Neutral Citation Number: [2010] IEHC 219

THE HIGH COURT

COMMERCIAL

2009 5142 S

BETWEEN

ALLIED IRISH BANK PLC

PLAINTIFF

AND

BRIAN HIGGINS, SEAMUS KAVANAGH,

JAMES MANSFIELD AND GLEN O'CALLAGHAN

DEFENDANTS

JUDGMENT of Mr. Justice Kelly delivered on the 3rd day of June, 2010

Introduction
This is an application for summary judgment against the defendants for €6,324,959.81.

The plaintiff (AIB) alleges that this sum is due to it in respect of monies which it lent to the defendants who formed a partnership for the purpose of acquiring and developing lands in Duleek, Co. Meath.

The first, second and fourth defendants do not deny that the moneys in suit were received by them as loans from AIB but contend that they have an arguable defence to the claim by reference to certain provisions of the Consumer Credit Act 1995 ("the Act"). They argue that they made these borrowings from AIB as "*consumers*" within the meaning of that Act. If correct, then s. 30 of the Act was applicable to the lending but its requirements were not complied with by the bank. That omission renders the loan unenforceable (s. 38 of the Act).

The third defendant (Mr. Mansfield), who was separately represented, also relies on this point. In addition, he seeks to make a number of other defences chief amongst which is one of *non est factum*.

I will deal with the defendants other than Mr. Mansfield first. I will then deal with all of Mr. Mansfield's alleged defences including the "*consumer*" point. In the light of his approach I have to set out the background to the transaction more than is necessary to deal with the other defendants.

AIB's claim is based on a facility letter of 19th January, 2009. This was the fifth in a series of such letters. I must outline its predecessors.

The First Facility
By letter of 3rd March, 2003, AIB offered the defendants a loan facility for €673,000 to assist them in the purchase of a 1.1 acre site in Duleek, Co. Meath. This letter was addressed to each of the defendants. It identified each of them as borrowers and offered the money for the stated purpose. It provided for a capital moratorium until 25th February, 2005 with a repayment schedule to be reviewed at that stage. In the interim, interest was to be met on a quarterly basis.

The offer was expressly made subject to the terms and conditions set out in the letter and also subject to the banks general terms and conditions governing business lending. A copy of those terms was enclosed and the addressees of the letter were advised that these were legal documents and should be read very carefully.

The loan was to be secured by the execution of two legal charges. One was over the 1.1 acre site at Duleek to vest in the names of the defendants. The second legal charge was over an adjoining 4.5 acre site at the same place.

It is common case that this letter of offer was accepted by each of the defendants appending their signatures to it on 19th April, 2004. The funds, the subject of the offer, were drawn down at that time.

The Second Facility
On 15th August, 2006, AIB offered a further loan to the defendants in the sum of €3,461,000.

The offer was made by a letter of sanction of that date addressed to each of the defendants and identified each of them as the borrowers. The purpose of this loan was "*to fund the development of two 2.5 story (sic) blocks containing 23 apartments, six commercial/retail units, crèche and underground car parking on site in Duleek, Co. Meath*". This loan was repayable on demand and at the pleasure of AIB subject to clearance in full from the 100% gross sale proceeds of the development. The loan was to be secured by means of an all sums legal charge over the 1.1 acre site with the existing house, commercial and derelict structures and the benefit of a full planning permission for the development in question. There was also to be a legal charge over the 4.5 acre site zoned residential at Duleek, Co. Meath. The offer was made on the terms and conditions contained in it and the banks general terms and conditions which were once again enclosed and advice tendered that these were legal documents to be read very carefully.

Mr. Mansfield accepts that his signature is on the acceptance of this offer. He says he signed it on the bonnet of a car and that it was "*just the plain back sheet*" he signed. The other defendants do not raise any issue as to their acceptance of this offer.

The funds the subject of this second letter of sanction were duly advanced to fund the development of the property.

The Third Facility
On 3rd April, 2007, AIB agreed to advance a further €500,000 to the defendants by way of an increase to their existing loan.

Again the letter was addressed to all four defendants and they were identified as the borrowers. Again, it enclosed a copy of the bank's general terms and conditions and pointed out that they should be read very carefully. The purpose of this loan was to fund the development. It was also to cover contributions and an archaeology survey and additional costs not accounted for in the previous loan. There is no evidence that this letter was executed by any of the defendants but none of the defendants save Mr. Mansfield make any point about this. It is common case that the €500,000 referred to in the letter was drawn down.

The Fourth Facility
On 17th January, 2008, AIB agreed to advance a further loan to the defendants. This was in respect of a sum of €1.3m. The letter was in similar form to the earlier ones and the purpose of this additional funding was expressed to be by way of assistance for the completion of the development.

This letter of offer was accepted on 24th January, 2008. Mr. Mansfield says that the signature on the letter is not his.

