[2024] IEHC 714

THE HIGH COURT

[2017/9086 P]

BETWEEN:

SEAN HARTE, PATRICK MCCARTHY, JOHN O'MEARA AND GERALDINE BALFE

PLAINTIFFS

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANT

JUDGMENT of Mr Justice Barry O'Donnell delivered on the 18th day of December, 2024

INTRODUCTION

1. This judgment concerns a dispute about the meaning and application of contractual provisions dealing with interest rates in a loan finance agreement. The plaintiffs are experienced businesspeople who sought to put in place financial arrangements relating to the purchase and development of an industrial site, and to that end entered into a written finance agreement with the defendant bank (*the Bank*).

2. The proceedings were commenced by plenary summons dated the 10 October 2017, and a statement of claim was delivered on the 31 July 2019. As originally formulated, the plaintiffs were seeking a variety of reliefs including damages for negligence, negligent misrepresentation and/or negligent misstatement. At the hearing of the proceedings, the plaintiffs stated that they were relying only on the breach of contract claim. As such, the issues to be determined are net issues of contractual interpretation. For that reason, as provided for in the authorities that will be discussed later, the court is concerned with an objective appraisal of the contract as a whole, taken in its proper relevant context, and not with what the parties subjectively intended at the time the bargain was struck or with the negotiations prior to the execution of the agreement.

3. As the central factual issues that frame the interpretation issue were not substantially disputed it is possible to present the facts relatively briefly. In November 2009, the plaintiffs entered into the financing agreement and they drew down funds provided by the Bank. The parties agreed, subject to the terms and conditions in their written agreement, that the interest rate would be a money market rate fixed for three monthly periods by reference to the Euribor rate, plus margin. In accordance with the terms of the financing agreement, in or around March 2010 the loan facilities were restructured into a single commercial mortgage repayable over 240 months.

4. In October 2011 the plaintiffs were informed by the Bank that it was changing the method of calculating the interest rate on the mortgage. That position was confirmed in a further letter in November 2011. The Bank changed the underlying reference rate from one calculated by reference to the Euribor to one calculated by reference to the Bank's Cost of Funds (*BCOF*). The plaintiffs strongly contested that the Bank was entitled to take that step. Despite that dispute, the plaintiffs made clear that they would continue to make repayments on the mortgage agreement in accordance with the new interest rate imposed by the defendant but confirmed their intention to pursue the matter further and reserved their rights in that regard. In the circumstances, the plaintiffs continued to make the necessary payments from November 2011 until the mortgage was fully discharged in or around January 2017. The plaintiffs claim that the actions of the Bank constituted a breach of contract, while the Bank contend that this was an action expressly provided for and permitted under the Standard Terms and Conditions (*STCs*) that had been agreed between the parties.

5. As a consequence of the above, the plaintiffs contend that they have paid interest in the amount of €738,440.24 more than they ought to have done had the proper terms of the contract, as they contend for, were applied. The sum claimed by the plaintiffs is a sum identified by their expert, Mr. Scott, and one which is agreed between the parties for the purposes of the proceedings.

6. Hence, put shortly, the dispute centres on the question of whether over the lifetime of the loan the Bank was entitled to change the reference rate by which it calculated the interest rate. If the plaintiffs are correct the Bank has overcharged interest in the amount of over €700,000. For the reasons explained in this judgment I am satisfied that the Bank was contractually entitled to alter the reference rate for the calculation of interest when it did and in the manner that it did, and accordingly the plaintiffs' case cannot succeed.

THE PLEADINGS

7. As noted, from the matters originally canvassed in the 31 July 2019 statement of claim the issues pleaded by the plaintiffs were reduced to a net issue of contractual interpretation regarding the entitlement of the Bank to vary the method by which it calculated interest and the interest rate. In its defence dated the 7 April 2020, the Bank makes the central contention that it was entitled to change the method of calculating its interest rate on the plaintiffs' loan having regard to the terms and conditions of the initial letter of loan offer and in particular having regard to clause 5 of the STCs agreed between the parties. Over the course of the hearings, the court heard evidence from the first and third named plaintiffs and a witness from the Bank together with experts retained on each side who gave evidence in relation to bank practice regarding interest rates. Notwithstanding the relatively extensive evidence that was adduced, there is very little disagreement on the core facts.

8. It may be helpful at this point to identify the legal principles that I consider applicable to the resolution of this dispute as this may assist in understanding the approach adopted to the evidence that was adduced at the hearing of these proceedings.

LEGAL PRINCIPLES

9. At a high level the parties were agreed as to the legal principles that are applicable to the resolution of this dispute, although they placed different emphases on different elements within those principles. Neither party sought to agitate any novel or unusual legal argument to resolve the issues. The following are the principles that I will apply to the interpretation of the contractual terms in issue.

10. In *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31 the Supreme Court restated the approach to be adopted to contractual interpretation. In the judgment, the Supreme Court set out that an agreement or terms within an agreement will have a single meaning to be determined by the court. The Supreme Court reaffirmed that the general principles relied upon to ascertain the meaning of the contract remain the well-known principles identified by Lord Hoffman in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* [1998] 1 All E.R. 98. Having considered those factors, the Supreme Court in *Law Society* highlighted the importance of approaching a contract in a holistic manner rather than immediately attempting to identify analogues in the existing case law. The Court noted the following at paragraph 12:

"*It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider they had agreed. In that regard, the Court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement*."

11. More recently, in *Brushfield Limited v Arachas Corporate Brokers Limited* [2021] IEHC 263 McDonald J considered the relevant case law in this area to identify a number of guiding principles, which he sets out at paragraph 110. For the purposes of the issues in this case the following matters appear particularly relevant:

a. First, the process of interpretation is entirely objective. Therefore, consideration will not be given to the previous negotiations between the parties or their subjective intentions or understandings of the terms agreed.

b. Second, the court interprets the contract by reference to the meaning that the contract would convey to a reasonable person having all of the background knowledge which would have been reasonably available to the parties at the time when the contract was concluded.

c. Third, the court will look not just at the specific words of the contract; they must be considered in the light of the contract as a whole and in the appropriate context.

d. Fourth, the appropriate context includes anything that was reasonably available to the parties at the time the contract was concluded, such as objective background facts or provisions of law that would affect the way in which the language used would have been understood by a reasonable person.

e. Fifth, the interpretation should not be approached through the prism of the immediate dispute between the parties.

