THE COURT OF APPEAL
CIVIL

Neutral Citation Number [2020] IECA 318
Court of Appeal Record Number: 2019/246
High Court Record No. 2017/823S

Haughton J.
Murray J.
Pilkington J.

BETWEEN/

ALLIED IRISH BANKS PLC

PLAINTIFF/RESPONDENT

- AND –

THOMAS O'CALLAGHAN AND MARY O'CALLAGHAN

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Robert Haughton delivered on the 19th day of November 2020

Introduction

1. This is an appeal from the order and judgment of Ms. Justice Donnelly made on 29 April 2019 whereby it was ordered that the respondent ("the Bank") recover jointly and severally against the appellants (who are husband and wife) the sum of €466,757.63 with interest thereon at the statutory rate from that date, together with the costs of the proceedings, with a stay on execution for a period of four months from the date of perfection of the order. The issue in this appeal is whether the appellants, or either of them, have demonstrated any credible or *bona fide defence* such that the proceedings should be remitted to plenary hearing.

2. The Summary Summons which issued herein on 10 May 2017 pleads the monies claimed as being due and owing on foot of three accounts maintained and operated by the appellants at the bank's Newcastle West branch as follows:

    (1) Account Number 37978822: -

    It is pleaded that the sum of €448,456.48 being principal and interest as of 12 April 2017 was due by the appellants to the Bank on foot of this loan account together with further interest from 12 April 2017 at the varying rates from time to time applying "[f]ull particulars of which have been furnished to the defendants." It is

pleaded that these sums are due on foot of a loan facility made available to the appellants jointly and severally dated 22 January 2019 whereby a loan facility in the amount of €416,000 for the purpose of purchasing property was made available to the appellants, the terms and conditions of which "were accepted by the defendants on 4 February 2009."

(2) Account Number 08617094: -

The sum of €7,822.77 being principal and interest as at 12 April 2017 is claimed on foot of this loan account, together with further interest from that date, "full particulars of which have been furnished to the defendants". It is pleaded that this is due on foot of a loan facility in the amount of €204,000 made available to the appellants jointly and severally and dated 22 January 2009 for the purpose of purchasing property, the terms and conditions of which "were accepted by the defendants on 4 February 2009".

(3) Account Number 37978236: -

The sum of €10,478.38 for principal and interest as at 12 April 2017 is claimed on foot of this account, together with further interest from 12 April 2017 at varying rates "full particulars of which have been furnished to the defendants". It is pleaded that this was an overdraft facility in the amount of €20,000 made available to the appellants jointly and severally dated 22 January 2009 the terms and conditions of which were accepted by the appellants on 4 February 2009.

3. The Summary Summons pleads that written demands for payment on foot of these accounts were made by the Bank on 12 December 2014 and 8 August 2016, despite which no payment was made, and that the total sum due and owing as at 12 April 2017 was €463,757.63.

4. The application for summary judgment was made on foot of a notice of motion issued on 30 June 2017 and grounded on an affidavit sworn on 26 June 2017 by Brian McGuinness, a manager of the Bank based at Bankcentre, Ballsbridge, Dublin 4. Mr. McGuinness exhibits the Bank's loan facility sanction dated 29 January 2009 ("the 2009 Loan Sanction"), which covers all three loans, and sets out the then applicable rates of interest. All three borrowings were stated to be "repayable on demand". Without prejudice to that the loan for €416,000 was repayable over six months by monthly payments commencing on 1 March 2009, with a final repayment of €418,159.01 on 1 July 2009.The lending was subject to "the enclosed general terms and conditions". The second loan for €204,000 was similarly without prejudice to being repayable on demand repayable over six months by monthly repayments with the final repayment of €205,058.75 on 1 July 2009. The overdraft was also "repayable on demand", but it was "the bank's present intention that the overdraft arrangement will outstand until further notice or until you wish to have it reviewed." It is notable that the term of the first two loans was very short, and, as emerged from later affidavits, this is because the 2009 Loan Sanction was a renewal of earlier loan sanctions originating in 2005.

5. The 2009 Loan Sanction set out a list of security required for the credit facilities. This included a mortgage from the appellants over 2 acres at Clonmore, Dromcollogher, being the lands described in Folio 53892F County Limerick, an assignment by the appellants over funds "in non-AIB for a minimum amount of €150,000", and assignments of various Life Policies. Immediately after the list of securities the Facility included the following underlined statement –

> "You must send a copy of this Credit Agreement to your solicitor as soon as possible so that your solicitor can advise you in relation to the execution of the mortgage."

6. The 2009 Loan Sanction was, on its face, accepted by both appellants on 4 February 2009 as evidenced by their signatures on the third page, and no issue was taken in relation to this. Their signatures also appear on other pages headed the "AIB Payment Protector Declaration" and "Direct Debit Instructions – Loan Repayment".

7. Mr. McGuinness then exhibits letters of demand dated 12 December 2014, and 8 August 2016 sent separately to each of the appellants, and again no issue was taken by the appellants with these demands.

8. Mr. McGuinness then exhibits a single page statement in respect of each account, giving a snapshot of the balance due at a particular time. In respect of the first loan account this shows that as of 3 March 2017 there was a sum due of €392,492.64, with the statement "balance excludes interest accrued since 16/09/2011 of €57,173.58", and a note at the bottom "Surcharges – see notice at branch". In respect of the second account the statement records a balance due as of 18 May 2017 of €6,846.57 with a note "Balance excludes interest accrued since 16/09/2011 of €997.30", together with a note at the bottom stating "Surcharges – see notice at branch". In respect of the overdraft account the statement refers to a balance due as of 7 February 2017 of €7,496.65 and notes "Balance excludes interest accrued since 16/12/2011 of €3,049.45" and again refers at the bottom to "Surcharges – see notice at branch".

9. It will be noted that the balances on these statements do not tot up to the sums set out in the Summary Summons. Mr. McGuinness avers at para. 7 –

> "I say that notwithstanding the said demands, the Defendants continue to be in default of repayment and I say that the amount of €466,757.63 remains due and owing by the Defendants jointly and severally to the Plaintiffs".

10. I pause here to say that had the appellants taken issue in the High Court with the level of particulars furnished in the Summary Summons it is likely that it would have been found wanting in several respects. In particular it gives no detail as to the earlier lending of which the 2009 Loan Sanction was a renewal; it fails to identify or plead the Terms and Conditions applicable to any of the lending; it refers to "full particulars whereof have been furnished to the defendants" but fails to identify the statements or other documents where these are to be found, and therefore falls short of incorporating Bank statements –

a shortcoming that is not made good by the one page statements exhibited by Mr. McGuinness. No particulars are given of the terms relating to surcharges or the sums claimed in respect of surcharge – again a deficiency not remedied by Mr. McGuinness' first affidavit. Had issue been taken it is more likely than not that the Bank would have been given an opportunity to amend/furnish fuller particulars.