The Final Facility
On 19th January, 2009, a further letter of sanction was issued by the bank in favour of the defendants. It identified the four defendants as the borrowers. The letter dealt with two facilities. The first was a term loan called account No. 1 (A/C No. 00046120) and the second was term loan account No. 2 (A/C No. 00046203). It is these loan accounts that are sought to be recovered in this action.

Term loan account No. 1 was in the sum of €772,187. This was originally sanctioned towards funding the purchase of the 1.1 acre site in Duleek, Co. Meath.

Term loan account No. 2 is in the sum of €5,331,229. It was originally sanctioned towards funding the development and completion of the various blocks of apartments and commercial and retail units.

Under the terms of this letter of sanction, there was a roll up of the interest that had accrued on the initial loan of €673,000 which had been used to acquire the site and also on the subsequent development loan which had been increased from time to time. Both of these facilities were expressed to be repayable on demand but were subject to clearance in full by 28th February, 2009 by way of refinance or otherwise.

All of the defendants agree that they signed the acceptance of these terms on 20th January, 2009 by appending their respective signatures to the acceptance form.

The loans were subsequently called in. No part of the monies advanced have been repaid.

AIB alleges that the moneys were advanced by it as part of its commercial lending business.

I turn now to the evidence advanced by the defendants other than Mr. Mansfield on the "*consumer*" issue.

Brian Higgins
Mr. Higgins swore two affidavits. In the first he accepted that he entered into the loan agreements with AIB and that the money was advanced by it and used for the specified purposes. He expressed concern that AIB failed to deal with him properly as a consumer.

He recounted that he began work as an apprentice electrician in 1977. He worked as an electrical contractor until 1983. At that stage he set up his own contracting business.

In 1998, he set up a second business through a company called Lara Alarms Limited which specialises in security alarms.

In the early 90s, he purchased one property as an investment in Maynooth, Co. Kildare. He continued to buy investment properties in the 1990s whilst at the same time running his other businesses.

He said that apart from the purchase of investment properties he had never been involved in building development professionally. In 2000, he was approached by Seamus Kavanagh who invited him to become involved in the purchase of a site in Duleek, Co. Meath. The idea was to obtain planning permission on the site and sell it on. He said that this was not his profession and he knew nothing of the planning process but was assured that Mr. Kavanagh would look after all of this. He said "*I approached another investor, James Mansfield, the third defendant and purchased the site in or around 2001*".

He went on to say that during negotiations with architects and planners, it became apparent that:-

> "*…we should purchase another piece of land to the front of this site to maximise the overall value of the site. At this point we approached the bank to obtain funding for the purchase of the second site. I had very little involvement with all of this; I was acting as an investor and had no expertise in obtaining planning permission or building development and this was made clear to the plaintiff at all times. Indeed my lack of experience and knowledge in this area is recorded on the plaintiff's files and the plaintiffs stated on several occasions that they had grave concerns regarding my lack of experience and expertise in this area.*"

The affidavit went on to assert that he did not enter into the loan agreements with the bank on a commercial basis but rather he was acting "*essentially as a consumer*".

I will deal with the second affidavit sworn by this defendant later in this judgment.

Seamus Kavanagh
Mr. Kavanagh swore a single affidavit. In it he expressed the belief that he did not "*engage with the plaintiff bank on a commercial basis but rather as a consumer*".

The affidavit set out his employment record. He began employment in 1989 as a site clerk. He then moved to another company as a finishing foreman and "*ended up as a general foreman*". He remained with that company for five years until 1995. He then worked with another company for a year and after that with yet another company for two years, also as a site foreman. He then set up his

own company called Finnan Construction Limited.

Through Finnan Construction Limited, he engaged in building one off houses for individuals who would employ him after they had acquired a site and obtained planning permission. He said that he never had to borrow from any financial institution for any of the activities of Finnan Construction Limited. That company was never a development company but merely did building work.

He also worked for a developer as a site foreman. That developer incorporated a company called Temple Construction Limited to develop two sites in Dublin. Work began on one site in 2003 and on the other in 2005. He was given a 20% shareholding in that company but was not involved in what he described as any of the "*background work*". He received an ongoing wage from that company for about two years after he left it. He was involved in a land deal in Foxrock in 2005 but all of the dealings concerning it were carried on by another person.

In 1999 having looked at another site in Duleek which was unsuitable, the auctioneer dealing with him told him of the site in suit. He said:-

> *"We discussed the opportunity and it was agreed to buy the site, obtain planning permission and sell it. During negotiations with architects and planners it became apparent that we should purchase another piece of land to the front of this site to maximise the overall value of the site. At this point we approached the bank to obtain funding for the purchase of the second site. I say that I made the bank aware of my background and my lack of experience in a development of such scale. Indeed my lack of experience and knowledge in this area is recorded on the plaintiff's files and the plaintiffs stated on several occasions that they had grave concerns regarding my lack of experience and expertise in this area."*

The affidavit concluded by him expressing the view that he did not enter into the loan agreements with the bank on a commercial basis but rather "*I was acting essentially as a consume*r".