12. There was some debate between the parties regarding the extent to which commercial common sense formed part of the interpretative exercise. The parties referred to and the court has considered cases such as *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50, *Arnold v. Britton* [2015] UKSC 36, and *ICDL GCC Foundation FZ-LLC v. European Computer Driving Licence Foundation Limited* [2012] IESC 55.

13. For the purposes of the issues in this case, as explained later in the judgment, I consider that matters concerning commercial common sense, which itself can be subject to differing and subjective understandings, can be of some limited assistance in determining the question of what the contract means. The concept potentially assists in connection with the application of two of the principles identified above. First, the commercial nature and purpose of the contract often will be an important piece of objective context that may be considered. Second, where competing interpretations are asserted, the fact that a particular interpretation makes little or no commercial sense may very well lead a reasonable person to conclude objectively that that interpretation may not be correct. It must be emphasised that considerations of commercial common sense cannot override clear language: language and proper context are the critical factors.

THE CONTRACT

14. The plaintiffs were successful and experienced businesspeople, and before they entered into an agreement with the Bank they had been engaged in negotiations around the proposed terms and conditions of the financing agreement. The court is not considering those negotiations for the purpose of interpreting the contract but instead to explain the factual context of the dispute. A particular feature of the negotiations related to the basis on which interest rates would be charged by the Bank. In that regard, it is clear that the plaintiffs were adamant that any interest rate will be based on Euribor and this appears to have been a consistent feature in the negotiations leading up to the issue of the letter of loan offer.

15. The letter of loan offer was dated the 10 November 2009 and was issued on behalf of the Bank by a senior business manager. The letter of loan offer makes it clear that the terms and conditions were those set out in the letter of loan offer together with the STCs of the Bank, which were attached to the letter. As is common in agreements of this type, the letter of loan offer stipulated that if there was any conflict between the terms of the offer letter and the STCs, the terms of the offer letter would prevail.

16. The facility being offered by the Bank was in two tranches, the first being an amount of €12,200,000 by way of loan which was to assist in the development of a 172,000 sq. ft. industrial premises on a 7.75 acres site at Aerodrome Business Park, Rathcoole, Co. Dublin. The second component in the loan was an amount of €2,800,000 to assist in the purchase of the site.

17. With regard to interest rates, the following is stated on the first page of the loan offer:-

> "*The rate(s) set out in this Offer Letter are indictive only in respect of the new facilities detailed and are subject to change between the date of this Offer Letter and the actual drawdown of the facility. <u>The actual rate will be determined on drawdown and subsequent roll-over dates (if applicable) and as set out in Clause 5 of the standard Terms and Conditions set out in the Appendix hereto</u>.*" [emphasis added]

18. The letter goes on then to identify the manner in which the interest rate will be calculated for each of the two sums being borrowed. Identical mechanisms were identified for each of the two loans, and were set out as follows:-

> "*The Interest Rate applicable is a fixed money market rate. Money market rates are calculating by totalling the following:-*
>
> *(A)*
>
> *The Bank's Cost of Funds for the selected period. The actual rate will be determined with reference to the market on the date of drawdown. If EURIBOR is utilised the actual rate will be determined with reference to the market two days prior to drawdown*
>
> *(B)*
>
> *Cost of Liquidity (if applicable)*
>
> *(C)*
>
> *The Banks Fixed Margin of 2.25% per annum. Any break costs incurred in amending a fixed rated will be borne by the Borrower. While the actual rate will be determined at date of drawdown, indictive all inclusive rates for a number of fixed interest period are as follows:-*

3 Months: 2.98%   6 Months: 3.26%   12 Months: 3.50%   5 Year: 5.18%"

19. The loan offer goes on to note that the exact repayments will be determined on date of drawdown based on the interest rate then prevailing. It was made clear that the loans would be restructured within nine months of drawdown into a single commercial mortgage facility. Interest was to roll-up for a period of nine months or until completion of the building project, which ever was the earliest, and the Bank's fixed margin upon restructure would reduce to 2%.

20. The remainder of the loan offer letter dealt with matters such as arrangement fees, security, legal fees and conditions precedent, none of which are the subject of a controversy within the proceedings.

21. On the 11 November 2009, each of the plaintiffs executed the form of acceptance attached to the letter of loan offer. The form of acceptance included wording to indicate that they had read and agreed to be bound by and fully accepted all of the terms and conditions contained in the offer letter and in the appendix to the offer letter.

22. The attached STCs are of critical importance to the issues, and they commence by setting out a number of definitions of terms used. These include the following:-

> "*Liquidity means such additional percentage rate as the Bank shall determine to be necessary to compensate the Bank for the cost to the Bank during the term of the facility of funding, or maintaining a facility, in the relevant amount by reason of the Liquidity Requirement relative to such period*."
>
> *Liquidity requirement means any liquidity, reserve ratio, special deposit or similar requirement (or other requirement having the same or similar purpose)*

of any Regulatory Authority, whether or not having the force of law with which the Bank has complied.

Regulatory Authority includes the European Central Bank, the Financial Regulator, the Revenue Commissioners and any other regulatory authority in or of Ireland or any federation, community, association or organisation of which Ireland shall be a member and any regulatory authority of any place from which the Bank obtains resources for funding or maintaining a facility in the relevant amount."

23. Clause 5 of the STCs address interest rates. As noted in the letter of offer, the interest rate applicable to the plaintiff's loans was a *fixed money market rate*. The term "*market related rates*" is described in clause 5(ii) as follows:-

"*These are Market Related Rates and are fixed for periods not exceeding 12 months. <u>The Market Related Rate(s) set out in this Offer Letter will be determined by the Bank, with reference to three components</u>:"* [emphasis added]

24. Thereafter the STC identify two alternative options for the first component by reference to which rates are determined. The first of these (*1a*) is "*Cost of Funds*", and the second (*1b*) is Euribor. There was no dispute but that the rates in this case as set out in the letter of loan offer were to be determined by reference to Euribor. In that regard, the STCs describe Euribor as follows:-

"*The rate determined by the Bank, two Rate Fixing Days prior to drawdown and calculated by reference to the rate at which Euro Interbank term deposits, (quoted for spot value on an adjusted 365 day count basis, for a period* *corresponding to the relevant interest rate period) are being offered within the EMU zone, by one prime bank to another at 11.00 a.m. (Brussels time).*

Euribor will be quoted to the bank on a 360 day count basis, adjusted to a 365 day count to take account of existing market practice in Ireland. The amount of interest will vary only to the extent of differences attributable to rounding, when the rate is adjusted from 360 to 365 days.