11. A replying affidavit was sworn by the second named appellant ("Mrs. O'Callaghan") on 2 November 2019. She says that she is a nurse, and resides at Clonmore, Drumcollogher, County Limerick, and that she makes the affidavit on behalf of herself and on behalf of the first named appellant ("Mr. O'Callaghan"). In seeking a plenary hearing the gravamen of the proposed defences appears from the following three paragraphs: -

> "3. I say that at no time did I meet with any employee of the Plaintiff at the Branch in respect of the purported loans or purported mortgage. I say that I did not realise the import of the loan and mortgage documents which I signed. I say that I did not obtain independent legal advice and AIB failed to take any adequate steps to ensure that I fully understood the transaction and as a result the purported loans are, without prejudice to the position of the first named defendant, void and/or unenforceable as against your Deponent.
>
> 4. Furthermore, I say and believe that the Plaintiff owed your Deponent a duty of care in respect of ensuring I was fully aware of the consequences and import of documents I signed and in light of the foregoing I say and believe that the Plaintiff breached its duty of care to your Deponent. Furthermore, I say and believe that as a consumer I was entitled to the benefit of the Consumer Credit Act, 1995 which was not afforded to me. I say and believe that, as the Plaintiff had a duty to ensure that I obtained legal advice independent and discrete from that which I had received in the circumstances, any agreement or consent signed by your Deponent was invalid and/or void.
>
> 5. …
>
> 6. Without prejudice to the foregoing or any other defence raised, I say and believe that letters of demand issued to the Defendants referred to a rate of interest that is a penal and punitive generic rate, and not a genuine pre-estimate of loss arising from any alleged default and that the Plaintiff is not entitled to same if that has been applied. Furthermore, I believe a full breakdown in respect of same should be provided to the Defendants herein and clarity provided around the rate of interest charged."

12. A replying affidavit was also sworn by Mr. O'Callaghan on 2 November 2017. In this he describes himself as a "Poultry Farmer". It becomes apparent from his affidavit that the 2009 Loan Sanction was a restructuring of an AIB loan package originally put in place pursuant to a facility sanction dated 15 August 2005 ("the 2005 Loan Sanction"). In the most relevant parts of this affidavit Mr. O'Callaghan avers: -

“3. I say that these proceedings arise from a three-way loan package advised, recommended and arranged by the Plaintiffs Newcastle West Branch (hereinafter “the Branch”) in or around 2005/2006 and concerned development lands in Slovakia. I say that the second named Defendant, who is my wife, never attended the Branch to discuss the matter nor had she any involvement in the arrangement of the said Slovakian deal, save and except for signing documentation.

4. I say that in or around early 2005 I saw an advertisement in the Farmer’s Journal concerning farming opportunities in Slovakia. Having carried out some research into the opportunities arising I arranged to see the Assistant Manager in order to obtain advice and guidance with regard to investing in Slovakia and to establish what would be required for me to obtain the necessary finance. I say that ultimately the Plaintiff charged me a fee of €3,000 for this service.

5. I say that the only entity which I retained to advise me in relation to the said Slovakian deal was the Plaintiff of which the second named Defendant and I had been clients for the preceding twenty years. Subsequent to the sale of some farming land in 2004 the second named Defendant and I had extensive cash resources and our credit rating was G1, being the highest in the Plaintiff’s rating system. As Slovakia had recently joined the European Union and the Plaintiff was well-established in its neighbouring country Poland, I believed that the Plaintiff was well placed to offer me the advice and guidance I needed. I say that I had been engaged in farming all my life and had no experience or training in trans-national investment.

6. The said Slovakian deal on which I was advised by the Plaintiff involved three parts: first, the purchase of 20 acres of development lands; second, the rental of 1,100 acres of agricultural land and; third, the purchase of a yard associated with the said agricultural land together with 50 adjoining acres. I say that the intention was to develop approximately 80 houses on the said development lands and farm the rental lands while employing the said yard and adjoining acres in the process.

7. I say that I had been involved in farming for my entire life and had never engaged in property development or speculation however I wanted to provide for the future of my family and ensure the funds I had would be put to good use. At the time, our first child was suffering from significant health issues and spent the first three months of life in Crumlin Children’s Hospital and providing security for my family’s future was paramount in my mind at the time. In the circumstances I say and believe that insofar as the Consumer Credit Act, 1995 applies, I was at all material times a consumer as defined therein; however, I was not afforded the protections contained in section 30 thereof.

8. I say that AIB Mortgage Bank plc has also issued proceedings against the Defendants herein by way of Civil Bill for Possession entitled “The Circuit Court, Record No. 2015/00982 South Western Circuit County of Limerick, Between AIB Mortgage Bank Plaintiff and Thomas O’Callaghan and Mary O’Callaghan Defendants”

wherein it is seeking, *inter alia*, possession of your Deponent's and the second named Defendant's family home. I beg to refer to true copies of the Grounding Affidavit of Paula Duffy sworn on the 8th of May 2015 and the Supplemental Affidavit of Ken McCutcheon therein sworn on the 4th May, 2016 upon which, bound together and marked with the numbers and letters "TOC 1" I have signed my name prior to the swearing hereof. As can be seen therefrom I say that my consumer status is manifestly demonstrated by the fact that these Affidavits are concerned in such detail with the Code of Conduct on Mortgage and Arrears and the Mortgage Arrears Resolution Process contained therein.

9. I say that having obtained finance from Tatra Bank in Slovakia which was secured over the local assets, and the plaintiff agreed that its loans would be secured over Irish investment bonds and two acres of land with poultry buildings. I say that the said Assistant Manager also advised me to provide security in the form of a mortgage over my family home. I say that the second named Defendant and I were somewhat nervous of this proposal but the said Assistant Manager was robust in his approach to matters and strongly advised me to do so. I say that, while I engaged solicitors to assist me with the process, the second named Defendant obtained no independent legal advice."

13. Mr. O'Callaghan then exhibits an internal bank document obtained as part of a data request and headed "Extra EMS/Lending Information", prepared by the Newcastle West Branch of the Bank seeking approval of the loans in respect of the Slovakian deal. He avers that –

"10. I say that this document is replete with mistakes: first, it refers to purchasing 3,750 acres when in fact only a yard with 50 adjoining acres together with 20 acres elsewhere of development land were being purchased; second, it refers to borrowing from a bank in Vienna when there was no such borrowing; it goes on to say that '*Clients have already secured sanction via eqty top up with IIB for 320k*' which is incorrect as there was no such arrangement; thereafter it states that the deal represented a move to '*go to Slovakia in partnership with two other*' when there was never any partnership. The following comment appears at the end of the second paragraph: '*win the business from IIB*'. I say that at no time did I seek finance from IIB in respect of the said Slovakia deal and I believe that this misrepresentation was designed simply to obtain approval from senior bankers for the loan which had been recommended to me by the said Assistant Manager.

11. Finally, this document seems to state that the lender '*[s]ought an equity release from unencumbered pdh to put funds into new farming venture in Slovakia*'. I say that, while no such equity release on the family home was discussed, I believe that it demonstrates that AIB sought to have the family home provided in some way as security. I say that I never considered using the family home in such a way until it was recommended to me by the said Assistant Manager."

14. Mr. O'Callaghan next exhibits a further internal Bank document headed "*Incomplete Application – seek further information*" upon which he comments at paragraph 12 "This document indicates that the plaintiff was under the impression that IIB had a charge over the family home, which was incorrect". This document in part reads –

> "Presuming this PDH [Private Dwelling House] is unencumbered at the moment or are we clearing IIB home loan as well? Commercial deal here and brings gearing to a high level on PDH; any additional security on offer? Any detailed projections for farm business abroad?"

15. At paragraph 13 of his affidavit Mr. O'Callaghan states –

> "I say that at all material times the said Assistant manager was acting as my financial advisor regarding the said Slovakia deal. I say and believe that this can be seen from the fact that he supplied me with a reference for the said Tartra Bank recommending me for the credit facility they were considering offering me at the time."