Glen O'Callaghan
Mr. O'Callaghan expressed the same belief as his co-defendants to the effect that AIB dealt with him as a consumer rather than on a commercial basis.

He began employment as an apprentice carpet fitter with Des Kelly Carpets in 1978. He completed an apprenticeship with Switzers in 1983 and then returned to Des Kelly Carpets as a salesman. He remained in that job for four years. In 1987, he was appointed sales manager with a company called Carpet Express. He returned to Des Kelly Carpets in the late 1980s and in the 1990s moved to the United States where he worked for two to three years as a carpet fitter. He then returned to Dublin and set up a carpet fitting business himself.

In 1995, he expanded the business and acquired a warehouse in Dublin. The business prospered and in 2004 he opened a purpose built showroom in the Dublin Industrial Estate in Glasnevin. He said that he had not been involved in any other business but he did purchase a number of investment properties which he acquired between 2001 and 2005.

He said that he was and is a good friend of Mr. Mansfield. In 2002, Mr. Mansfield approached him and "*discussed an investment opportunity with me involving the Duleek site. Mr. Mansfield confirmed to me that he would be investing in this and would be a 33.3% shareholder in the partnership. He asked if I would consider splitting the investment with him. After consideration of the proposal I agreed to his proposal. I had no experience in the construction industry and so I did not anticipate having much involvement in the project. As far as I was concerned the idea was to obtain planning permission on the site and to sell it on. As stated above this was not and is not my profession and I know nothing about the planning process but I was assured that Mr. Seamus Kavanagh, the second named defendant, had experience of such matters and was looking after this aspect. During negotiations with architects and planners it became apparent that we should purchase another piece of land to the front of this site to maximise the overall value of the site. At this point we approached the bank to obtain funding for the purchase of the second site*."

The affidavit said that he was acting as an investor and had no expertise in obtaining planning permission or building development and that this was made clear to AIB. He made the same averment as the other defendants concerning his lack of experience being recorded on AIB's files and that bank's concern about his lack of expertise in the area.

AIB's Response
AIB contend that it is clear that the defendants borrowed from the bank as part of a commercial transaction. The purpose was to buy and develop the lands. The defendants arranged their affairs as a partnership and did so on the basis of professional advice.

AIB exhibited a letter from a firm of accountants called O'Connor Leddy Holmes addressed to Mr. Higgins, the first defendant advising him on the "*most tax efficient methods of purchasing the site at Duleek with a view to reducing the tax costs in the long term*". That letter is dated 22nd November, 2000, long prior to the first loan. It set out in some detail the advantages of a partnership over a limited company. The letter furthermore identified three people who were involved at that juncture namely Messrs. Mansfield, Kavanagh and Higgins.

The letter advised as follows; "*… what I would suggest in this situation would be that the property be held in the individual names through a partnership…*". That is in fact what happened with the inclusion of a fourth partner, Mr. O'Callaghan.

On 25th October, 2006, a firm of accountants and business advisers wrote to AIB in connection with "*Letter of sanction; Brian Higgins/Seamus Kavanagh/James Mansfield/Glen O'Callaghan" confirming that "the partnership as noted above is being registered for VAT in respect of the project*".

On 11th August, 2008, a firm called OCC Chartered Accountants wrote to a firm of solicitors acting on behalf of the Revenue Commissioners in connection with the tax liabilities of "*the Duleek partnership*". The letter, *inter alia*, stated:-

> *"In relation to the RCT Refund, it is due to Finnan Construction a company in which one of the partners, Seamus Kavanagh, is the majority shareholder. He has undertaken to make these funds available to the partnership".*

AIB also exhibited a series of letters emanating from the Duleek Partnership written between July 2009 and February 2010. These letters identify each of the defendants as members of the partnership and the letters are written on the headed paper of the "*Duleek Partnership*".

One of those letters dated 4th February, 2010, is written by Mr. Mansfield who said "*I, James Mansfield of the Duleek partnership request all information and documentation held in your files relating to me personally*."

In the case of Mr. Higgins, AIB put evidence before the court that he was the managing director of two electrical contracting companies and had also built up a substantial property portfolio. He was also involved in the construction of eight apartments in Tallaght in 2006.

In the case of Mr. Kavanagh, AIB produced evidence that he had over twenty years experience as a builder. He had a directorship of Finnan Construction Limited and a 20% shareholding in Temple Construction Limited. Finnan Construction Limited was the building company contracted by the Duleek partnership to carry out the development in Duleek. Mr. Kavanagh was also involved in the building of 40 apartments in Tallaght and 49 apartments at Christ Church in Dublin. The bank also exhibited the 2005 director's report and financial statements for Finnan Construction Limited and Temple Construction Limited (which showed a turnover of €11m in 2005).