Euribor can be availed of any Rate Fixing Day. Rate Fixing Day means any day on which banks are open for general business in Ireland and "Target" is operating. "Target" means the "Trans European Automated Real-Time Gross Settlement Express Transfer" System to facilitate, inter alia, large value inter-bank same day payments, which is scheduled to operate every day excluding Saturdays, Sundays, Christmas Day, 26th December, New Years day, Good Friday, Easter Monday and 1st May."

25. The second identified component by reference to which interest rates can be determined is "*Liquidity Costs / Reserve Asset Cost*". These are defined as follows:-

"*Such additional percentage rate as the Bank shall determine to be necessary to compensate the Bank, for the cost to the Bank, during the period of the facility, of funding or maintaining a facility in the relevant amount, <u>by reason of the Reserve Asset Requirement relative to such period</u>. Reserve Asset Requirement means any liquidity, reserve ratio, special deposit or similar requirement (or other requirement having the same or similar purpose) of any Regulatory Authority, whether or not having the force of Law with which the Bank has complied."* [emphasis added]

26. The third component by reference to which interest rates are determined is described as "*bank lending margin*", and this is defined as follows:-

> "*The margin is as stated earlier in this Offer Letter. Such margin may be increased at any time, at the discretion of the Bank, if, in the opinion of the Bank, there is an Event of Default or failure to complete and deliver security in the form specified in this Offer Letter or where the bank has permitted drawdown without satisfaction of conditions precedent in this offer letter. Such increase in margin will be notified to the Borrower in writing and will be effective from the date specified therein*."

27. Where a market related rate is used in calculating interest the following was noted:-

> "*All facilities based on Market Related Rates are subject to interest rate period determined on the date of original drawdown or such other period (i.e. 1, 3, 6 or 12 months), as maybe agreed between Banker and Borrower.*
>
> *On the termination of the original interest rate period and all subsequent interest rate periods determined, unless the Bank is contacted by the Borrower in accordance with these provisions, the Bank will rollover the facility for the same interest rate period, as originally determined, at the prevailing interest rate on the date of rollover, for the relevant interest period.*
>
> *In the case of rate being determined, inter alia by reference to Euribor, the rate applicable will be set two Rate Fixing Days prior to rollover.*
>
> *The Borrower will be notified in writing of the new interest rate on the next rollover date.*"

28. Clause 5 of the STC goes on then to describe "*Calculation of Interest and Conversions*". This portion of the clause deals with the calculation of interest and describes that:-

> "*Interest will be calculated and accrued daily on the basis of a 365 day count and be computed and payable by the Borrower on the daily balance outstanding (after adjustment is made for items in the course of collection) on the facility and shall be compoundable at such quarterly or other periodic rests as the Bank, in its absolute discretion, shall determine and in accordance with the Bank's practice for accounts, from time to time*."

29. Finally, and a sub-clause that was the main subject of debate in the case, the final sub-clause in clause 5 of the STC is titled "*Change in the Method of Calculation of Interest for all facilities set out in this Offer Letter*" (which I will describe as the "*final subclause*") and it provides that:-

> "*The method for calculating interest and the interest rate may be changed in respect of all facilities from time to time at the Bank's absolute discretion, whether to take account of a change in prevailing market conventions in Ireland or otherwise. In the event of such change occurring during the continuance of this facility, the Bank will give to the Borrower one month's prior notice that such change is to take place with effect from the date of expiry of such notice.*"

30. It should be noted that clause 20(iv) of the STCs provides that the captions used in the offer letter (which includes the STC) "*are for convenience of reference only and shall not define or limit the provisions hereof.*"

THE DECISION TO CHANGE THE REFERENCE RATE

31. On the 11 October 2011, the Bank wrote to the plaintiffs informing them of a change to the method of calculating interest. The letter noted that since 2007 the Bank had experienced a significant increase in its funding costs, driven by prevailing market conditions which were outside of its control. The letter stated that during that time, the Bank had been paying a premium over publicly quoted interest reference rates to funds its lending to customers. It went on to state:

> "*In an effort to recoup some of these higher input funding costs, with effect from 16th November 2011, Bank of Ireland is changing the method of calculating its interest rate on your term lending facility(s) from the current Euribor / Euro Interbank derived reference rates to a reference rate based on Bank Cost of Funds ("BCOF")."*

32. The letter explained that:-

> "*The BCOF will be calculated on a daily basis and will represent the cost to the Bank of funding in the domestic and international market from consumer, business and institutional sources. The BCOF will be available to customers through our Branch Network and Relationship Managers*."

33. The letter went on to note that it was anticipated that the change from the plaintiffs' reference rate to the BCOF would add a premium of approximately 0.7% to the interest rate on the facility, and it was noted that the rate will change in line with the movement in the Bank's overall cost of funding.

34. An appendix to the letter noted that the *"current reference to Euribor in your facility letter will no longer be applicable"*, and explained that the change to the BCOF rate will involve an approximate 0.7% increase in the cost of funding to term loan customers.

35. A number of documents extracted from discovery made by the Bank were referred to which appeared to show the evolution of the proposal that led to the 11 October 2011 letter notifying of the change in approached interest rates. I do not consider that the Bank's reasons for making the change are relevant to the interpretation of the contract, as no argument was made that if the Bank, in fact and as a matter of law, had a discretion to make the changes that discretion was qualified by the need to provide some form of explanation. Accordingly, the following is provided merely as factual context.