He exhibits a letter dated 18 August 2005 on AIB notepaper signed by Mr. Pat Enright Assistant Manager of the Newcastle West Branch and addressed "To whom It May concern" concerning the proposed purchase by Mr. O'Callaghan of lands at "ING.VRANIAKOVA Samorin, Slovakia" and confirming that Mr. O'Callaghan and his family were long term customers of the bank, that over the years Mr. O'Callaghan has held substantial borrowings from the Bank all of which have been cleared on or ahead of schedule, that he currently has no borrowings "with ourselves or any other financial institution in this state", that "we have loan facility approved for equity investment into the above land purchase", that "he currently has in excess of EUR500,000 of cash investments with this office and other financial/insurance companies" and ending with a recommendation of Mr. O'Callaghan for "credit facility under consideration at your offices".

16. In paragraphs 14 and 15 Mr. O'Callaghan refers to a further document obtained through a data request, being a "memorandum dated 13 November 2005 from Mr. Pat Enright the assistant manager to BMS Mortgage Lending". This document describes the Slovakian deal as follows: -

> "11,000 acres involved in total productive/dairy/tillage farm proposed

- 3 way partnership with one other Irish farmer who is putting in EUR500K and Slovakian farm manager who will have 25% stake for running the operation. [Mr. O'Callaghan] will have 50% stake in the overall operation."

Mr. O'Callaghan avers that these statements are incorrect in that the farm size was 1,100 acres and there was no three way partnership "…as the business was entirely owned by your Deponent". He also takes issue with the statement on the second page of this document which referred to the loans being funded by "AIB home loan 350K equity

release costing 15K PA". Mr. O'Callaghan avers "that no equity release was ever considered as I believe this would have consisted of monies being made available to the Defendants herein in return for proceeds from the sale of the family home on our death". At para. 16 Mr. O'Callaghan avers –

> "I say that the recommendation in the said Memorandum states '*we feel our client would also accept home loan offer €300K should we wish to limit our exposure*'. I believe that this clearly demonstrates that it was the plaintiff which recommended the purported mortgage to the Defendants herein. I say and believe that the closing statement of the said document is illustrative of AIB's attitude to the application:

Like a lot of customers, [your Deponent] is looking at Eastern Europe, hence difficulty in getting exact fix on operations out there, we have to rely on his track record and asset base at home."

17. Mr. O'Callaghan goes on to aver that this "demonstrates the cavalier attitude which was taken by AIB and towards the Slovakia deal. I say that I went to AIB seeking advice, guidance and financing". He avers that the advice and guidance he received was flawed in that the bank did not carry out any real analysis or research into the deal. In para. 18 he avers that "the particulars of the proposed Slovakia deal were greatly exaggerated in the Plaintiff's internal documents and I believe that this was done to ensure that my application would be successful. I believe that the plaintiff had a duty especially in light of the fact that I was relying on its advice and guidance, to genuinely assess the loans and their merits and advise me accordingly."

18. In para. 19 of his affidavit Mr. O'Callaghan exhibits the 2005 Loan Sanction which sanctioned an overdraft of €20,000 and a term loan of €400,000. The Term Loan purpose is stated to be "Land Purchase", and to be repayable "over a thirty six months by Monthly repayments of EUR1343.92 commencing on the 1st November 2005 with a Final Repayment of EUR401,343.92 on 1st September 2008". The second page sets out various Special Conditions, four of which Mr. O'Callaghan asserts that AIB did not seek to enforce. Without identifying which conditions these were Mr. O'Callaghan avers that "this further demonstrates the substandard attitude taken by the Plaintiff to carrying out any due diligence regarding the venture on which it was advising the Plaintiff" (para. 19). The security listed included a mortgage of the appellant's property at Clonmore. At para. 20 Mr. O'Callaghan makes the following averment in support of his wife's proposed defence –

> "20. I say that at no time did the second named defendant meet with any employee of the Plaintiff at the Branch in respect of the purported loans or purported mortgage. I say, and believe and I am advised by her that she did not realise the import of the loan and mortgage documents which she signed. I say, believe and I am advised by her that the second named Defendant did not obtain independent legal advice and AIB failed to take adequate steps to ensure that the second named Defendant fully understood the transaction and as a result the purported loans are, without

prejudice to my own position, void and/unenforceable as against the second named Defendant."

19. In paragraph 21 Mr. O'Callaghan asserts that the bank owed the appellants "a duty of care in respect of the advice provided by its servants or agents" and that the bank breached its duty of care, and further that as a consumer he was entitled to the benefit of the Consumer Credit Act, 1995. At para. 23 he addresses the question of a surcharge interest: -

"23. Without prejudice to the foregoing or any other defence raised, I say and believe that the rate of interest the Plaintiff is seeking to charge the Defendants is a penal and punitive generic rate, and not a genuine pre-estimate of loss arising from any alleged default and that the Plaintiff is not entitled to same. Furthermore, I believe a full breakdown in respect of same should be provided to the Defendants herein."

20. To this a replying affidavit on behalf of the respondent was sworn on 2 April 2018 by Mr. Patrick Enright, the assistant manager at the Bank's Newcastle West branch at the relevant time. The relevant averments appear from paragraph 5 on –

"5. I say that the contention by the First Named Defendant that the Plaintiff in some manner acted as his adviser with regard to his investments in Slovakia, is not correct. Indeed, the first named Defendant, at paragraph 4 of his Affidavit avers to having carried out some research into the opportunities arising in Slovakia and indeed I recall the First Named Defendant mentioning the fact that he had made numerous trips to visit the properties and research the investment into same. Indeed, my recollection is that the first named defendant had previously bought and sold property, comprising in an apartment in Eastern Europe from his own funds. Additionally, the first named Defendant at all times had significant business experience in Ireland as a businessman and having extensively worked with Solicitors, Accountants, and Auctioneers, both in respect of his Irish properties and farm business and whereby I do not accept that the Defendant in any way came to the Plaintiff for advice in connection with the investment in Slovakia. Indeed the Defendants at all times were advised to obtain independent advice borne out by the fact that a firm of Solicitors were retained when executing the Home Mortgage offer.

6. Next, at paragraph 9 the first named Defendant in his affidavit confirms that before approaching the plaintiff, he secured finance in Slovakia from Tatra Bank and indeed the first named Defendant had by then secured such finance over the local investments and consequently again prior to making any approach to the Plaintiff or myself, the first named Defendant had determined to invest in Slovakia.

7. Again, my recollection is that the first named defendant was in other discussions with Banks in Eastern Europe and Slovakia to fund the investment projects.

8. I do not accept that the plaintiff in any of the documentation exhibited by the first named Defendant exaggerated the situation and again in this regard, the Plaintiff was reliant on the first named Defendant to advise it of what the nature of the investments were and what was being proposed in respect of same. As to the contention that the arrangement fee is indicative of the plaintiff billing for its advice, I say that this again is not the situation and the set fee arose from the cost of loan production, issue and fulfilment.

9. In the circumstances I do not accept that the defendants were consumers, again as contended for.

10. In the circumstances and where there is no denial by the defendants that they accepted the loan facility dated 29 January 2009 and where there is no denial that there has been a default in repayment of the monies so loaned and further where absolutely no detail is given as to the present status of the Slovakian investments, I say, and believe and I am advised that the Plaintiff is entitled to maintain these proceedings and the Application seeking liberty to enter final judgment."

