THE COURT OF APPEAL

Woulfe J.

Murray J.

Ní Raifeartaigh J.

Neutral Citation No.: [2022] IECA 288

Court of Appeal Record No.: 2018/132

High Court Record No.: 2015/594S

Between

AIB MORTGAGE BANK AND EVERDAY FINANCE DAC

Plaintiffs/Respondents

-and-

ELAINE HEFFERNAN

Defendant/Appellant

-and-

Between

ALLIED IRISH BANKS PLC AND EVERYDAY FINANCE DAC

Plaintiffs/Respondents

-and-

ELAINE HEFFERNAN

Defendant/Appellant

JUDGMENT of Mr. Justice Woulfe delivered on the 14th day of December, 2022

Introduction

1. These are the appellant's appeals against the judgment of the High Court (Noonan J.) delivered on the 14th March, 2018, and his orders made in consequence thereof on the same date. By his order in the above first entitled proceedings ("the Mortgage Bank proceedings") the learned trial judge acceded to the first named respondent's motion for liberty to enter final judgment against the appellant in the sum of €844,737.54, and also granted the first named respondent the costs of that motion. This was subsequently amended by further order of Noonan J. dated the 16th May, 2018, by substituting the sum of €602,883.95 in place of the sum of €844,737.54. By his order in the above second entitled proceedings ("the PLC proceedings"), the learned trial acceded to the first named respondent's motion for liberty to enter final judgment against the appellant in the sum of €242,292.98, and again granted the first named respondent the costs of that motion.

2. The appellant was a litigant in person at the time the two motions came on for hearing before the High Court, but she instructed solicitor and counsel prior to her appeals coming on for hearing before this Court.

3. By orders of this Court dated the 19th March, 2021, Everyday Finance DAC ("Everyday") was added as a co-respondent to the within appeals, on the grounds that the facilities the subject of the High Court judgment and of these appeals had been transferred and assigned to it by the first named respondent in each case.

Background

4. The appellant was previously a part-time teacher and also involved in health and safety training. In or about 1994 her father gifted her approximately 22 acres of agricultural lands at Corrogemore, County Tipperary, which adjoined lands that were being used as a quarry by a

concrete company. In or about January, 2006 her accountant contacted a bank official, Mr. Declan Ryan, who worked at the AIB branch at Cashel, County Tipperary, with a view to the AIB ("the bank") granting facilities to the appellant for a project to develop a quarry on her lands.

5. The appellant met with Mr. Ryan on a number of occasions to discuss the project. She commissioned a "sand and gravel resource assessment" from Fehily Timoney & Co., which was issued to her on 1st June, 2006. The report concluded that as the probable working area for the site was under five hectares, a full environmental impact assessment should not be necessary. It recommended that an assessment of the economic viability of the resource should be made, further to which a planning application and environmental report should be prepared.

6. The Fehily Timoney & Co report appears to have inspired great confidence with the bank, and to have triggered the first loan facility which was made available to the appellant. The appellant exhibited a note from Mr. Ryan recommending sanction of facilities, which is undated but clearly follows that report. In his note Mr. Ryan states that "full planning permission will be granted". He adds that on receipt of full planning permission the land will be worth "min 5M" with the appellant keeping her options open at that stage as to which way she would then proceed, either in terms of selling the land, retaining and leasing the land as a quarry for a five to seven year period, or developing the quarry herself.

7. The above was the background to the first loan facility made available to the appellant by the bank, on foot of a facility letter dated the 13th June, 2006, which facility appears to have been restructured by way of a credit agreement dated the 27th October, 2006. Under this agreement the bank agreed to advance the amount of €350,000.00 until the 26th April, 2008, the expiry date, on which date the credit facility was to be repayable by a single payment of €376,425.11. A special condition provided that drawdown for quarry development was to be by way of stage payments against engineer's certificates for work completed.

8. It appears that the appellant regularly drew down sums on foot of this loan facility to discharge debts arising from the property, including engineer's fees and solicitor's fees and costs of reports, up to a sum of approximately €201,500.00. This loan facility was subsequently restructured on a number of occasions, including in November 2007, August 2008 and September 2010. By the summer of 2010 the entire property market had collapsed, including the market for quarries. The appellant avers on affidavit that by late 2010 the bank had made it clear that they would not advance her the monies necessary to finish the quarry development, and that without the further monies which the bank had previously agreed to advance to her she was unable to complete the works required to complete the quarry development. The bank denies this and states that if the appellant was unable to complete the quarry development, this was due to her own failure to meet her repayment obligations under the restructured facility.

9. No further repayments were made in respect of the restructured facility after October, 2013, and the bank called in the loan by letter of demand dated the 28th July, 2014.

10. Returning back to 2006, it appears that during their initial meetings Mr. Ryan suggested to the appellant that she should look at other investments, and that the bank considered her to be a good risk, as she owned approximately 22 acres which could have a value of up to €5M as a quarry. The appellant avers on affidavit that the bank advised that she borrow the monies on an interest only basis, and that she could repay all the monies once planning permission was obtained for the quarry. She states that it was on foot of these representations by the bank that she borrowed monies to buy three investment properties during the period from January to November, 2007.