36. In the first instance, the minutes of a Bank ALCO meeting from the 20 December 2010 noted under the heading "*Cost of Funds*" that a paper had been presented which proposed a *"single, simplified cost of funds rate to be applied consistently across all of* Business Banking *customers*." The minute explained that the "*rate proposed was a Group Average Cost of Funds Rate (GACF) which took into account the blended cost of funds to the Group on all interest earning liabilities*."

37. The paper prepared for the ALCO meeting noted that the GACF reflected the actual cost the Bank was paying to fund its assets. The proposal was further discussed in a "*New Product Questionnaire*" dated the 5 October 2011, which appears to have been prepared by the Group Regulatory, Compliance and Operational Risk Division of the Bank. In the executive summary of the paper, it was noted that the divergence between Euribor and the real cost of funds to the Bank had increased significantly since 2008. It was noted that wholesale funding costs had risen sharply, and the cost of raising retail deposits in the market had also increased sharply. It stated that the Bank had been absorbing the increased costs of this funding, but could not continue to do so. Hence, the new approach was described in the following way:-

> "*BBROI will price Lending products of a new BOI Cost of Funds, which will substantially reflect the costs of funds to the business. This was the subject of a submission and subsequent approval at Group ALCO committee meeting in December 2010.*
>
> *There are 2 elements to the New Bank of Ireland Costs of Funds. The Euribor element (market driven reference point) of the funding cost will be updated daily, and the funding premium which will be reviewed and reset on a monthly basis. This additional element will be added to the Euribor rates for the forthcoming period and will be applied to new/increased lending and facilities rolling over in that period*."

38. The questionnaire noted that the proposed changes were being effected within the current terms and conditions of the Bank's contractual documentation.

39. As noted above, following receipt of the letter dated the 11 October 2011, the plaintiffs wrote to the Bank on a number of occasions querying and taking issue with the approach adopted by the Bank. Essentially, the plaintiffs took the view that it was not open to the Bank to change the interest rate in the manner proposed. The Bank responded to that correspondence with its own letter of the 24 February 2012 in which they expressed their disagreement with the arguments put forward by the plaintiffs. The essential position of the Bank was that the terms and conditions attaching to the loan which were agreed to by the plaintiffs permitted it to change the calculation method and the interest rate and "*thereby use a different reference* *rate and a different rate in respect of the calculation of the interest in accordance with clause 5 of the standard terms and conditions of the Facility Letter.*"

40. In a letter replying to that dated the 21 March 2012, the plaintiffs expressed their strong disagreement with the approach adopted by the Bank, but they noted that they would proceed with the repayment of their loan in accordance with the contract and would proceed with the repayments in accordance with the Bank's demands in order to avoid any suggestion that they may somehow become non-compliant in respect of their contractual obligations. However, the letter concludes with the following:-

> "*However, notwithstanding our proceeding with repayments as above, we hereby give notice that we are in dispute on this matter and, in furtherance of same, we reiterate all that has already been raised in our letter of 12th January 2012.*
>
> *We further give notice of our intention to pursue this matter further in the future and we reserve all our rights in this regard*."

41. As noted above the proceedings herein were commenced by plenary summons dated the 10 October 2017.

THE EVIDENCE

42. As I explain in this section there was very little material dispute in the evidence. I use the term *"material"* advisedly, because the issue that the court has to determine is relatively narrow, albeit a matter of real significance to the parties. The case as originally pleaded canvassed a wide range of legal and factual issues. The case narrowed considerably at trial. This meant that the relevance of much of the proposed evidence fell away.

43. The evidence for the plaintiffs was given by the first and third named plaintiffs, Mr. Sean Harte and Mr. John O'Meara, and expert evidence was given by Mr. Francis O'Neill. For the Bank, evidence was given by Mr. Pat Purcell, and expert evidence was given by Mr Ian Tyler. All witnesses had prepared written witness statements prior to the trial and with some minor clarifications those statements were adopted by the witnesses as their evidence in chief. It should be observed that the witness statements included material relevant to the claims of negligent misstatement and misrepresentation, and therefore contained material that was not relevant to the matters that fell to be adjudicated by the time of the trial.

The position of the plaintiffs

44. Mr. Harte had provided a witness statement, and he adopted the contents of that statement as his evidence in chief. In that statement, Mr. Harte explained that he and the other plaintiffs had agreed to invest in the purchase and development of an industrial site in Rathcoole, County Dublin. Mr. Harte took the lead in negotiating with potential financers. While another bank also was interested in providing finance, the plaintiffs proceeded to reach an agreement with the Bank. The main negotiations took place between January 2009 and the issue of the final loan offer on the 10 November 2009.

45. There did not appear to be any real dispute that the plaintiffs were insistent that the interest rate should be fixed by reference to the Euribor rate. Mr. Harte was clear that the plaintiffs' preference for a Euribor reference rate was that this was market related and not fixed by an individual bank. There was some negotiation around the period for which interest rates would be fixed, e.g. one month, three months or longer. However, the final agreement was that interest would be calculated by reference to a three-month Euribor rate together with a 2.25%

margin. The initial agreement was that there would be elements to the loans: €2,800,000 for the site purchase, and €12,200,000 for the development costs. The agreement provided that nine months after the initial drawdown the loans would be converted into a 240-month commercial mortgage with the same reference rate for interest and a reduction in margin to 2%. Mr. Harte confirmed that all repayments were made.

46. As I have already noted, I do not consider that evidence of the negotiations or subjective intent of the plaintiffs are relevant to the construction of the contractual terms.

47. Under cross examination, Mr. Harte confirmed that the loan was paid off in 2017. There was some discussion about the arrangements around the development. These involved the purchase of the property from a company owned by the plaintiffs, the letting of the property on a 25-year lease to tenants, and its subsequent sale to an institutional investor at a considerable profit. My understanding of this line of cross examination was to show that, notwithstanding the dispute around interest, the overall transaction was profitable for the plaintiffs.

48. Again, I do not see the relevance of the commercial profitability of the underlying endeavour to the bargain struck between the plaintiff and the Bank. The case was concerned with the net question of whether the parties' contract allowed the Bank to alter the interest rate in the way it did. This was either permitted or it was not. The fact that there were commercial advantages for the Bank in the course adopted or whether the changes ultimately did not prevent the plaintiffs making a good profit on the underlying endeavour does not seem to be material to the matters that have to be decided.