21. The last piece of evidence before the High Court was a further affidavit sworn by Mr. O'Callaghan on 11 June 2018, in response to Mr. Enright's affidavit. At para. 3 Mr. O'Callaghan states –

"3. … While I say it is correct that I had previously bought and sold an apartment in Hungary, however, it appears that Mr. Enright is trying to portray your Deponent as some sort of property investment entrepreneur. I say that in reality, I merely saw an advertisement in The Farmers Journal regarding opportunities in Slovakia where after I did some research and sought advice and guidance from Mr. Enright. I say that I had never previously invested in such opportunities.

4. I say that while it is correct to say that I retained a firm of solicitors in respect of the home mortgage, this was put in place solely for the execution of mortgage documents. Furthermore, as set out in her Replying Affidavit, the second named defendant never had the benefit of independent legal advice.

5. I say and believe that the plaintiff is seeking to place an unfair burden on the Defendants as consumers. I respectfully submit that there is a positive duty on this Honourable Court to identify if the terms in the consumer agreements the subject matter of these proceedings are unfair and thereby contrary to the Unfair Contract Terms Directive 93/13/EEC. I say that without prejudice to any further defence or submission of the Defendants, in order for this to be conducted the matter should be adjourned to plenary hearing."

The High Court

22. Both parties were represented by senior counsel when the application for summary judgment proceeded in the High Court. In an *ex tempore* judgment delivered on 29 April

2019 the trial judge entered judgment against the appellants, having made the following findings in respect of the defences suggested on behalf of the appellants: -

(1) That nothing in terms of case law or otherwise substantiated the point that independent legal advice was either required or mandatory in respect of the loans so far as Mrs. O'Callaghan was concerned, and that the evidence that Mr. Enright had advised the appellants to obtain independent legal advice had not been contested.

(2) The claim that the sums included a surcharge of 12% which was penal or punitive was "a bald assertion", and not supported by any comparative evidence.

(3) That the appellants were not "consumers", as this borrowing was for investment and, as far as Mr. O'Callaghan was concerned, for actually farming the lands, applying a dictum of Kelly J. in *Allied Irish Banks plc. v. Higgins* [2010] IEHC 219.

(4) Without making any finding as to whether or not the appellants were "consumers" insofar as the family home was mortgaged to the respondent as part of the security, the trial judge noted that there was a separate claim by the Bank seeking possession of the family home pursuant to the mortgage, and that was a matter for those proceedings and not relevant to the claim for summary judgment.

(5) As to the argument that the Bank was acting as advisor the trial judge stated–

> "However, I am satisfied, when you look at all the evidence in the case and in particular his own affidavit that that is not the case; he went to the bank for a loan. His own affidavit establishes (a) that he had seen the ad in The Farmers Journal in respect of investments in Slovakia; (b) he had researched it himself; (c) he was the one who approached the Bank; and (d) he got a loan from Tatra Bank in Slovakia and that loan was secured over the assets for which the loan was bought. And in fact that's why it may well be that the assets here securing this loan were the Irish ones. But, as I say, he got the loan elsewhere."

(6) As to the internal Bank documents relied upon by the appellants, the trial judge found that "nothing in those documents support the contention that advice was being given by the Bank through Mr. Enright or otherwise." The trial judge was satisfied that Mr. O'Callaghan approached the Bank and put forward his proposition and that this was "an application for a loan that was to be made on the basis of the information that he was giving to the Bank and the information that the Bank was gathering".

(7) Apart from the reference to the Circuit Court proceedings in which possession was being sought of the family home, the trial judge found that there was no evidence of what loss the appellants were claiming in respect of the particular loans in question, and no evidence of "what happened to the asset in Slovakia".

(8) The trial judge noted that "the defendant has shied away from using the term 'reckless lending', and that that may well be because the law doesn't support such a claim. In any event the trial judge did not accept that the internal documents relied upon in any way established a suggestion of 'reckless lending'.

(9) In relation to the fee of €3,000 the trial judge was satisfied that there was no real dispute but that this was for the purpose of an arrangement fee.

Accordingly the trial judge concluded that there "is no *bona fide* defence to these proceedings" and judgment was entered accordingly, with a four month stay on execution only.

Notice of Appeal

23. The Notice of Appeal raises but three generic grounds of appeal : -

A. The learned judge erred in fact and in law in refusing to transfer this matter to plenary hearing.

B. The learned judge erred in law and in fact in failing, refusing or neglecting to find that the evidence contained in the Respondent's affidavits and exhibits thereto amounted to a *bona fide* defence.

C. Further, the learned trial judge erred in law and in fact in directing that judgment be entered against the Respondents in the sum of €466,757.63 or at all in circumstances where there were many substantive issues which gave rise to the need for viva voce evidence.

24. Despite the paucity of these grounds the appellants in written Submissions prepared by counsel sought to rely on most of the arguments that had been unsuccessfully pursued in the High Court, together with some additional arguments relating to particularisation and proof of claim in summary summons proceedings, based on the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84.

25. In recognition of the lack of specificity in the Grounds of Appeal, counsel (who did not appear in the High Court or draft the Notice of Appeal) relied on the dictum of Clarke J. (as he then was) in *IBRC v. McCaughey* [2014] 1 IR 749 where at para. 5.6 he stated –

"5.6 As was pointed out by this court in *Lopes v. Minister for Justice, Equality and Law Reform* [2014] IESC 21, in the context of an application to dismiss as being bound to fail under the inherent power of the court first identified in *Barry v. Buckley* [1981] I.R. 306, the courts, in hearing such applications, must be mindful of the fact that a party may, by a successful application, be shut out from having their claim determined at full trial, and are required to be more flexible in relation to the consideration of arguments or materials brought forward on appeal (see para. 9.1 of the judgment). It seems to me that like considerations potentially arise in the context of a summary judgment motion for precisely the same reason in that, if successful, the defendant will be shut out from having a full trial of the issues

raised by his defence. While it remains important that a defendant put forward his full case on the summary judgment motion, and while it follows, therefore, that the courts will be reluctant to allow a different or additional case (backed up by evidence) to be run on appeal, nonetheless, some proportionality between the consequences of granting summary judgment and the rigour with which the rules applicable to new evidence on appeal ought be enforced, needs to be achieved."

26. The present appeal is not one that is concerned with new evidence, but counsel relied on this statement to support his contention that this court should take a flexible approach, and entertain full submissions having regard to the significance for the appellants of having judgment marked against them.

27. The members of the court had, as is usual, read the papers in advance, including the appellants' written Submissions. It was also clear that, for the most part, the Bank would not suffer any prejudice were the court to hear the appeals based on the written Submissions because in large part they repeated arguments raised in the High Court, although the Bank did object to the appellants raising issues not raised in the High Court. The court was therefore prepared to take a flexible approach, and to take into account the oral and written submissions. The court might have taken a different view if the Bank had brought an application to dismiss the appeal on the basis that the Grounds of Appeal were entirely lacking in specificity; however, even if the Bank had done that the court might in all the circumstances have been disposed to grant the appellants leave to expand their grounds of appeal.

28. In taking this view the court is also conscious of dicta of O'Donnell J in Lough *Swilly Shellfish Growers Co-Op Society Ltd. v Bradley* [2013] IESC 16, in particular his comments on the constitutional requirement that there be an appeal, then from the High Court to the Supreme Court, now from the High Court to this court:

"[28] What the Constitution requires is an appeal which permits the Supreme Court to consider whether the result in the High Court is correct. The precise format and procedure of an such appeal is not dictated by the Constitution. While that object is often and best achieved by a careful analysis of argument in the High Court and the High Court's adjudication of said argument, it does not follow that the constitutional appeal must always be limited to that process".