11. These three buy to let mortgages were each for a period of 25 years, and were repayable on a tracker buy to let interest only basis for the first three years. The appellant avers on affidavit that it was always accepted by the bank that her only capacity to repay these loans on a long term and ongoing basis was going to be by obtaining planning permission and ultimately selling the

quarry. She states that on one occasion she did question Mr. Ryan as to what would happen if she did not obtain planning permission, and he assured her that the bank would always work with her, that they viewed her as a shrewd operator, and even without planning permission the bank was well covered and she did not need to worry. She avers that she absolutely relied upon this assurance and promise, as her real concern was that by then she was the primary provider for her infant daughter.

12. Following the recession and the property crash the appellant was unable to meet the repayments on these buy to let mortgage loans, and ultimately AIB Mortgage Bank called in these loans by letters of demand dated the 28th July, 2014.

13. The last facility the subject of these proceedings is an overdraft facility, which the bank made available to the appellant by letter of sanction dated the 18th August, 2009, in the sum of €3,000.00, subject to certain terms and conditions. The bank called for repayment of the amount then due and owing by letter of demand dated the 28th July, 2014.

The High Court Proceedings

The Mortgage Bank Proceedings

14. The Mortgage Bank proceedings were commenced by summary summons dated the 30th March, 2015, wherein AIB Mortgage Bank claimed judgment in the sum of €843,462.44 pursuant to the three mortgage loans referred to above. The matter came before the Master of the High Court pursuant to a notice of motion issued on the 22nd May, 2015, seeking liberty to enter final judgment, and was transferred to the Judge's list.

15. A series of affidavits were exchanged between the parties during the course of the proceedings, and in the course of same the appellant sought to raise an arguable defence and have the proceedings sent forward for plenary hearing. In her first affidavit sworn on the 18th November, 2015, the appellant refers to the representations allegedly made by the Bank before

she borrowed these monies, as set out at para. 10 above. She states that obtaining planning permission for the quarry formed the basis for the investment mortgage funds which were released to her, and she refers to promises made to her in 2007 that the property loans would only be repaid once she had secured planning and/or the sale of the quarry.

16. In a replying affidavit sworn on the 23rd March, 2016, Declan Ryan denies these assertions. He states that the mortgage funds were released based on the terms and conditions set out in the letters of sanction. While he accepts that the bank was enthusiastic about the appellant's plans to develop a quarry, he wished to make it perfectly clear that the loans, the subject matter of the within proceedings, have nothing whatsoever to do with the development of a quarry. On the contrary, the three loans in suit are mortgage loans which were offered to the appellant to fund the acquisition of investment properties.

The PLC Proceedings

17. The PLC proceedings were also commenced by summary summons dated the 30th March, 2015, wherein Allied Irish Banks PLC claimed judgment in the sum of €241,054.94, being the total sum claimed due and owing by the appellant pursuant to the quarry loan facility and the overdraft facility. Again, the matter came before the Master of the High Court pursuant to notice of motion issued on the 22nd May, 2015, seeking liberty to enter final judgment and was transferred to the Judge's list.

18. Again, a series of affidavits were exchanged between the parties during the course of these proceedings, and in the course of same the appellant again sought to raise an arguable defence and have the proceedings sent forward for plenary hearing. In her third affidavit sworn on 29th November, 2017, the appellant avers that she believes and is so advised that the facts in these proceedings and in the Mortgage Bank proceedings are so inextricably linked that they cannot be looked at as different loans, but are facilities made available on the strength of the

potential quarry project. She suggests that the plaintiff has sought to make an arbitrary distinction between them, but she states that to do so would not identify the reality of her personal situation at that time.

The High Court Hearing and Judgment

19. The first named respondent's motions for liberty to enter final judgment came on for hearing before Noonan J. on the 14th March, 2018. In advance of dealing with same Noonan J. made orders in both cases allowing the appellant's solicitors to come off record. In the light of same the appellant protested about the motions proceeding to hearing, on the basis that she had no legal representation and was prejudiced. Noonan J. ruled, however, that he had adjourned the motions on a peremptory basis on the last occasion they were listed, when he had allowed the appellant's previous solicitors to come off record, and therefore the motions had to go on.

20. The hearing of the two motions then commenced, and counsel for the first named respondents made some opening submissions. The appellant was then invited by the trial judge to address him, and she asked if she could read through a few points for each of the cases. On being told that she could make any points she wished, she stated at the outset that she was doing so "for" the PLC proceedings. The appellant's first submission was that in all of these matters she was a "consumer", and the loan contracts contained unfair terms as per the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995("the 1995 Regulations"). The loan facility was repeatedly rolled over on pro forma contracts, with no time allowed to her side to discuss interest rates or terms, and with no requirement for legal advice when she signed these various rolled-up loans.