49. Mr. Harte gave evidence that, while there were references to the Bank's STCs in the final loan offer and earlier iterations of that offer, he probably did not read the STCs. Mr. Harte confirmed that he read the letter from the Bank dated the 11 October 2011, which set out the proposed introduction of the BCOF reference rate. Likewise, he received the letter dated the 11 November 2011 which explained how the new reference rate would affect the plaintiffs. He stated that at all times his understanding was that changes to the interest rates could only occur because of a change to the Euribor rate itself. He confirmed that the plaintiffs continued to pay the altered interest under protest. Mr. Harte was asked whether he accepted that the Bank could not continue with the Euribor rate as that was not a sustainable commercial proposition in the financial circumstances that presented in 2011. Mr. Harte appeared to take the position that the deal that was struck should have been adhered to by the Bank, and that the commercial viability of the loan from the perspective of the Bank was not really a concern for the plaintiffs, who were concerned with the viability of their project.

50. Mr. O'Meara had also provided a witness statement, and this was adopted as his evidence in chief. Again, the statement addressed a number of matters that were no longer relevant by the time of the hearing. The primary focus of Mr. O'Meara's oral evidence was on the interactions between the plaintiffs and the Bank concerning the 2011 interest rate changes. Without diminishing the evidence, it would be fair to observe that once the Bank indicated that it proposed to change the reference rate for the calculation of interest, the plaintiffs engaged in correspondence with the Bank that disputed the Bank's entitlement in strong terms, and this was followed by a meeting with officials from the Bank. The upshot was that neither party altered their views: the Bank rejected the proposition that Euribor should remain as the reference rate, and the plaintiffs rejected the proposition that the Bank was entitled to change the reference rate to BCOF.

51. Under cross examination, Mr O'Meara was asked about his understanding of the meaning of the Bank's STCs, and particularly clause 5. In that regard, he confirmed that he stated that his usual practice was to read contractual documents, but he was unable to say at this remove whether he definitely had read the full terms and conditions. Mr. O'Meara also confirmed that the plaintiffs had the benefit of a solicitor when they came to signing the agreement, but he was not able to say whether any specific advice was sought or received in relation to the terms as they related to the interest rate. Mr. O'Meara stated that the Bank did not confirm that the interest rate would be applicable for the entire term of the loan or that it would not.

The position of the defendant Bank

52. The evidence adduced by the Bank was relatively brief. Mr. Pat Purcell is a senior manager on the Bank's new Business Origination Team. At the time relevant to the proceedings, he was a Senior Business Manager in charge of the management of a portfolio of the Bank's Business Banking clients and was involved in generating new clients for the Bank. Mr. Purcell had prepared a written witness statement which he adopted as his evidence in chief. In his statement he outlined the course of negotiations with the plaintiffs, which were conducted primarily with Mr. Harte. The negotiations resulted in a series of heads of terms and draft loan offers prior to the finalisation of the loan offer and the letter of the 10 November 2009. The main focus of the negotiations was on the interest rate applicable and the question of whether there should be a hedging requirement or some fixing of a percentage of the debt. Following the acceptance of the 10 November 2009 loan offer, and the subsequent restructuring of the loans into a single commercial mortgage in March 2010, Mr. Purcell engaged with Mr. Harte in September or October 2011 to let him know that there would be changes to the reference rate for the method of calculating interest.

53. Mr. Purcell noted that along with his manager, Mr. Hastie, he met with Mr. Harte and Mr O'Meara on the 17 November 2011 to discuss the rationale for the change in approach to the reference rate. It was clear that the parties, at that stage, were significantly at odds on the issue of the entitlement of the Bank to alter the reference rate. Mr. Purcell concluded his statement with his observation that the plaintiffs were persons who had a high level of understanding of the details of the loan facilities and interest rates, and that this observation was based on the discussions and negotiations prior to the acceptance of the loan offer.

54. Under cross examination, Mr. Purcell explained that in the period 2009 – 2011 he was primarily concerned with attempting to generate new business and manage existing accounts. He was not very familiar with the high level concerns of the Bank regarding the costs of funds that led to the change from Euribor to BCOF, and had no role in that decision making process. Similarly, he was not involved in setting the precise terms and conditions for lending but rather with high level issues around generating new business, such as the amount, security and covenants. That said, he was familiar in a general sense that the lending environment at the time was difficult. He was not in a position to engage in any detailed discussion around the use of the term "*Costs of Funds*" as it appeared in the STCs and around the use of the term in connection with the changes effected in 2011. He suggested that, in terms of the discussion of new business, he considered that Euribor would be the usual reference rate. Likewise, he was not able to recall if he engaged in any discussion about the difference between "*changes in market conventions*" and "*changes in market conditions*" at the meeting of the 17 November

2011 with Mr. Harte and Mr. O'Meara. He did not believe that he would have been involved in that discussion, if it occurred.

The expert evidence

55. Both experts, Mr. Tyler and Mr. O'Neill had provided reports prior to the hearing and had collaborated to produce a document setting out their areas of agreement and disagreement. There was no significant issue between the parties regarding the qualifications or expertise of the two experts. In summary and hopefully without doing any disservice to their work, the focus of the court will be on the evidence from the experts on the difference between "*market conventions*" and "*market conventions*" in the context of the decision of the Bank to alter the reference rate for interest calculation from Euribor to BCOF. The difference between the terms has potential relevance to the construction of clause 5 in the Bank's STCs because there is a reference to "*market conventions*" in the final subclause, which was relied upon by the Bank to allow for the change from Euribor to BCOF.

56. Mr. O'Neill, who gave evidence for the plaintiffs, is an expert in banking, regulatory, treasury, and capital markets. Among the roles held by him, Mr. O'Neill has been the Managing Director of Treasury and Capital Markets with Scotiabank Ireland Limited and also Global Head and Managing Director, Liquidity Portfolio, for Scotiabank (Toronto). He has been Head of Function, International Banks, and Broker Dealers, with the Central Bank of Ireland, and, before acting in his current role with his consultancy, Avalon Financial Services Limited, had been Director, Risk and Regulatory Consulting, with KPMG.