While O'Donnell J went on to discuss the spectrum of cases in which a new issue is sought to be argued on appeal, it seems to me that this court should bear in mind the overall objective of affording an appeal, particularly where not hearing a particular argument, and dismissal of the appeal, will potentially have serious consequences for the appellants. In my view however this should not be taken as an indication that a flexible approach of this nature will be taken in other cases, and I would re-emphasise the importance of Grounds of Appeal setting out with particularity and precision the grounds that are to be relied upon.

The test for remitting to plenary hearing

29. There was no disagreement as to the threshold test for remitting a claim of this kind to plenary hearing. In *Aer Rianta cpt v. Ryanair Limited* [2001] 4 IR 607, at p. 614 McGuinness J. approved the test laid down in *Banque de Paris v. de Naray* [1984] 1 Lloyd's Rep. 21 in the following terms: -

> "The mere assertion in an affidavit of a given situation which was 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 was a fair or reasonable probability of the defendants having a real or *bona fide* defence."

McGuinness J. stated at p. 615 –

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

It is clear that the threshold is low. In the same case Hardiman J. put it thus (p. 623) –

> "In my view, the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?

The test was further helpfully summarised by *McKechnie J. in Harrisgrange Limited v. Duncan* [2003] 4 IR 1 at para. 9. It's not necessary to set this out in full but of note is that the court should exercise the jurisdiction to grant summary judgment "with discernible caution" and should look at "the entirety of the situation" and assess not only the defences raised but also the "cogency of the evidence adduced on behalf of the plaintiff".

30. As to the credibility of the defence raised, counsel relied particularly on the following quote from Clarke J. in *IBRC v. McCaughey* [2014] IESC 44 where it was stated –

> "5.4 It is important, therefore, to reemphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out *in Aer Rianta*, be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the Court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction identified in *McGrath*, the Court may come to a final resolution of such issues. That the Court is not obliged to resolve such issues is also clear from *Danske Bank v. Durkan New Homes*.
>
> 5.5 Insofar as facts are put forward, then, subject to a very narrow limitation, the Court will be required, for the purposes of the summary judgment application, to accept

that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence, are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or, facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta*. It needs to be emphasised again that it is no function of the Court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

31. Counsel on this issue also referred the court to the recent judgment of Collins J. in *Allied Irish Banks plc. v. Cuddy* [2020] IECA 211 where he stated: -

"67. The relevant test is not, at this stage, one of "*cogent evidence*" and/or "*written evidence*". It is, rather, whether "*credible*" evidence is before the Court in the particular sense indicated in the authorities. That is not to suggest that the absence of such documentary evidence is irrelevant; it may be a factor, and an important factor, in assessing the credibility of a defence but the absence of documentary evidence does not necessarily require that the court refuse leave to defend.

68. In addressing that test, it is evident from the authorities that mere "*assertion*" is not sufficient. Where precisely the line between credible evidence and mere assertion is to be drawn cannot, I think, be delineated *a priori*. Rather, a case-by-case assessment has to be made to decide on which side of the line any given case properly falls.

69. Ultimately, what the Court must ask itself is whether it "*very clear*" that there is no defence disclosed on the material before it."

32. The proposed defences raised in this appeal will now be addressed in turn.

The "Consumer" defence

33. The appellants contend that they have an arguable defence by reference to certain provisions of the Consumer Credit Act, 1995. In Part 3, Section 30 sets out various requirements for credit agreements, e.g. they must be in writing and signed by the customer, the customer must be given a copy, and there must be a ten day "cooling-off period". Section 38 provides that a creditor is not entitled to enforce a credit agreement unless the requirements set out in Part 3 are complied with, although there is a proviso that if a court is satisfied that any failure in compliance was not deliberate and does not prejudice the consumer, and that it would be just and equitable to dispense with the requirement, the agreement shall still be enforceable.

34. Section 2 of the 1995 Act defines "consumer" to mean "a natural person acting outside his trade, business or profession." This definition was considered by Kelly J. in *Allied Irish Banks plc v. Higgins & Ors* [2010] IEHC 219, in the context of borrowing for the purpose

of development, in that case blocks of apartments, commercial/retail units, a crèche and an underground carpark. Kelly J. stated –

> "85. 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.
>
> 86. 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."

35. The defence argument in that case was that the word "business" in the definition should be read in the singular.

36. Kelly J. considered that this argument ran counter to Council Directive 87/102/EEC of 22nd December 1986, as amended by Council Directive 90/80/EEC of 22nd February 1990, which contains the 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". Kelly J. did not consider that there was much difference between that definition and the one contained in the 1995 Act. Kelly J. also rejected a contention that the definition in the 1995 Act imposed, as it was permitted to do by EU law, a more stringent measure to protect the consumer, but this was rejected by Kelly J. in the following terms: -

> "94. 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.
>
> 95. 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.
>
> 96. 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).
>
> 97. 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."*

98. 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.

99. 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.

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

101. 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."

37. There is as yet no higher authority in this jurisdiction than the decision of Kelly J. in *AIB v. Higgins*. However counsel for the appellants did not seek to argue before the High Court that that case was wrongly decided. Counsel argued simply that the trial judge in the present appeal never determined the professional status of Mrs. O'Callaghan in her *ex tempore judgment*, and therefore failed properly to consider her professional status and by extension the professional status of both appellants. Rather, it was suggested, at para. 17 of the appellants' Submissions, that the trial judge "was more fixated upon the professional status of the first named appellant and his marital relationship with the second named appellant."

38. I do not think that this criticism of the trial judge is entirely fair. First of all it is clear from the *ex tempore* judgment that the trial judge had read the affidavits, including that sworn by Mrs. O'Callaghan, in which she states that she is a nurse. Secondly, in dealing with the "consumer issue", the trial judge notes "that there hasn't been an engagement by the defendants with the decision of Kelly J., as he then was, in *AIB v. Higgins*." She expressly accepted the logic of that decision that if it were decided otherwise then "every person who belongs to a trade or profession and they have decided to borrow money to invest it in promoting another business with a view to a profit would have to be treated as a consumer under the Act". She then proceeded to state that the appellants took out these loans as an investment –

> "…and in that sense they were not consumers. I would also say in terms of Mr. O'Callaghan, if he wasn't doing it as an investment, and if he was doing it to actually farm the lands, then he was obviously doing it for his trade or profession, but I don't have to go that far".

39. In my view it was not necessary for the trial judge, in deciding this issue, to make an express finding or declaration in her judgment as to the professional status of the second named appellant. It was sufficient for her to decide, as she did, that both appellants secured the borrowing for investment purposes, and that therefore they were not consumers.

40. There was also ample documentary evidence to support the trial judge's conclusion in this regard. The 2005 Loan Application was a joint one, as was the 2009 Loan Sanction, and the primary Term Loan of €400,000 was for "land purchase" and attracting a "premium business rate". The Term Loan was structured for repayment of modest monthly sums of €1,343.92 which appear to cover interest only, with a Final Repayment of €401,343.92. Special Condition 4 in the 2005 Loan Sanction refers to the pre-existing Eastern European bank loan approval "for the balance of the purchase price (€600,000) including all conditions", and Special Condition 9 requires "written confirmation that the purchase price of the property in Samorin, Slovakia is Eur 1,000,000". These are very strong indicia of borrowing for business/trade as opposed to borrowing as consumers. It is notable that while Mrs.O'Callaghan says she "did not realise the import of the loan and mortgage documents which she signed" she does not state that she did not read them, and she must, on the affidavit evidence, be taken to have read their contents.

