an attempt by Community and domestic law to offer special protection to a person who might have a deficit of bargaining power. There is nothing in my mind which suggests a strict construction of the concept of "consumer" for the purposes of the consumer protection legislation is warranted by the European case law. While Kelly J. in *Allied Irish Banks Plc. v Higgins & Ors.* quoted with approval from the judgment of the European Court of Justice in *Benincasa v. Dentalkit,* he did so for the purposes of the conclusion that he reached that the self same person can be a consumer in relation to certain transactions and an economic operator in others, and only some contracts concluded by an individual person may be properly characterised as consumer contracts. He nowhere in that judgment stated a view that the concept was to be interpreted restrictively.

89. In *ACC Loan Management Ltd. v. Browne* I observed at the stage of an application for summary judgment that I would not consider whether counsel for the defendants was correct that an overly restrictive interpretation of the notion of consumer is not intended by the Directive, or by the Act of 1995. The point remains to be decided by an Irish court or by the CJEU. However the argument that a less restrictive construction is warranted is one that adds weight to the submissions of the defendant that the legal issues in the present case are less than clear.

Conclusion on question of the status of the defendant as a consumer

90. The defendant makes the argument that as an investor in a financial instrument he was not, or could not be said to be, engaged in the business of the underlying assets. He was not a property developer as were the defendants in *Allied Irish Banks Plc. v Higgins & Ors.* . While the underlying funds may have been "sophisticated investments", to use the language of the plaintiff that is not to say that Mr. Lavelle, by investing in those instruments himself was a sophisticated investor. His level of sophistication in any event seems to me to be irrelevant to how he is to be characterised for the purposes of the transaction.

91. I accept that there is sufficient evidence before me that Mr. Lavelle did not engage in the business of the underlying investments. He was not engaged in the activity of investing in commercial property or other commercial investments with his money. He was rather placing the money in the hands of somebody who would do that on his behalf, and he did so in the hope that his money would in turn generate further monies, or at least be secure in terms of the capital.

92. As a result of the conclusion come to by the English High Court in *Standard Bank London Ltd. v. Apostolakis (No. 1),* a judgment that was referred to with approval by O'Malley J. in *Allied Irish Banks Plc. v. Fahy,* and because of the decision of Barrett J. in *Ulster Bank Ireland Ltd. v. Healy,* and because there is no decided Irish case or judgment of the CJEU which deals with the matters I have outlined, I have come to the conclusion that the question of whether the defendant was a consumer is one that cannot readily be answered on the authorities. The factual matters identified by the defendant with regard to compliance with the requirements of the legislation are in my view more than mere assertions, unsupported by evidence, and do raise what Clarke J. identified in *IBRC v. McCaughey* as *"a realistic suggestion that evidence might be available to support the argument put forward by a defendant."*

The burden of proof

93. Before I leave the topic of the nature of a consumer contract however, I wish to address a question that arose in the course of the argument, namely whether there is a presumption that a natural person is a consumer. In my judgment in *ACC Loan Management Ltd. v. Browne*, at para. 52, I made the following somewhat infelicitous statement:

> *"52. I consider that the legislation is such that a person is a consumer unless it can be shown that the person is acting inside the person's business. I accept the argument of counsel for the defendant that the legislation is drafted such that in a sense the default position is that all natural persons are consumers unless it can be shown they are acting inside or for the purpose of the business in entering into a credit agreement."*

94. Barrett J. in *KBC Bank Ireland Plc. v. Osborne* expressly refused to agree with that particular conclusion, and I wish to take this opportunity to clarify the obiter statement by me in that judgment.

95. I have re-read the statement made by me at para. 52 of my judgment in *ACC Loan Management Ltd. v. Browne* and consider that it lacked clarity, and, having regard to the submissions of counsel in this case, I consider that the broad statement made by me therein is not borne out by the authorities and is not correct as a matter of law.

96. I agree with Barrett J. that there does not exist, as a matter of law, any presumption or default position that a natural person is a consumer. As Barrett J. said, *"the only default position arising under the Act of 1995 is that a person other than a natural person cannot … be a consumer"*. It was not my intention in making that statement in *ACC Loan Management Ltd. v. Browne* to express a view that there exists an evidential or factual presumption that all natural persons are consumers. The distinction may more properly be expressed as follows: only a natural person may be a consumer for the purposes of the legislation under the European Directives, therefore the first question that must be asked by a court is whether the transaction, be it a borrowing or other transaction, was conducted by a natural person or by a corporation or business entity such as a partnership.

97. As this is an application for summary judgment, the burden is on the defendant to establish to my satisfaction that he has an arguable defence that he is a consumer and that certain provisions of the legislation were not complied with by the predecessor in title of the plaintiff. Beyond that, I do not intend considering the broader question of where the burden of proof lies with regard to the establishment of the satisfaction of a court that a person is a consumer in the present case, as the matter did not require to be argued before me on the motion.

The quantum of the claim

98. The defendant makes a number of specific arguments with regard to the calculation made by the plaintiff in the grounding affidavit. These may briefly be outlined.

99. The defendant asserts that IBRC delayed in crediting the sum of €169,552 in his account between 2011 and 6th February, 2013. It is argued in those circumstances that interest for that period was incorrectly calculated. Without prejudice to its assertion that no error was made, the defendant has amended its figures and has reduced the sum in respect of which judgment is claimed by €20,000 to take account of this potential conflict of fact.

100. The second issue raised by the defendant was that he had agreed interest rates with IBRC during the period from 30th June, 2008 to 28th June, 2013. Mr. Lavelle exhibits correspondence with Anglo with regard to what was described as "interest rate hedges" and an email of 6th June, 2008, to suggest that there was agreed a rate of 4.96%. Mr. Lavelle says in his replying affidavit that the arrangement of an interest rate swap had not been discussed with him and that it "distorts the balance of the accounts".

101. Thirdly, it is asserted that the bank credited the amount of €320,129 to the accounts in lieu of the sum of €383,842.90, in September, 2010. Again, he says that this has distorted the accounts.

102. Fourthly, the defendant says that certain monies were transferred to his account and not to a trust account, in accordance with his instructions. That suggestion would, it seems to me, not benefit the defendant with regard to the calculation of the plaintiff's claim in that his personal accounts in respect of which this claim was brought were augmented by those amounts, and a smaller amount of interest accrued thereafter as a result.

103. Mr. Lavelle's overriding proposition is that he should be entitled to test the evidence of calculations and his assertion that there has been a "distortion" of the accounts and that he ought to be afforded the benefit of discovery for the purpose of defending the quantum of the case. While he suggests that interest was charged at a penal rate but does not seem to be making any argument that the interest rate is unenforceable as being a penal rate.

104. I accept the argument of the plaintiff that the concession it has made which, in total, reduces the amount of its claim by €120,000 may be sufficient to deal with the assertions by the defendant. However, the calculations are likely to change with the delay now inevitable as a result of my decision that the defendant has raised a bona fide entitlement to defend and accordingly I will not consider that matter further

Conclusion

105. I therefore propose making an order that the defendant be permitted to defend the claim save in regard to the issue of the Statute of Limitations and the matter of the proof of assignment.