57. Mr. Tyler who gave evidence for the Bank, has experience with responsibility for capital management, liquidity and funding risk and non-trading market risk. He has held senior roles with Barclays Bank and Royal Bank of Scotland. He has been Group Treasurer for Tesco Bank and a Director and Non-Equity Partner, acting in financial services treasury advisory work, with Deloitte LLP. More recently he has worked in a variety of advisory and consultancy roles in financial services.

58. In his report, Mr. O'Neill addressed first the question of how the term *"prevailing market conventions"* was understood in commercial bank lending, particularly in relation to the question of interest rates. He described these as the conventional standards followed by financial services providers, reflecting the consensus view of the market and current accepted practices. His view was that these are "*structural and systemic in nature*". In a lending transaction of the type involved in these proceedings, the Euribor reference rate is the main systemic component of the interest rate calculation. Mr. O'Neill noted that while historically other reference rates, such as LIBOR, were used by banks, Euribor remains a critical benchmark for European banks. The core identifier of a market convention is its homogeneity between markets.

59. In considering the pricing of the loans in this case, Mr. O'Neill was of the view that the systemic element should be treated as separate to the idiosyncratic or bank/transaction specific elements that can be utilised by banks as part of the methodology of structuring interest rates. Hence, a further margin or amount can be introduced to provide for the bank's liquidity risk (the *Liquidity Spread*). In his oral evidence in chief, Mr. O'Neill noted that a bank could have demanded a premium, for instance of 100 to 200 basis points above Euribor, to reflect the fact that the money lent was tied up for 20 years. Mr. O'Neill noted that there appeared to be provision for this element in the loan offer, but it was not sought by the Bank in this case. The systemic element is also separate to the margin charged by the bank to reflect the credit risk of the borrower (the *Credit Spread*) which in this case was 2.25% descending to 2% when the loans were consolidated.

60. Mr. O'Neill also noted that other examples of market conventions include the choice of "*day count*" for the calculation of interest, such as 360 or 365 day counts. In that regard, it was noted in oral evidence that the 365 day count is a convention specific to Ireland and the UK, whereas a 360 day count was a European convention. Similarly, a systemic convention and part of the Euribor approach is that rates are set at a particular time of day.

61. On the other hand, the term "*prevailing market conditions*" are exogenous: factors outside the control of the bank but which can greatly affect lending activities. Market conditions in this sense are dynamic and represent how a market is functioning at a specific point in time. These can be further divided between systemic and idiosyncratic market conditions. Systemic market conditions can include factors such as the absolute level of real interest rates, the level of equity markets and credit spread metrics. Idiosyncratic market conditions are specific to the bank and can be seen as factors that represent the ability of the bank in question to raise money on the wholesale money markets. Mr. O'Neill observed that between 2009 and 2011 both systemic and idiosyncratic market conditions tightened, and this affected the ability of the Bank to raise competitively priced funding.

62. Mr. O'Neill was of the view that what led the Bank to transition to the use of BCOF as the reference rate for interest calculation was a change in market conditions and not a change in market conventions. In the context of this case, Mr. O'Neill was of the opinion that where a bank does not impose a liquidity premium - or liquidity spread - when originating a loan, it should be taken as accepting that it will absorb any liquidity risks onto its balance sheet. In this analysis the change by the Bank from Euribor to BCOF involved the transfer of a risk that the Bank had undertaken to the customer.

63. Mr. Tyler started from the premise that longer term lending involves a maturity mismatch: banks lend money to customers on a longer term maturity basis than the period for which they raise deposits. Mr. Tyler gave examples of the mechanisms used by banks to avoid the potential downsides of maturity mismatches when they are providing longer term loans. These include fixing the credit for sub-periods of the whole loans, so that pricing is renegotiated at the end of each pricing period. In addition, the banks can add a comprehensive liquidity cost to the total charge of credit, impose an interest rate floor for the Euribor rate, or retain the right to change the basis for the interest rate charged. While accepting that this was a matter for the court to determine, Mr. Tyler was of the view that the Bank's contractual documentation in this case was an example of the retention of the right to change the basis for charging interest.

64. Mr. Tyler did not take substantive issue with Mr. O'Neill's description of market conventions, although he observed that his understanding was that the Bank was not seeking to rely on any change in market conventions to justify or explain the change in the approach to the calculation of interest. He agreed that the Bank changed its approach in response to changing systemic and idiosyncratic market conditions, and he considered that this was provided for in the terms and conditions. He considered that making provision for this type of situation in lending agreements was *"entirely normal"*.

65. Mr. Tyler provided market context for his understanding of the reasons why the Bank considered it necessary to introduce the BCOF method for calculating interest and also made observations on the methodology that was adopted. Mr. O'Neill took issue with aspects of this evidence in a short replying report.

66. With respect to both experts, who clearly were careful and engaged with the issues, that aspect of the evidence was of little relevance to the issue facing the court. As noted above either the contractual terms allowed the Bank to take the steps that were adopted, or they did not. The motivation for the Bank's actions or the way it structured the BCOF approach do not seem to be material to the arguments made by the parties. The plaintiffs did not contest the motivation or suggest that the Bank acted other than on a reasoned commercial basis. Instead, they argue that the contractual terms simply did not permit the steps that were taken; and the Bank was tied to the bargain that it struck, whether or not the bargain turned out to be uncommercial from the Bank's perspective. In those premises I do not consider that it is necessary or appropriate to come to any conclusion on those elements in the expert evidence.

67. It seems to the court that the most relevant aspects of the expert evidence as expressed in the reports were that the changes made by the Bank responded to tightening market conditions and there were no changes in market conventions.

68. Under cross examination, Mr. O'Neill agreed with Mr. Tyler's that there was very significant disruption in market conditions at the time when the Bank proposed the changes that were implemented in 2011. Drawing on his experience of the Irish and Canadian markets, he disagreed that it was common for banks to make contractual provision for the alteration of interest rates on the contingency that markets would be disrupted.

69. For his part, when Mr. Tyler was cross examined, he was asked about a situation regarding tracker mortgages and the fact that banks were required to absorb the negative consequences for them of the movement in mortgage rates.