In the case of Mr. O'Callaghan, AIB averred that his carpet company had an annual turnover of €3.1m and that he has also built up a substantial property portfolio.

The bank accepted that it had some concern about the defendants' lack of expertise in that only Mr. Kavanagh had experience in building units. On account of that, it was a condition of the sanction of the development loan that an independent quantity surveyor be appointed to oversee the building on a monthly basis. That in fact occurred.

Final Affidavits
In response to AIB's evidence, Messrs. Higgins and O'Callaghan filed two short affidavits.

Mr. Higgins made a request to AIB pursuant to the Data Protection legislation seeking documents pertaining to his dealings with that bank. He procured copies of five accounts which he exhibited. This was in an effort to demonstrate that in some instances the bank had treated him as a consumer.

The first two agreements are not with AIB at all. One is with AIB Finance Limited. It is dated 27th June, 1996 and concerns funds which were provided for the purchase of a motor car. The amount is £16,000. The amount is repayable by 36 monthly instalments.

The second agreement is dated 2nd January, 2002, and again is not with the plaintiff but rather with AIB Finance and Leasing. This is an agreement which relates to an advance given for the purchase of a Land Rover jeep. The money (€16,500) was repayable by 36 monthly instalments.

The third agreement is a credit agreement of 27th February, 2003. It is in respect of a sum of €254,000 repayable by 213 monthly instalments. It was advanced for the purchase of a premises in Clondalkin. He was treated as a consumer for the purposes of the legislation in respect of this agreement.

The fourth agreement is dated 15th August, 2003 but does not involve Mr. Higgins at all. The borrower is Mrs. Delia Higgins, his wife.

The last agreement is one dated 26th August, 2005 and is one whereby the bank advanced €250,000 but it is a joint borrowing of Mr. Higgins and his wife. They were treated as consumers.

Mr. Higgins contends that as he was treated as a consumer for the purpose of some of those agreements so, likewise, he ought to have been treated as a consumer for the purposes of the loan in suit.

Mr. O'Callaghan in his final affidavit also referred to documents which he received pursuant to a request made by him under s. 4 of the Data Protection legislation. He said that some of these documents support his assertion that he was a consumer. He relied in particular on a document which was entitled "*Credit Grade 2 – Memorandum Request for Renewal of in Order Accounts*". The document was furnished to him in a redacted form. However, the unredacted form was put in evidence before me without objection.

The document predates the facilities in suit. It deals with a number of borrowings made by Mr. Higgins or his wife or themselves jointly or his companies and in a single instance the borrowings in suit. There are a number of boxes which were ticked on it, one of which is to the effect that the Consumer Credit Act applies. The document is inaccurate since the Act could not apply to the two limited companies which are listed.

The other document which he relies on is a report and recommendation of the bank in which he says the bank recognised that he did not have any experience in the business of property development and that this supports his contention that he was acting outside of his business trade or profession in borrowing the funds in suit.

The Test
The test which the court must apply in an application for summary judgment is well established in the jurisprudence on the topic.

The leading case is *Aer Rianta Cpt v. Ryanair Limited* [2001] 4 I.R. 607.

There the test postulated by Hardiman J. was summarised by him by posing the question "*is it very clear that the defendant has no case?*". If the answer is in the affirmative the motion succeeds. If not, it does not. That is the test I propose to apply here.

In the course of his judgment he cited with approval some observations from *National Westminster Bank v. Daniel* [1993] 1 WLR 1453 in the following terms:-

> *"the mere assertion in an affidavit of a given situation which is to be the basis of a defence did not of itself provide leave to defend: the court had to look at the whole situation to see whether the defendant had satisfied the court that there is a fair or reasonable probability of the defendants having a real or bona fide defence."*

In her judgment, McGuinness J. said:-

> *"The question is rather whether the proposed defence is so far fetched on so self contradictory as not to be credible."*

In his judgment in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, McKechnie J. in considering the case law on this topic set out in summary form the considerations which the court should bring to bear on an application for summary judgment. One of them is that "*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*".

In the present case, each defendant asserts that AIB ought to have dealt with them as a consumer but failed to do so. By that omission it has rendered its loan agreement unenforceable, they argue.

The Act
The Act (which was amended by Part 12 of the Central Bank and Financial Services Authority of Ireland Act 2004) insofar as it is relevant defines "*consumer*" as meaning "*a natural person acting outside the person's business*".

The term "*business*" is defined as including "*trade and profession*". The term "*borrower*" means a consumer acting as a borrower. A credit agreement is defined as "*an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a cash loan or other similar financial accommodation*".