41. The internal bank documents exhibited by Mr. O'Callaghan corroborate the business and investment nature of the lending. The Branch Recommendation Document refers to the requirement for "balance and surplus for working capital in venture" and that "clients have purchased dev land in Slovakia 700K loan 400K with AIB 300K Austria". It refers to "full plans of land which clients are getting involved in faxed… Mary is a full-time nurse and Tom is farming poultry…" Although some details in that document are incorrect, such as the size of the farm proposed to be purchased and the reference to partnership with others, it is abundantly clear that this is a business venture being undertaken jointly, albeit that Mr. O'Callaghan was taking the lead role. The document "Incomplete

Application – seek further information" also bears this out, raising the question "is this loan business will have to repay?" and a note "commercial deal here and brings gearing to a high level on PDH; any additional security on offer? Any detailed projections for farm business abroad?"

42. While Mr. O'Callaghan's affidavit focuses on the original borrowing in 2005, it is nowhere contested that the 2009 Loan Sanction was signed by the appellants and is the contractual basis for the indebtedness the subject matter of the Summary Summons; that it was a restructuring of the 2005 Loan Sanction, and that by extension it also therefore related to "Property Purchase"; and that it was a lending to both appellants' consequent on their investment.

43. At para. 19 of their written submission the appellants now submit that "… it is for this Honourable Court to determine if the interpretation rejected by Kelly J. is correct or not." It is further submitted that this court should make a reference to the Court of Justice.

44. In my view this submission is not tenable because of the evidence to which I have referred, and Mr. O'Callaghan's acceptance that he became interested in the investment following "an advertisement in the Farmer's Journal concerning farming opportunities in Slovakia" (para. 4 of his first affidavit) and his acceptance in the same paragraph, that he was "investing in Slovakia". This is particularly in light of the fact that Mr. O'Callaghan is a poultry farmer, and had been "engaged in farming all my life" (para. 5 of his first affidavit). He says that the intention was to develop approximately 80 houses on the development lands and "farm the rental lands while employing the said yard and adjoining acres in the process thereof" (para. 6). He thus had in contemplation two businesses. This is not contradicted by his averment that he "had no experience or training in trans-national investment" (para 5) which was not entirely true in that he accepts that he had invested in and sold an apartment in Hungary (para. 3 of his second replying affidavit). Stating this however does not involve any judgment of his "credibility". As a matter of law the trial judge was correct to decide that there was no credible argument that the appellants were "consumers" for the purposes of the 1995 Act. Even if the trial judge is to be criticised (and I am not to be taken as doing so) in referring to the appellants "who are husband and wife", and in not referring to Mrs. O'Callaghan's profession as a nurse, in my view the trial judge was correct to identify that these borrowings and the restructured borrowing was for business purposes. As is made clear by the ECJ in the *Benincasa v. Dentalkit*, the critical consideration is the "particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned". I am satisfied that in relation to these borrowings the appellants must both be considered to be "economic operators", and therefore engaged in business activity, and that they cannot be considered "consumers" within the meaning of the 1995 Act.

45. In furtherance of this argument the appellants also contend that the trial judge fell into error in finding that the proceedings in the Circuit Court seeking repossession of the appellant's family home were "an entirely separate issue". They note that the

respondents agreed to pause the repossession proceedings in respect of the family home pending the determination of the Summary Summons proceedings. As I understand one of their arguments, it is that this private family home element supported the contention that they were "consumers".

46. One of the securities in respect of the loans was a mortgage by the appellants over two acres at Clonmore, being the lands described in Folio 53892F County Limerick. I assume for the purposes of this argument that that includes the appellants' family home, and indeed that does not appear to be disputed by the Bank. However in my view that does not alter the character of the loans. The loan contracts were clearly for a business purpose, and not for private consumption, and, while the creation of the mortgage over the family home undoubtedly raised the stakes, it did not, in my view, alter the fundamental nature of the loans which was for investment/business purposes. There will be many occasions when, in order to obtain a loan to bolster a business, a person will be prepared to mortgage their family home, or to furnish a personal guarantee which, if enforced, may result in the registration of a judgment mortgage against a family home, but this cannot alter the nature and purpose of the original loan.

47. Before leaving this subject mention should be made of *Standard Bank London Limited. v. Apostolakis* [2002] CLC 933, where it may be said that the English Commercial Court took a slightly different view to that of Kelly J. in *AIB v. Higgins*. That was a judgment on certain preliminary issues in an application for summary judgment, one of which was whether or not contracts entered into between the parties were consumer judgments. The defendants, a Greek married couple, were a civil engineer and a lawyer. They entered into an agreement with the plaintiff bank whereby the latter was to purchase European Currency Units (ECU's) on their behalf in exchange for Drachmas. Unilateral action by the bank taken on foot of a devaluation of the Drachma resulted in litigation in both the Greek and English courts. In holding that the contracts were consumer contracts, Longmore J. proved that despite the size of the contracts the defendants had been acting outside their trade, business or profession. They were not engaged in the trade of foreign exchange contracts as such, but were simply disposing of income in the hope of making a profit. Longmore J. distinguished *Benincasa* on the basis that the factual situation was very different. He doubted whether the Court of Justice had intended to substitute the words "for the purpose of satisfying an individual's own need in terms of private consumption" for the definition in the Directive, which it will be recalled is "a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession".

48. *Standard Bank v Apostalakis* concerned a pure investment that was obviously outside the trade and profession of the defendants, and may therefore be distinguished on its facts. It may however be seen as taking a different approach to that taken by Kelly J in *AIB v Higgins* and generally followed in the Irish High Court. It seems to me that the correctness or otherwise of the decision in *AIB v. Higgins* will fall to be decided in an appropriate case. However this is not such a case because Mr. O'Callaghan was a poultry farmer who became interested in the Slovakian investment because of an advertisement

which he saw in the Farmers Journal and because he researched the opportunity himself and it involved the acquisition inter alia of 1,100 acres of agricultural land (rental) and the purchase of a yard with associated agricultural land with 50 adjoining acres, and that his intention was *inter alia* to farm the rental lands while employing the yard and adjoining acres in the process. These facts are very far removed from those in *Standard Bank v Apostalakis*.

Reckless lending

49. While accepting at para. 37 of their written submissions that this potential defence was not pursued by counsel before the trial judge, counsel for the appellants nevertheless sought to pursue it before this court. The difficulty faced by the appellants, which doubtless led to the matter not being argued in the High Court, is that no tort of 'reckless lending' is known to Irish law and this was squarely set out in *ICS Building Society v. Grant* [2010] IESC 17 where at para. 6 of his judgment Charleton J. stated: -

> "Here, what is asserted is some alleged wrong akin to reckless trading. I have no material whereby I could come to any such conclusion on this case since both the Plaintiff and the Defendant seem to have taken the same overvalued view as to the worth of the security. But, more fundamentally, the argued for tort of reckless lending does not exist in law as a civil wrong. It is not within the competence of the Court to invent such a tort. The Oireachtas could, if it saw fit, pass a law creating such a civil wrong. It is difficult to imagine the parameters of such a law since those who seek a loan will have a view as to what should be borrowed, and if the law is badly made by a bank, how can the issue of contribution be escaped from by the borrower who sought the money in the first place. Defining that civil wrong would tend to remove the presumption of arm's length dealing as between borrower and bank and replace it with a new relationship based on a duty of nurture that other common law countries do not see it as their duty to put into the marketplace as any argued-for law as to reckless lending does not appear in the works on tort that I have consulted from other common law jurisdictions."