70. I should note that I do not consider that issue to be material to the matters under consideration in this case. First, there was no substantive evidence adduced by the plaintiffs of the contractual or legal/regulatory framework in which issues relating to tracker mortgages were addressed. Hence, other than drawing on a very generalised knowledge of that issue, the court is unable to assess if there is a meaningful comparison to be drawn between that situation and the situation in this case. Second, in this case the court is faced with deciding arguments relating to a specific series of contractual terms. There was no argument in this case that, outside of the contractual terms, there was any other legal or regulatory impediment to the Bank altering the interest rates. The fact that banks took or were obliged to take different steps in relation to contracts that involved consumers and that may have involved different contracts does not seem material.

Findings on the evidence

71. Ultimately the court's view of the evidence is that when it is considered in the light of the relatively narrow issue of contractual interpretation, there were very few areas of material dispute.

72. The evidence given by Mr. Harte and Mr. O'Meara was consistent with their views that the Bank had agreed to use the Euribor three month rate as the primary reference rate for the loans. Mr. O'Meara confirmed that the plaintiffs had access to legal advice when they accepted the terms offered by the Bank, and they did not seek advice on the precise meaning and effect of clause 5 of the STCs. In addition, the effect of Mr. Harte and Mr. O'Meara's evidence was that they may not have read through the STCs and, if they did, they did not appreciate the potential effect of clause 5. While that may have been imprudent given the value of the loans, there is no reason not to believe their evidence. However, the question before the court is a narrow one: it is not whether the plaintiffs were induced to enter the contract on a mistaken understanding of the nature of the agreement, but what is the correct interpretation of the contract.

73. In the circumstances, all the court needs to do for the purposes of this dispute is to find that following a process of negotiation, the plaintiffs who were experienced and well-resourced businesspeople with access to legal advice, made a competent decision to accept the terms offered by the Bank. The provisions concerning interest were contained in the loan offer and clause 5 of the STCs, which are to be read together. The parties are agreed that in October 2011 the Bank informed the plaintiffs of its intention to vary the interest rate, and the Bank's entitlement to do so was contested by the plaintiffs.

74. Clearly the experts were retained and provided reports at a time when the case sought to agitate broader issues than that of the interpretation of clause 5. Other than the expert evidence regarding the question of the general understanding in the financial services industry of the terms "*market conventions*" and "*market conditions*" – and this was an area where there was general agreement between the experts - I am of the view that the expert evidence generally does not assist in the interpretation of the contract, which in any event is a matter for the court alone to determine.

75. Mr. O'Neill was sceptical of Mr. Tyler's evidence that banks generally used contractual terms to provide for the potential for the contingency that a need may arise to alter interest rates to respond to fluctuations in market conditions. Again, I do not see any need to resolve that dispute. This is because there was no argument on the pleaded case that even if the Bank was correct in its construction of clause 5, there was some other reason why the Bank was not lawfully entitled to seek to rely on such a clause.

76. As noted above, the experts gave evidence on the underlying systemic financial circumstances when the Bank decided to move to a BCOF approach to setting interest rates, and also about the specific financial circumstances of the Bank at the time. Again, I do not consider those issues relevant to the question of contractual interpretation that arises in the pleadings. Accordingly, it is not necessary to adjudicate on any difference that arose in that regard between the experts.

DISCUSSION

77. The Banks argument was presented as a straightforward matter: the final subclause in clause 5 of the STCs was clear that the Bank had an *"absolute discretion"* to change *"the method for calculating interest and the interest rate".* That discretion could be exercised at any time and for any reason. The Bank accepted that there may an argument for the existence of some implied terms that qualified the discretion, but that no such argument arose in the circumstances of this case. This was because the increase in the interest rate was in the region of 0.7% and the reasons were explained and justifiable.

78. The plaintiffs' argument commenced by placing some emphasis on the heading of the final subclause in clause 5 in the STCs. That heading was "*Change in the Method of*

Calculation of Interest for all facilities set out in this Offer Letter". The argument was that the reference to method of calculation was not referrable to the initial description in clause 5 of the three components used in the definition of Market Related Rates. It can be recalled that the subclause addressing Market Related Rates referred to the Bank *determining* the rates by reference to the three components, in this case they were (i) Euribor, (ii) Liquidity / Reserve Asset Cost, and (iii) Margin. The argument was that Euribor was identified as part of the method for *determining* but not *calculating* the interest rate. The plaintiffs argued that the reference method for *calculating* interest rates and interest was set out in the subclause immediately prior to the final subclause. That subclause stated that interest *"will be calculated and accrued daily on the basis of a 365 day count and be computed and payable by the Borrower on the daily balance outstanding ... on the facility…".* So, the argument went, the Bank could not change the method of determining interest by reference to Euribor but could only change the day count element.

79. Second, the plaintiffs argued that the final subclause only permitted the Bank to change the method of calculation to take account of changes in market conventions, and not market conditions. This argument relied on the language in the final subclause, that the "*method for calculating interest ... may be changed ... at the Bank's absolute discretion, whether to take account of a change in prevailing market conventions in Ireland or otherwise*". In that regard, the plaintiffs stated that the words should be read as referring to such a change whether it was (i) in Ireland or (ii) otherwise, with "*otherwise*" to be taken as synonymous for this purpose with "*elsewhere*".

80. In considering the proper meaning of the final subclause I have borne in mind that the agreement is in place to regulate the finance arrangement entered into between the parties. Both parties undertook obligations. Fundamentally from the perspective of both parties it was necessary to ensure that there was clarity around the method by which the loans would be repaid and the price paid for the loan, and it is relevant that the loan in this case was for an extensive period, 20 years.

81. It is true that the agreement makes reasonably detailed provision concerning the methods and mechanisms to be utilised where the interest is to be calculated by reference to a market related rate, in this case Euribor. However, much of that detail was directed to ensuring clarity around the definition of certain terms. Clause 5 describes what Euribor is and how the rates quoted to the Bank is derived from the Euro Interbank term deposits rate. There is a description of how those rates are quoted on a 360 day count basis and how there will be an adjustment to a 365 day count to take account of Irish market practice. The description of the margin component in a market related rate is straightforward and raised no issue in this case.

