

THE HIGH COURT

[2016 No. 1411 S.]

BETWEEN

AIB MORTGAGE BANK

PLAINTIFF

AND

DECLAN GUNNING AND FIONA GUNNING

DEFENDANTS

JUDGMENT of Ms. Justice Reynolds delivered the 10th day of October, 2018**Introduction**

1. In this case, the plaintiff seeks summary judgment in the sum of €313,570.00 as against the defendants, jointly and severely, together with costs.

Background

2. In 2008, the defendants entered into an agreement to borrow the sum of €253,000.00 from the plaintiff. The purpose of the loan was to purchase a property situate at the Glebe, Lagan, County Longford.

3. The loan facility was made available to the defendants in July 2008 in the amount of €253,000.00 for a 20 year period.

4. In September 2008, the defendants accepted the loan facility and the terms and conditions of same. The defendants agreed to a mortgage over the said property together with a legal charge over a site at Kilglass, Lagan, Co. Longford.

5. The defendants drew down the monies to facilitate the purchase of the said property. However, they subsequently defaulted on their loan repayments and in December 2015 and July 2016 the plaintiff demanded the amount then due and owing on foot of the said loan account.

6. Despite repeated demands and requests, the monies remain due and owing and the plaintiff contends that the defendants have no *bona fide* defence to the within application.

Issues Raised by the Defendants

7. The cornerstone of the defences relied upon by the defendants is that they were at all material times consumers and therefore entitled to certain statutory protections. Further, the defendants contend that the plaintiff has failed to provide the necessary protections to which they were entitled as consumers.

8. In the alternative, the defendants posit that they have raised a *prima facie* case that they are consumers and that Council Directive 85/577/EEC is applicable and seek a referral for a preliminary ruling to the Courts of Justice of the European Union to enquire into the applicability or otherwise of the said Directive.

The Proceedings

9. The summary proceedings came before this Court for hearing on the 8th May, 2018. The applicant sought liberty to enter final judgment against each of the defendants whilst the defendants brought their own application seeking a referral to the Courts of Justice of the European Union as already outlined.

Issues

10. The first issue to be determined is whether or not the defendants can be deemed "consumers" and thereby entitled to the protection provided by S.I. 224/1989.

11. The Consumer Credit Act, 1995 defines "a consumer" as follows:-

"A natural person acting outside the person's business".

12. S.I. 224/1989 provides a similar definition of consumer as follows:-

"A natural person who, in transactions covered by these Regulations, is acting for purposes which can be regarded as outside his trade or profession."

13. The plaintiff submits that the defendants were not entering into a consumer contract by virtue of the loan agreement whereby the stated purpose of the loan was to purchase a Buy to Let property.

14. On behalf of the defendants, it was submitted that the purchase of the property was for their personal use and benefit, for the use of their children, and that the loan was for the individual needs and private consumption needs of the defendants and their family.

Authorities on Consumer Contracts

15. Both parties rely on the decision in *Allied Irish Bank v. Higgins* [2010] IEHC 219 as the leading authority on this issue. In that case, the defendants had formed a partnership with the intention of acquiring lands for development and had received a number of loans from the plaintiff for that purpose. In defending proceedings for summary judgment, the defendants submitted that there were not professionally involved in the business of property development and therefore contended that they had an arguable defence by virtue of the provisions of the Consumer Credit Act, 1995, in that they were acting outside the scope of their ordinary business when they borrowed the money. The plaintiff contended that it was a commercial transaction.

16. In considering the interpretation of "consumer" as being relied upon by the defendants in those proceedings, Kelly J. stated as follows:-

"... the interpretation urged by these defendants would have the most profound consequences in business and commercial life. It would mean that every person who belonged to a trade or profession and who decided to borrow money to invest it in promoting another business with a view to profit would have to be treated as a consumer under the Act. The legislature could never, in my view, have so intended. If it did it would have said so in clear and unequivocal terms."

17. The judgment also considered the decision of the European Court of Justice in *Benincasa v. Dental Kit* (Case C-269/95) and where in the course of its judgment, the court stated:-

"As far as the concept of 'consumer' is concerned, the first paragraph of Article 13 of the Convention defines a 'consumer' as a person acting 'for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law, it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities.

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.

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."

18. In his findings on the issue, Kelly J. determined:-

"These defendants acted as partners in a partnership which borrowed money from AIB. They did so with a view to investing in property and its development for profit. In so doing, they engaged in business and the Act had no application to them."

19. The issue was considered further in *Allied Irish Banks plc. v. Fahy* [2014] IEHC 244. In rejecting the "consumer" defence, O'Malley J. stated as follows:-

"The primary issue for determination is the position of the defendant in entering into the loan agreement, having regard to the nature and aims of that agreement".

20. The defendant further relies upon the recent decision of Baker J. in *ACC Loan Management Ltd. v. Browne* [2015] IEHC 722. In that case it was held that where it can be shown (on a *prima facie* basis) that a loan has been advanced for a dual purpose, it may be difficult to obtain judgment at a summary stage.

21. However, in the instant case there is no contention that the loan was advanced for a dual purpose in circumstances where the stated purpose of the loan was for the defendants to purchase a Buy to Let property.

22. Further the defendants rely on the decisions of *Ulster Bank Ireland Ltd. v. Healy* [2014] IEHC 96 and *Stapleford Finance Ltd. v. Lavelle* [2016] IEHC 385 in circumstances where the defendants in both cases successfully resisted summary applications relying on the "consumer" defence and were granted leave to defend the proceedings at plenary hearing. In the latter case, Baker J. found that "the purpose of the loan is the defining or identifying characteristic and not the quantum of the loan".

23. Clearly, the instant case has to be distinguished on its own particular facts where the stated purpose of the loan was to purchase a Buy to Let property and where the defendants, in their affidavits, make absolutely no averments to the contrary.

24. It is clear from the *Fahy* decision that the onus rests on the defendants to establish that they were, at all material times, acting as consumers in relation to the loan agreement. I am not satisfied on the evidence that the burden has been discharged by them in the instant case. They entered into the loan agreement with a view to investing in a Buy to Let property and the "nature and aims of that agreement" were for the purposes of making profit. I must, therefore, conclude that this was a commercial transaction and the issue of statutory protection under the Act simply does not arise.

25. It follows that the defendants' application for a referral to the Courts of Justice of the European Union must fail.

Conclusion

26. The plaintiff is entitled to judgment in the amount claimed, jointly and severally, as against the defendants.