Section 30 of the Act contains mandatory provisions concerning a credit agreement or contract of guarantee entered into by a consumer. Such an agreement has to be made in writing and signed by the consumer. A copy of it must be given personally to the consumer or delivered to him within ten days of the making of the agreement. A credit agreement must contain a statement in respect of a cooling off period which gives the consumer a right to withdraw from the agreement without penalty if he gives written notice to this effect within a period of ten days of receipt of the agreement. Alternatively, he may indicate that he does not wish to exercise that right by signing a statement to that effect under certain conditions. A credit agreement must contain a statement of the names and addresses of all of the parties to it and all of the costs or penalties to which the consumer may become liable for any failure to comply with its terms.

Section 38 of the Act is far reaching. It provides that a creditor:-

> *"shall not be entitled to enforce a credit agreement or any contract of guarantee relating thereto, and no security given by the consumer in respect of money payable under the credit agreement or given by a guarantor in respect of money payable under such contract of guarantee as aforesaid shall be enforceable against the consumer or guarantor by any holder thereof, unless the requirements specified in this Part have been complied with:*
>
> *Provided that if a court is satisfied in any action that a failure to comply with any of the aforesaid requirements, other than section 30, was not deliberate and has not prejudiced the consumer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be enforceable."*

Thus, although s. 38 confers a discretion on the court to excuse non-compliance and thereby enable a credit agreement which would be otherwise unenforceable to be enforced, it may not do so in respect of a breach of Section 30.

The point made by the defendants can be stated simply. The defendants were acting outside their business when they borrowed the monies in suit from AIB. They thus fell within the protection of the Act but as s. 30 was not complied with by the bank, the loan is unenforceable.

The Partnership
Section 1 of the Partnership Act 1890 defines partnership as "*the relation which subsists between persons carrying on a business in common with a view of profit*".

Section 45 of the Act provides that unless the contrary intention appears the expression "*business*" includes every trade, occupation or profession.

In the present case there is no dispute (nor indeed on the evidence could there be) but that these defendants formed a partnership in respect of the venture which led to their borrowing the monies in suit. There was no deed or written instrument governing the partnership but that did not make it any less a partnership within the meaning of the statutory definition. The purchase and development of the lands was with a view to making a profit.

In order to be beneficiaries of s. 30 of the Act, the defendants have to demonstrate that they borrowed as consumers or, in other words, as persons acting outside their business which includes their trade and profession.

From the affidavits sworn by the defendants, I accept that property investment was not their principal or main business. Their counsel argues that for the purposes of the Act a natural person may have just one business or trade or profession. Any borrowings made outside that single business or trade or profession are borrowings made as a consumer and attract the protection of the Act.

I will examine this proposition to see whether it raises an arguable defence to these proceedings.

Discussion
Counsel for these defendants accepts that his argument necessarily means that the definition of "*consumer*" in the Act has to be read as confining the words "*business*" to being read in the singular.

This argument might appear to fail to take into account the provisions of s. 18 of the Interpretation Act 2005. That section provides that in every enactment, unless the context otherwise requires, the singular imports the plural. The precise wording of the section is "*a word importing the singular shall be read as also importing the plural, and a word importing the plural shall be read as also importing the singular…*". In the light of this statutory provision a "*business*" could be either singular or plural.

Despite any express indication in the wording of the Act to justify the interpretation contended for, counsel for these defendants says such an approach is justified by reference to the purpose of the Act as found in its long title and the European Directives which prompted it.

The argument runs that the Act was enacted to enable effect to be given to Council Directive 87/102/EEC of 22nd December, 1986, as amended by Council Directive 90/80/EEC of 22nd February, 1990. That Directive contains a definition of consumer as meaning "*a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or*

profession". There is not much by way of difference between that definition and the one which is contained in the Act.

Counsel pointed out that the penultimate recital to this Directive required Member States to provide for a certain degree of approximation of their laws concerning consumer credit and protection but went on to say that the States "*should not be prevented from retaining or adopting more stringent measures to protect the consumer with due regard for their obligations under the Treaty*". Thus, he argued that the Act can be more stringent in the protection which it affords than the Directive. That is undoubtedly so. He argued that the legislature in enacting the Act was deliberately being more stringent by, in effect, providing that the term "consumer" should only be construed by reference to such a person having but one business.

I am unable to accede to this argument.

First, it appears to me that if the legislature set out to achieve the purpose identified by counsel for these defendants, it would have to do so in a manner which made it clear that such interpretation was the only permissible one. It did not do so. There is no suggestion contained in the Act that s. 18 of the Interpretation Act 2005 or its statutory predecessor should not apply.

Second, 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.

Third, I am satisfied that not alone does the interpretation urged upon me fail to find support in the wording and content of the Act but it also runs counter to the observations of the European Court of Justice in the case of Benincasa v. Dentalkit (Case C-269/95).

In the course of its judgment that court said:-

> *"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."* (My emphasis)

These observations fortify my view that the construction which is sought to be placed upon the Act by counsel for the defendants is unsustainable.