50. Counsel nevertheless sought to argue that the issue of whether such a tort existed was "not closed", and suggested that it could arise in the present case for a number of reasons. He argued that a duty of care arose because of the special relationship that existed between the appellants and the Newcastle West Branch, and because of the particular knowledge that that Branch had of the appellants' affairs. He suggested that the letters of loan sanction were not consistent with the appellants' financial objectives, particularly having regard to the taking of security over Irish investment bonds, and the two acres of land with poultry buildings and their family home. Counsel argued that the taking of this security was not properly explained by the Bank to the appellants, not limited to Mrs. O'Callaghan, who had no meeting with any bank official prior to the original lending. Counsel in this regard also placed reliance on suggested breaches of the 'Code', by which he appears to refer to the Code of Conduct for Investment Business 2006 provided for by s. 117(1) of the Central Bank Act, 1989. Suggested breaches of the Code are set out in the submission at para. 32 where it is argued that the Bank –

(1) failed to act honestly and fairly in the best interests of the appellants;

(2) failed to act with due skill, care and diligence in the best interests of the appellants;

(3) failed to seek from the appellants information regarding their financial situations, investment experience and objectives;

(4) failed to make adequate disclosure of material information;

and,

(5) failed to comply with all applicable regulatory requirements so as to promote the appellants' best interests.

Thus it is argued that Mrs. O'Callaghan was never advised to obtain independent legal advice, and reliance is placed on the errors apparent from the internal Bank documentation exhibited by Mr. O'Callaghan. Reliance is placed on Mr. Enright's engagement with Mr. O'Callaghan, to the exclusion of Mrs. O'Callaghan, prior to the original loan offer. Counsel urged that for the purposes of assessing whether there is a "credible defence" the court should take the facts as deposed to by the appellants which it was submitted went beyond mere assertion.

51. As to the suggested riskiness of the investment, reliance was placed on a decision of Peart J. in *Komady Limited & Anor. v. Ulster Bank Ireland Limited* [2014] IEHC 325 – a case which was principally concerned with a Statute of Limitation point, but which arose out of, *inter alia*, the effect of the Code of Conduct for Investment Business 2006. At para. 12 of his decision Peart J. stated –

> "The Belgard Retail Development ("the development") was an important element in the plaintiffs' wealth. The plaintiffs did not wish to put the development at risk by getting into "high risk, unstable or complex financial products". The plaintiffs wished to ensure this by only entering into conservative financing arrangements and measures which were in their best interests. Specifically, the financial objectives identified by the plaintiffs to the bank were to minimise any future harm that might be caused by rising interest rates. They notified these financial objectives to the Bank, both orally at meetings and by email, in 2005. The plaintiffs relied upon the advice of the bank in relation to the Swap Agreements."

52. In my view the decision in *Komady* does not assist the appellants. It was a decision on a preliminary issue in relation to the Statute of Limitations, and concerned high risk 'Swap Agreements' sold to the plaintiffs by the defendant. The Code of Conduct for Investment Business 2006 applied to such investments. The plaintiffs in that case had also pleaded inducements, representations and warranties "as to the suitability of the investments for the plaintiffs in that case, and as to consistency with their financial objectives". Nothing comparable arises in the present appeal or is contained in the appellants' affidavits. Peart J. also had to determine a plea of fraudulent concealment for the purposes of s. 71(1)(b) of the Statute of Limitations 1957, and for the purposes of his decision Peart J. had

necessarily to accept that the relationship between the Ulster Bank and the plaintiffs was at all material times a fiduciary relationship, as pleaded.

53. The appellants have failed to satisfy me that the Code of Conduct for Investment Business 2006 could apply to the lending the subject matter of the present Summary Summons or the land purchase the subject of the lending. Furthermore, no fiduciary relationship existed between the appellants and the Bank. Indeed it is evident from the *ex tempore* judgment that in the High Court that the appellants accepted that in loan cases there is no fiduciary duty between the bank and the borrowers, save to the extent that such a duty might arise in certain guarantee cases.

54. It is also significant that Mr. Enright says at para. 5 of his affidavit that "the Defendants at all times were advised to obtain independent advice borne out by the fact that a firm of Solicitors were retained when executing the Home Mortgage Offer". This averment is not contradicted by Mr. O'Callaghan in his subsequent affidavit, or by any affidavit sworn by Mrs. O'Callaghan; they only go so far as to say that they never had the "benefit of independent legal advice". As I have previously noted in the 2009 Loan Sanction there is an express statement, on a page signed by the appellants on 4 February 2009, that –

> "You must send a copy of this Credit Agreement to your solicitor as soon as possible so that your solicitor can advise you in relation to the execution of the mortgage."

55. I am not satisfied that the appellants are able to show such special relationship or other factors as could ever give rise to an argument that a court could find a duty of care the breach of which gives rise to an entitlement to damages or other relief for 'reckless lending'. I don't see that the Code of Conduct for Investment Business 2006 can have any application, and even if it did it is well established that a breach of a consumer code is not actionable per se. The legal status of the Code of Conduct on Mortgage Arrears was considered by the Supreme Court in *Irish Life and Permanent plc v. Dunne* [2015] IESC 46, and in his judgment Clarke J. (as he then was) stated –

> "There is nothing in the legislation to suggest that it is the policy of the legislation that the courts should be given a role in determining whether particular proposals should be accepted or in deciding whether a financial institution, in formulating its detailed policies in respect of mortgage arrears and applying those policies to the facts of individual cases, can be said to be acting reasonably. Neither can it be said that the policy of the legislation requires that courts assess in detail the compliance or otherwise by a regulated financial institution with the Code. If the Oireachtas had intended to give the courts such a role then it would surely have required detailed and express legislation which would have established the criteria by reference to which the Court was to intervene to deprive a financial institution of an entitlement to possession which would otherwise arise as a matter of law."

That decision was applied by Meenan J. in *AIB Mortgage Bank and Allied Irish Banks plc v. Hayden* [2020] IEHC 442. Accordingly breaches of a code such as that under

consideration are not of themselves justiciable, although breaches of the Code of Conduct on Mortgage Arrears could have a bearing on a court's willingness to grant possession. However, and in this respect the trial judge was correct, these proceedings do not involve an application for repossession of a family home, and accordingly breaches of the Code of Conduct on Mortgage Arrears cannot afford the appellants any defence in law to the present proceedings.

56. As to the Code of Conduct for Investment Business, counsel relied on a statement of Peart J. at para. 17 of his judgment in *Komady* where he stated –

> "17. The Code, while not actionable *per se*, nevertheless informs the standard of behaviour expected of the bank in relation to the plaintiffs."

57. Counsel relied on this as one of the building blocks in the attempt to argue that a court may yet find a tort of 'reckless lending'. I reject that argument and endorse the views of Charleton J. that it is not within the competence of the courts to invent such a tort, and it would be up to the Oireachtas, if it saw fit, to pass a law creating such a civil wrong.

