

## THE HIGH COURT

[2010 No. 2182 S]

BETWEEN

ULSTER BANK IRELAND LIMITED

PLAINTIFF

AND

BARRY HEALY

DEFENDANT

**JUDGMENT of Mr. Justice Barrett delivered on the 28th day of February, 2014**

1. These are summary proceedings in which Ulster Bank Ireland Limited is seeking €612,712.96 plus interest and costs from Mr. Healy. Any views expressed herein are tentative in terms of the strength or weakness of the case that either party might seek to make at plenary hearing. The central issue arising in the proceedings is whether a person who borrows money to invest in a number of investment properties is engaged in the business, trade or profession of property investor, and thus loses the protection of the Consumer Credit Act 1995, being no longer a consumer within the meaning of that Act.

**Facts**

2. Mr. Healy, an accountant, is an employee of a company that manufactures construction materials. He has availed of a number of loans from Ulster Bank. He has defaulted on his loans and the bank has commenced summary proceedings seeking the recovery of amounts that it claims are owed to it under the applicable loan agreements, along with interest and costs. The affidavit evidence of Ulster Bank indicates that there are several loans in issue, being an overdraft facility and various continuing loan facilities. The purpose of these last facilities was apparently to enable Mr. Healy to purchase certain investment properties in the United Kingdom. The total amount sought to be recovered in the proceedings is clearly a significant sum so far as Mr. Healy is concerned. However, it is not of a scale that would suggest him to be a major player on the property market. In his affidavit evidence, Mr. Healy asserts that the loans in issue:

*"were sought so that I could purchase property and shares with a view to them being held as a long term pension type investment to be realised upon or subsequent to my retirement from employment, for my benefit or that of my family".*

3. Mr. Healy seeks leave to defend the proceedings at a plenary hearing. He claims that he is a "consumer" for the purposes of the Consumer Credit Act 1995 (as amended) and that Ulster Bank has not acted in compliance with that Act. Ulster Bank contends that, insofar as the loans in issue are concerned, Mr. Healy is what Ulster Bank describes in its affidavit evidence as a "business customer" or "commercial customer" and thus not entitled to the protections that the law extends to consumer-borrowers.

**Leave to defend**

4. The hurdle that must be surmounted by Mr. Healy as regards obtaining leave to defend is a low one. As Hardiman J. stated in the Supreme Court case of *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 at 623:

*"In my view, the 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?"*

5. In *Harrisrange Limited v. Michael Duncan* [2003] 4 I.R. 1 at 7, McKechnie J. summarised the principles that he considered to be relevant when a court approaches the issue of whether to grant summary judgment or leave to defend, viz:

*"(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) the 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 in 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."

### **Who is a 'Consumer'?**

6. Section 2(1) of the Consumer Credit Act 1995, as inserted by Part 12 of Schedule 3 of the Central Bank and Financial Services Authority of Ireland Act 2004, provides that a "consumer" is:-

"(a) a natural person acting outside the person's business, or

(b) any person, or person of a class, declared to be a consumer in an order made under subsection (9)."

7. So for Mr. Healy to be a "consumer" within the meaning of the Consumer Credit Act he must, when borrowing the loan monies from Ulster Bank, have been acting outside his business, which term includes his trade and profession, or else be a person or class of person declared to be a consumer.

8. It does not appear that Mr. Healy is a person or class of person who has been declared to be a consumer. So the sole issue arising for the purposes of determining whether he was a "consumer" when he borrowed the loan monies from Ulster Bank is whether, when borrowing those monies, he was acting outside his business, trade and profession. It is of course possible for a person to be both a consumer and a non-consumer in different circumstances. This was acknowledged in *Allied Irish Bank plc v. Higgins and Others* [2010] IEHC 219 at 28, Kelly J. stating:

*"The self same person can be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others".*

9. For his part, Mr. Healy has engaged in some property side-investments to provide for his retirement and his family. In this he is not unusual. Many prudent people are concerned to provide for their retirement income. Some may invest in stocks and shares. Some may invest in property. Some may use saved or borrowed monies to avail of these investments in the hope of funding a better quality of retirement for themselves or a better quality of life for their families. The court does not consider that a consumer who on one or more occasions places saved or borrowed monies in a particular form of investment, such as property, with a view to making a profit therefrom necessarily becomes a person whose business, trade or profession is that of professional investor or property investor and thus no longer a "consumer" for the purposes of the Consumer Credit Act. 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.

10. In the *Higgins* case, summary proceedings were commenced against the defendants for over six million euro in respect of monies loaned by AIB to the defendants' partnership for the purpose of acquiring and developing lands in County Meath. The scale of the borrowings and the venture in which the defendants in that case were engaged is quantitatively and appears qualitatively different from the level and form of speculation engaged in by Mr. Healy. Of interest in the present context is Kelly J.'s analysis of the European Court of Justice's decision in *Benincasa v. Dentalkit* (Case C-269/95) [1997] E.C.R. I-03767. Having considered the judgment of the court in that case, Kelly J. concluded, at 28:

*"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. There is nothing in the [Consumer Credit] Act suggesting that the legislature here sought to go further than the Directive".*

11. It seems to the court that it could be argued that a good example of a person satisfying their individual needs in terms of private consumption is a man such as Mr. Healy engaging in personal investments, using either saved or borrowed monies, so as to meet the retirement or other future requirements of himself or his family.

12. Much of the argument in this case concerned how Ulster Bank classified Mr. Healy in its dealings with him, whether he was treated as a business customer or served by a commercial manager. The court has had close regard to this argument but considers that Ulster Bank's view of Mr. Healy, while of interest, is not of determinative significance in the assessment of whether he is a consumer for the purposes of legislation such as the Consumer Credit Act.

### **Conclusion**

13. For the reasons stated above, the court considers that it is arguable that: Mr. Healy has never had the additional business, trade or profession of professional or property investor; and thus that he was acting outside his business, trade and profession, and so as a consumer, when he borrowed from Ulster Bank the loan monies that have led to the current proceedings. Ulster Bank contends that Mr. Healy was not a "consumer" within the meaning of the Consumer Credit Act when he borrowed the monies. This raises the possibility that Ulster Bank may have acted in contravention of the Consumer Credit Act when it extended the loans to Mr. Healy by mis-classifying him as a non-consumer and treating him accordingly. As contravention of the Consumer Credit Act can lead in some instances to a loan agreement being unenforceable, or being enforceable on such basis as the court considers fit to impose, the defence raised by Mr. Healy in these proceedings that he is a "consumer" for the purposes of the Consumer Credit Act and has not been treated as such appears significant.

14. Having regard to the criteria propounded respectively by Hardiman J. and McKechnie J. in the *Aer Rianta c.p.t. v. Ryanair Limited* [2001] 4 I.R. 607 and *Harrisrange Limited v. Michael Duncan* [2003] 4 I.R. 1 cases, the court considers that Mr. Healy satisfies the low hurdle that arises for a defendant seeking leave to defend and grants Mr. Healy leave to defend these proceedings at plenary hearing.