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. The self same person can be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. 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 Act suggesting that the legislature here sought to go further than the Directive, still less to confine the interpretation of the term "business" in the definition of "consumer" to a single business activity.

Finally, I should deal with the point which is made by reference to the documents which were obtained on foot of the Data Protection Act requests. Many of them do not relate to the parties to this litigation at all. Insofar as they do, they are of no relevance since as the European Court has said:-

> *"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."*

The subjective view of AIB whether right or wrong has no relevance.

Conclusion
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.

The assertion by them to the effect that they were "consumers" which is contained in their affidavits is not sufficient to warrant this case being adjourned to plenary hearing. No arguable defence or triable issue has been identified by them on this topic and accordingly I enter judgment against Messrs. Higgins, Kavanagh and O'Callaghan for the amount claimed.

I will now deal with Mr. Mansfield's defence.

Mr. Mansfield
In addition to raising the "consumer" point Mr. Mansfield seeks to raise two other lines of defence. The first is a contention that he was not involved in the partnership. Rather he says that he was involved only in the purchase of the lands and then only to the extent of one sixth of the site purchase borrowings. In other words, he contends that he is a 1/6th co-owner of the lands but had nothing to do with the subsequent borrowings in respect of their development.

The second point which he seeks to raise is a defence of *non est factum*.

I will consider each of these in turn.

Limited Involvement
It must be remembered that these proceedings are brought to recover monies the subject of the letter of sanction of 19th January, 2009. There is no issue but that that letter was accepted by Mr. Mansfield and no question is raised as to the authenticity of his signature upon it. Neither is there any issue but that these monies were drawn down.

He seeks to go behind that letter by reference to the earlier ones which I have described in this judgment. He accepts that he signed the first of these which gave rise to the borrowing of €673,000 for the purchase of the 1.1 acre site in Duleek. He says that he got involved in that as a result of an invitation from Mr. Higgins and he agreed to make an investment. He then contends that he made an agreement with Mr. O'Callaghan to reduce his (Mr. Mansfield's) one third share to a one sixth share. However, the first letter of sanction which is accepted by all four defendants makes no distinction between them as to their respective liabilities on foot of it. If there was any arrangement *inter se* seeking to limit Mr. Mansfield's liability that cannot affect the entitlement of the bank on foot of that letter to recover against all four borrowers. He goes on to say that he did not understand nor was it explained to him that a joint and several liability was being incurred by him on foot of that borrowing. But, crucially, he has sworn that he "*knew what I was signing and why I was signing it*".

Insofar as the letter of loan sanction of 15th August, 2006, is concerned he acknowledges that it has his signature upon it but thinks that he signed it on the bonnet of a car and that it was "just the plain back sheet" that he signed. He then goes on again to assert his belief that he was only a one sixth co-owner in the lands.

It is quite clear from all of the evidence that at no stage was the alleged limited nature of his involvement in this whole transaction notified to the bank. The letters of sanction were addressed to the defendants without any suggestion that there was any limitation of the liability being undertaken by them. If Mr. Mansfield believes that he has only a one sixth liability then that is a matter for him to raise with his co-defendants.

Whatever may be the position concerning signatures on the other letters of sanction the fact is that Mr. Mansfield acknowledges that he signed the last facility letter of 19th January, 2009 and it is on foot of that that the bank seeks to recover the monies advanced. He has sought to distance himself from any loan other than the first.

AIB has produced compelling evidence demonstrating a much greater involvement by Mr. Mansfield than he admits.

Apart from signing various of the letters of facility and in particular the last one, it is quite clear that Mr. Mansfield, in common with the other defendants, executed a joint account mandate in favour of the bank in February 2003. Under the terms of that mandate, he agreed and declared that he would be jointly and severally liable for any monies advanced by the bank along with his fellow defendants on that account and in respect of any overdraft or indebtedness arising on foot of any facility granted on the account and for any debit balance which should arise or exist on it.

Mr. Mansfield asserted that the bank's normal requirements in respect of money laundering legislation had not been met. He said that he could not remember being asked by anybody to provide identification or utility bills for the borrowing. But the bank had been able to exhibit just such documents provided by him including an ESB bill and a copy of his passport. This he did not once, but twice. The first was to the Naas branch of the bank in February 2003 but more to the point in 2004, he presented a further ESB bill and a further copy of his passport to AIB's commercial unit.

In respect of the facility letter of 15th August, 2006, whilst he acknowledges that his signature is on that letter, he contends that he was "*not aware of these letters of sanction save the one for €673,000*". It is to be noted that special condition 1 of that letter of August 2006 required an accountant's written confirmation that each of the defendant's business and personal tax affairs were up to date and in order. Mr. Mansfield provided just such a letter from a firm called O'Brien Harnett and Associates in August 2006. The provision of such a letter is consistent with Mr. Mansfield having accepted the bank's facility from which he now distances himself.