Independent legal advice

58. It is apparent from the *ex tempore* judgment that the High Court was urged to find a possible defence in relation to the absence of independent legal advice for Mrs. O'Callaghan. That particular argument was not pursued before this court. I have in any event already touched on it in the foregoing paragraphs, and for the sake of completeness would repeat that the ordinary relationship of lender and borrower that existed between the Bank and Mrs. O'Callaghan was not such as to give rise to a fiduciary relationship or any special relationship that would have mandated that she be advised to obtain independent legal advice before entering into the original or subsequent loan agreements. Furthermore Mr. Enright's averment that the appellants were advised to obtain independent legal advice is not contradicted. In those circumstances no *bone fide* or arguable defence is made out in respect of the alleged absence of any independent legal advice.

Particularisation of the claim

59. At paragraph 41 of their written submissions the appellants sought to argue that the Bank failed to comply with the requirements placed on it in respect of Summary Summons proceedings as set out in the decision of the Supreme Court in *Bank of Ireland Mortgage Bank v. O'Malley* [2019] IESC 84, and the earlier decision of this court in *Allied Irish Bank v. Pierce* [2015] IECA 87, regarding particularisation of the claim in the pleadings.

60. In *O'Malley* Clarke CJ was critical of the level of information in the Summary Summons and in the Statement of Account to which it referred. He stated at para. 6.7 –

> "6.7. But it does not seem to me to be too much to ask that a financial institution, availing of the benefit of a summary judgment procedure, should specify, both in the special indorsement of claim and in the evidence presented, at least some straightforward account of how the amount said to be due is calculated and whether it includes surcharges and/or penalties as well as interest."

61. The decision in *O'Malley* was handed down some six months after the decision of the trial judge in the present appeal. However, it was at all times open to the appellants to agitate any concerns they had as to the adequacy of the particulars endorsed on the Summary Summons in this case, before the High Court. As I noted earlier in this judgment the adequacy of particularisation of the claim in the Summary Summons was not raised in the High Court. Had it been raised – as it could have been under the Rules of the Superior Courts and existing jurisprudence on the level of particularisation required in a Summary Summons - it is likely that the trial judge would have afforded the Bank an opportunity to amend the Summary Summons and/or file additional affidavit evidence. A lack of particularisation was also not a Ground of Appeal. In my view therefore the appellants should not be permitted to raise this entirely new issue/argument at this stage. This is particularly so in circumstances where no denial is made in respect of the draw down of the sums borrowed originally in 2005, or the sums drawn down pursuant to the loan sanction dated 29 January 2009 upon which the proceedings are based or where the appellants have never claimed prejudice of any kind arising from the level of particularisation in the proceedings. Furthermore, as Clarke CJ. observes in para. 5.5 of *O'Malley* "…a court may be entitled to take into account, in assessing the adequacy of the manner in which a debt claim is particularised, any documentation which has been sent to the defendant in advance of the commencement of the proceedings." The court was therefore entitled to take into account the three bank statements exhibited by Mr. McGuinness in his first affidavit. Minimalist as they were, they do on their face indicate that they were addressed to the appellants, they all bear the date 1st June 2017, and they set out the balances due as at that time.

Surcharge

62. While I am satisfied that the appellants cannot rely on a standalone *O'Malley* type defence to seek a plenary hearing or remittal of the application for summary judgment to the High Court, the position might have been different if the Bank was persisting in its claim to recover a surcharge from the appellants. In respect of each account the Special Endorsement of Claim refers to principal and interest due "full particulars of which have been furnished to the defendants", but does not itself set out the contractual basis for surcharges, or particulars of interest. The one page bank statements exhibited by Mr. McGuinness in respect of each account give a balance due and state that this excludes interest accrued since a particular date, and as to surcharges says simply "Surcharges – see notice at branch". There is no particularisation of interest or of surcharge interest.

63. In his replying affidavit Mr. O'Callaghan does raise an issue on this at para. 23 –

> "Without prejudice to the foregoing or any other defences raised, I say and believe that the rate of interest the Plaintiff was seeking to charge to the defendants is a penal and punitive generic rate, and not a genuine pre-estimate of loss arising from any alleged default and that the plaintiff is not entitled to same. Furthermore, I believe a full breakdown in respect of same should be provided to the Defendants herein."

This may fairly be taken to be a reference to surcharge interest. The trial judge did not consider that this gave rise to a *bona fide* defence. It appeared that counsel for the appellants relied upon a 12% surcharge rate in the High Court. It is not clear where this rate originates because the Bank's General Terms and Conditions Governing Lending, as referred to in the 2009 Loan Sanction, were not exhibited. At any rate the trial judge referred to this claim as being "solely claimed that this 12% surcharge, when taken in particular with the 6% or so base interest rate, is penal and punitive", and took the view that there was no evidence to substantiate such a claim (such as comparative evidence from other lending banks operating in the area), and that the defence raised was essentially a bald assertion.

64. There is certainly plenty of authority to suggest that default surcharges well below 12% would constitute unlawful penalty clauses and be struck down. In *ACC Bank plc v. Friends First Managed Pension Funds Ltd & Ors.* [2012] IEHC 435, Finlay Geoghegan J. struck down a surcharge interest rate of 6%, and in *Sheehan v. Breccia and Ors.* [2016] IEHC 67 I struck down a surcharge of 4% in a term loan facility entered into with Anglo Irish Bank in 2006. The extent to which comparative or expert evidence might be required, at a summary judgment stage, to support a claim that a surcharge is penal where the applicable rate is 12%, must be doubted.

65. However there is no need for this court to concern itself with the surcharge issue because, in the course of the hearing before us, counsel on behalf of the Bank indicated that it was waiving any claim in respect of surcharge interest included in the amounts claimed. Counsel advised the court that the element of surcharge was extremely small, being a total of €400.89 across the three accounts. While the court accepts at face value what it has been advised by counsel, in my view this should be vouched on affidavit: the appellants are entitled to have particulars of the revised interest calculations verified on affidavit sufficient to demonstrate where the surcharges were made, and where they are now being deducted, and sufficient to discharge the onus of proof on the respondent to satisfy the court that not only is there no surcharge included in the final figures in respect of which judgment is sought, but also that the surcharges did not lead to further compounding of interest.

Conclusion

66. I am not satisfied that the appellants have made out any *bone fide* or credible defence. As the figure in respect of which judgment should be entered now changes by reason of the respondent's waiver of surcharge, I would direct that the respondents file and serve an affidavit setting out the recalculated principal and interest exclusive of surcharge in accordance with the comments set out in the preceding paragraph. This should be done within 21 days from the date of delivery of this judgment. Should the appellants wish to contest the contents of this affidavit or file any further affidavit in response thereto, they will have 21 days to file such affidavit or file further submissions in the Court of Appeal Office. If required the court will then determine the amount in respect of which judgment is to be ordered against the appellants unless it considers that a further hearing is required. I would therefore dismiss this appeal and affirm the order of the High Court

save insofar as adjustment to the amount of the judgment is required by the deduction of the surcharge interest.

Costs

67. The respondent will have 21 days from the date of delivery of this judgment to file a submission in writing not exceeding 1000 words in respect of costs. The appellants will have 21 days thereafter in which to file a reply submission, on receipt of which the court will determine the costs without further hearing.

Having read this judgment Mr. Justice Murray and Ms. Justice Pilkington have indicated that they are in agreement with same.