82. There was some discussion at the hearing regarding the component described as "*Liquidity Costs / Reserve Asset Cost*", and this was considered by the experts. Despite that debate, my view is that this component also is clear and understandable. While there may be an understanding of what the term "*liquidity cost*" can mean in the industry, the meaning of the term in the contract is defined. I do not agree that this component is the same as *"liquidity spread"* in the sense described by Mr O'Neill - a further margin introduced to provide for the Bank's liquidity risk that operates as a form of premium above Euribor to reflect the fact that the money lent was tied up for 20 years.

83. In this contract it was clear to the court that this component had a specific meaning. The liquidity cost described in the contract is a cost that the Bank incurs "*by reason of the*

Reserve Asset Requirement". In turn, the Reserve Asset Requirement means *"any liquidity … or similar requirement … of any Regulatory Authority … with which the Bank has complied"*. In that sense, the liquidity cost component in a market related rate – for the purposes of this contract – reflects an externally imposed cost to the Bank arising from liquidity requirements imposed by a Regulator. As such, contrary to the suggestions made by the plaintiffs, this was not a mechanism that could be used by the Bank when the loan was initiated to introduce a further element of margin to reflect the Bank's internal appraisal of any maturity mismatch, or to reflect, as the experts put it colloquially, the problem associated with *"borrowing short and lending long".*

84. The subsequent subclauses address what could be described as general housekeeping of the loan. In that regard, the contract addresses the situation where there is no change to the method of calculating interest, but instead how any changes in the underlying Euribor rates are accommodated and computed for each fixed period. It should be borne in mind that in this case the Euribor rate applied for fixed three month periods, with the obvious potential that there may be changes in the actual rates between such periods. The contract then confirms that interest will be calculated by reference to a 365 day count with some discretionary provision for adjustments to be made to the repayment schedule to accommodate changes to interest rates.

85. I do not agree with the argument made by the plaintiff that the use of the word *"calculated"* in connection with the description of the 365 day count means that the term "*calculating*" in the final subclause of clause 5 must refer to that same calculation. The description of the 365 day count calculation, in my view, uses the word *"calculated"* because this is what is being described at that point: "*Interest will be calculated and accrued daily on* *the basis of a 365 day count, and be computed and payable by the Borrower on the daily balance outstanding… on the facility*". The contract does not define the term "*calculate*" or variations of that word. Instead, the court's view is that the word is used at various points to express the process being described at each point in the contract. For instance, the word *"calculated"* is used somewhat interchangeably with the term *"computed"* in the part of the subclause that I have just quoted, and there is no sense that there is any lack of clarity about what is described.

86. This leads to the final subclause in clause 5. At the risk of unnecessary repetition, it is worth setting out that subclause in full again:

> "*The method for calculating interest and the interest rate may be changed in respect of all facilities from time to time at the Bank's absolute discretion, whether to take account of a change in prevailing market conventions in Ireland or otherwise. In the event of such change occurring during the continuance of this facility, the Bank will give to the Borrower one month's prior notice that such change is to take place with effect from the date of expiry of such notice*."

87. I am of the view that a consideration of this subclause does permit some application of considerations of commercial common sense. Before considering the precise language used, it can be recalled that the plaintiffs argue that the Bank committed to a 20 year loan where regardless of what occurred in the market during that period the Bank will only be able to make small adjustment to the interest rate calculation – for instance altering from a 365 to a 360 day count – and only then in response to a change in market conventions. In effect, over the 20 year term the Bank had not provided for any power to vary interest rates, for instance where a change in market conditions has meant that the existing interest rate renders the loan non-commercial from the Bank's perspective. While this of course may be the result if the language of the clause is clear, it must be observed that it would be an unusual scenario and one that made scant business sense for a lending bank.

88. I do not accept that the discretion conferred on the Bank by the final subclause can only be exercised in response to a change in market conventions. The reference to market conventions is unhelpful and introduces potential uncertainty to what otherwise is a clear piece of drafting. However, the construction urged by the plaintiffs requires the court to conclude that the reference to "*absolute discretion*" means something quite different. The plaintiffs say that the words "*whether to take account of a change in prevailing market conventions in Ireland or otherwise*" qualifies and delimits the "*absolute discretion*". As noted above this requires the court to treat the words "*or otherwise*" as strictly referable to the words "*in Ireland*" and therefore synonymous with "*or elsewhere*".

89. I do not accept that the plaintiff's construction is correct. The fact is that the subclause does not use the words "*or elsewhere*". I consider that the use of the words "*or otherwise*" does not restrict or limit the discretion but instead operates to emphasise the extent of the discretion. The discretion is described as "*absolute*". The words *"or otherwise"* confirm that the reference to changes in prevailing market conventions is illustrative. The Bank's absolute discretion to change interest rates or the method for calculating interest can be to take account of a change in market conventions *or otherwise*, where "*otherwise*" means "*for other reasons*".

90. On that construction, the plain meaning of the final subclause is clear, and this can be seen by the following questions and answers:

- What can be changed?

(a) the method for calculating interest, and (b) the interest rate

- When can changes be made?

  From time to time.

- What facilities are subject to potential change?

  All facilities.

- Is there is a limit on the reasons why the Bank can vary the rates?

  No, the Bank has absolute discretion.

- What must the Bank do if it decides to vary the interest rate?

  It must give the borrower one month's prior notice.

91. In the premises I consider that the final subclause allows for the variation that was implemented in this case. It is an example of the type of mechanism described by Mr. Tyler in his evidence that could be utilised by banks to protect themselves from exposure to the liquidity repricing risk involved in longer maturity lending. There was no dispute that the Bank gave the plaintiffs prior notice of the proposed variation, nor was there any claim that, independent of the contractual argument, the Bank was prevented from making the variation. Accordingly, the court finds that the proper construction of the final subclause in clause 5 of the STCs, which formed part of the contract between the parties, permitted the Bank to change the method of calculating interest from one based on Euribor to one based on BCOF.

92. In the circumstances I will dismiss the plaintiffs' claim. As this judgment is being delivered electronically, I will express the provisional view that the defendant is entitled to its costs as against the plaintiffs. I will list the matter before me at 10:30am on Wednesday, the 15 January 2025 to address any argument that the parties may wish to make in relation to costs and for the purpose of making final orders.