Insofar as the letter of facility of 17th January, 2008, Mr. Mansfield contends that the signature on it is not his. It is of interest to note, however, that on 14th May, 2008, a firm of accountants certified to AIB that his personal income tax affairs were in order and paid up to date. This was required as one of the terms of the letters of loan sanction.

However, as I have already pointed, the letter which is relied upon by the bank in the present proceedings is that of 19th January, 2009. Mr. Mansfield acknowledges that he signed that letter. That signature was appended to the letter following a meeting with the bank on 20th January, 2009. He said he believed that it related only to an extension of the loan for €673,000. He then swears "*I knew I signed some papers which were to extend the time limit for repayment of the loans and I acknowledge that I signed same*". (My emphasis)

Detailed evidence has been placed before the court concerning what went on at a meeting with AIB on 20th January, 2009 and its aftermath. At the meeting, which discussed the entire debt, the defendants indicated that Mr. Kavanagh was seeking to be released from the partnership and that henceforth they wished to refinance the total debt into the names of the other three defendants. They were told that they would need to put a formal request to the bank if that was what they sought to do. That is indeed what happened. On 27th March, 2009, a formal proposal was made to AIB by a firm of accountants acting on behalf of Messrs. Higgins Mansfield and O'Callaghan. Some elements of that letter are of relevance.

First the letter is headed "*Re: the Duleek Partnership*". It records a recent meeting with the bank at which that firm indicated a wish to make a proposal to progress the completion of the site and the taking over of the properties on a residential investment basis. It goes on:-

> *"We also discussed and we can now confirm that agreement has been reached between the parties for the cessation of Seamus Kavanagh as a partner. We would ask you to note that this proposal is being put forward by Messrs. Higgins, O'Callaghan and Mansfield and as such we would ask to issue a new facility letter to these three individuals."*

The letter goes on to point that Mr. Kavanagh is not a man of any material net worth. The letter continues;-

> *"While in normal circumstances I would accept that you have a better chance of recovery from four individuals rather than three, this partnership would be the exception to that rule. The three remaining partners represent those with the strongest net worth and income base".*

Appendix 3 to the letter identifies the "*present loan facility*" as one of €6,200,000. That is the total debt borrowed by the partnership. In the body of the letter, the proposal which is made is to the effect that the existing facility was to be discharged with a new facility in the names of Messrs. Higgins, Mansfield and O'Callaghan. It is difficult to see how Mr. Mansfield contends that his involvement was as limited as he says in the light of this letter written on his behalf with the proposal and terms set out therein.

On 15th July, 2009, on headed paper bearing the title "*the Duleek Partnership*", Messrs. Higgins, Mansfield and O'Callaghan authorised Mr. Seamus Sutcliffe to carry out negotiations with AIB on their behalf. Mr. Sutcliffe was Mr. Mansfield's own adviser. He put forward a proposal to the bank on behalf of Messrs. Higgins, Mansfield and O'Callaghan concerning the entire of the debt.

In respect of all of these communications it is important to recall that under s. 5 of the Partnership Act 1890 every partner is an agent of the firm and his other partners for the purpose of the business of the partnership. The acts of every partner pertinent to normal carrying on of the business bind the other partners.

Given this evidence, it is difficult to accept as credible the contention made by Mr. Mansfield that his only liability to the bank is in respect of one sixth of the loan account. Whatever may be the arrangements made between himself and his co-defendants, all of the documentary evidence to which he was a party demonstrates a liability to the bank on precisely the same basis as his co-defendants. His argument that his involvement was limited to the purchase of the lands is completely at variance with the documents executed by him and his conduct in connection with the Duleek Partnership over a number of years.

Mr. Mansfield has not demonstrated an arguable or credible defence under this heading.

Non Est Factum

Whilst Mr. Mansfield accepts that he has a liability to the bank in respect of one sixth of the loan extended for the land purchase, he says it is no more than that. He contends that the signatures which he put on the letters of sanction were put there by him believing the documents to be something else.

This plea is in large part based upon an alleged disability from which Mr. Mansfield suffers. He said that he could not read the final facility letter which he signed and thought that he was extending the term of the monies which he had borrowed to purchase the lands. He said he did not understand that by signing the letter he was taking on any additional borrowing. He said that as far as he was concerned he was obtaining an extension on the first loan account and the other defendants were getting an extension on their borrowings. He knew that to be more significant and a larger amount but did not think that it related to him.

In support of this plea, he relies heavily upon his alleged inability to read. He has put in evidence an assessment which was carried out upon him by the National Assessment Agency Limited. The purpose of the assessment was to investigate whether he suffered from dyslexia or not.

The report demonstrates that Mr. Mansfield has had very little schooling. He attended Rathcoole National School but on his own admission was a poor student and was often absent. Following primary school, he attended a technical school in Naas but again was a regular absentee. He left that school after two years without taking any exams.

His reading fluency was assessed as that of a seven year old child. He fared no better in a passage comprehension test. His scores on a verbal comprehension index demonstrated him to be substantially below average and less than 3% of people of his age would score so low.

He did better on the perceptual organisation index which is a measure of non-verbal and "*in the moment*" reasoning. There he scored as being at least average and possibly above average.

Mr. Mansfield's working memory index was such that less than 2% of his age peers would be expected to score so low.

The summary of these tests which were carried out by an educational psychologist records that Mr. Mansfield has a very severe reading difficulty. He cannot read any more than very basic sentences like "*the cat sat on the rug*". Even then he would be very slow, might make mistakes and would be unlikely to comprehend or remember what he has read.

The psychologist was, however, unable to say with certainty if Mr. Mansfield is dyslexic or whether his reading difficulties are the result of missing school or inadequate teaching. He exhibits many characteristics of a person with dyslexia but intellectually is of at least average intelligence when non-verbal reasoning is required.

Given these difficulties of Mr. Mansfield, it is surprising to find that he recounted to the psychologist carrying out the test that he could fly a helicopter even though he would be unable to obtain a license to do so because that involves taking a written examination.

It is even more surprising to discover that despite his alleged disability, he is a director of some 25 companies. The range of the activities of these companies is very wide. They include animal husbandry services, maintenance and repair of motor vehicles, financial intermediation, real estate agencies, agricultural activities and management activities of holding companies. One of the companies has its name in Irish whilst two are registered in the Isle of Man. Mr. Mansfield is, in addition, the signatory on the annual returns in respect of a number of these companies. There he has certified that all of the information provided in the return is correct. Whilst this is no proof of his literacy, it does suggest that he has a good deal of experience in understanding commercial and financial matters.

All of these are family companies. He explained that documents are read and explained to him by his fellow directors who are members of the family. All of this suggests that his family members repose considerable trust in him to be able to understand and participate in the management of all of these family companies.

Despite this curious situation, I have for the purpose of this exercise to accept as I do that Mr. Mansfield is indeed under the considerable disability of having the reading age of a seven year old.

The defence of *non est factum* is one which has been considered in the context of an application for summary judgment by Morris J. (as he then was) in *Tedcastle McCormack & Company Limited v. McCrystal* (15th March, 1999). There that judge considered the decision of the House of Lords in *Saunders v. Anglia Building Society* [1971] AC 1004 which is the authoritative modern authority on

the topic. He said:-

"I am satisfied that a person seeking to raise the defence of non est factum must prove:

> *(a) That there was a radical or fundamental difference between what he signed and what he thought he was signing;*
>
> *(b) That the mistake was as to the general character of the document as opposed to the legal effect; and*
>
> *(c) That there was a lack of negligence i.e. that he took all reasonable precautions in the circumstances to find out what the document was."*

In the course of his speech in *Saunder's* case, Lord Reid having pointed out that there is a heavy burden of proof on the person who seeks to invoke this remedy went on to say:-

> *"The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief…"*

Lord Hodson in the same case said:-

> *"Want of care on the part of the person who signs a document which he afterwards seeks to disown is relevant. The burden of proving non est factum is on the party disowning his signature; this includes proof that he or she took care. There is no burden on the opposite party to prove want of care."*

AIB contend that they knew nothing of Mr. Mansfield's reading difficulties until they met Mr. Sutcliffe in August 2009. Mr. Sutcliffe informed them of the difficulties of his client Mr. Mansfield.

Mr. Mansfield himself did not tell AIB about his difficulties. He said in his affidavits that he was not aware as to whether the plaintiff was specifically made aware of these difficulties. He said it may have been known to them at the local branch where he had dealings. He went on:-

> *"Certainly no member of the plaintiff's staff ever spoke to me about it in relation to the borrowing. I have never emphasised my difficulties with strangers and there was no reason, as far as I was concerned, to notify the AIB."*

Mr. Mansfield has wide business experience given his company directorships. He is of at least average intelligence where non-verbal reasoning is concerned.

He ought to have taken steps to find out what the letter of 19th January, 2009 was or told the bank of his problems. He did neither. He cannot be said to have taken any, still less "*all reasonable precautions to find out what the document was*" (per Morris J.)

Thus, one of the three ingredients required for a defence of *non est factum* is absent.

In these circumstances, I conclude that he has not demonstrated an arguable defence of *non est factum*.

Consumer
For the reasons which I have given concerning the other defendants, I hold that Mr. Mansfield has not made out an arguable defence under this heading. He did not borrow as a consumer.

Conclusion
Notwithstanding the low threshold that has to be achieved to avoid summary judgment, Mr. Mansfield has not surmounted it. The defences proffered fail for the reasons which I have indicated.

There will be judgment for the full amount against Mr. Mansfield also.