21. The appellant's next submission was that the bank had abused their position of power, by refusing to allow her to draw down the balance of her loan facility in 2008, which she needed in order to apply for planning permission, and further by the manner in which the loans were

restructured. She submitted that various bank employees should be cross-examined in relation to oral advice given to her over the years. She complained about the bank calling in the loans and not participating in mediation. She submitted that the purported contracts which the bank was relying on were neither signed nor stamped, and thus were not legally binding. She queried the employment status of two of the bank's deponents.

22. In reply counsel for the first named respondents dealt first with the "consumer" point. He submitted that it was not disputed that the purpose of the loan was to develop a quarry, which is in the nature of a commercial endeavour. As regards unfair terms, he submitted that the thread running through all of the cases is that one has to actually identify a term which is unfair. In this case the 2010 restructuring was in ease of the appellant, because instead of the loan being a short term loan or an on-demand facility, it was a term loan over a long term that would give the appellant a chance to pay off the indebtedness by instalments. As regards signing the loan contracts, he noted that the mortgage bank loans were signed not just by the appellant, but signed by her in the presence of a solicitor acting for her at the time. As regards the employment status of the bank's deponents, he noted that both witnesses had averred as to their employment status and one had exhibited a letter to corroborate that.

23. After counsel had finished his submissions the trial judge asked the appellant a couple of questions, and he then proceeded to deliver his *ex tempore* judgment. He first set out the background to the proceedings. He referred to the appellant's point about the fact that the bank did not sign one of the loan contracts. He held that where the party to be charged in this case, the appellant, has signed the contract, it was immaterial that the other party to the contract did not sign it, as it is nonetheless plainly enforceable.

24. Noonan J. then turned to what he described as the core point relied upon by the appellant, that it was represented to her that these loans would only be repayable on the basis that she did in fact get planning permission for the quarry, and that this was a term of the loan contracts which

rendered them now unenforceable. He noted the bank's argument that the fact that the appellant sought to restructure her loans again in 2014, after they were ultimately called in, was inconsistent with the suggestion now made by her that they were not repayable at all in circumstances where the quarry had not got off the ground. He noted the Bank's further point that this putative defence was only raised by the appellant for the first time in November, 2015, despite the facts that demands for repayment had been made in March, 2014 and a receiver appointed in March, 2015.

25. The trial judge then referred to the well settled principles governing the exercise of the Court's jurisdiction to grant summary judgment. The test is that the defendant had to demonstrate that he or she has a fair or a reasonable probability of having a *bona fide* defence. He noted that 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.

26. Applying those principles to the facts of this case, Noonan J. held that the documents executed by the appellant herself were entirely at odds with the suggestion that the contract was, in fact, not as set out in those documents but consisting of something quite different. Not only was the appellant's assertion contradicted by the written documents, it was also contradicted by the subsequent conduct of the appellant in relation to the negotiations in 2014, the demand letters and the appointment of the receiver. It therefore seemed to him that the appellant's assertion could not, as a matter of law, amount to a fair or reasonable probability of having a *bona fide* defence.

27. Noonan J. did not consider that any of the other points raised by the appellant disclosed even an arguable defence. He held that there was no obligation on a lender to ensure that a borrower has legal advice before entering into a contract. As regards the consumer/unfair terms

point, he felt it was questionable whether the appellant entered into these contracts as a consumer at all, as given the nature of the transactions these were sophisticated investment arrangements. In any event, having examined the terms of the contracts that were before the court, Noonan J. could discern no term which could be deemed to be unfair, even in the event that the appellant was considered to be a consumer.

28. The trial judge was satisfied in all the circumstances that the appellant had not demonstrated that there was any fair or reasonable probability of her having a *bona fide* defence, and therefore he was obliged to the accede to the application for judgment in this case. After he granted judgment in each of the two cases the appellant stated that she had other submissions to make in the Mortgage Bank proceedings, and she had just read out her points in the PLC proceedings, as she had said at the beginning. She just did not get the opportunity to go on to the Mortgage Bank proceedings. The trial judge stated that he had already given his judgment, and he could not rehear the matter. He thought it was very clear to everybody that he was dealing with both cases as one, and counsel for the bank was dealing with both cases as one, so he was afraid that it was too late now to rehear the Mortgage Bank matter.

Notice of Appeal

29. The appellant filed a notice of appeal to this Court on the 4th April, 2018, while a litigant in person, and set out eleven grounds of appeal. At the hearing of the appeal, however, counsel appeared on behalf of the appellant and at the outset helpfully identified five main net issues which she would be addressing. In addition, during the course of the hearing, in exchanges with members of the court, she stated that she was still pursuing certain other grounds of appeal. I will turn to all of these issues shortly but it is necessary, firstly, to refer to the legal principles by reference to which a case such as this falls to be determined.

The Legal Principles

30. In *Promontoria (Arrow) Limited v. Burke* [2018] IEHC 773, Barniville J. set out the following very useful summary of the applicable legal principles, which I gratefully adopt:-

> "14. The legal principles governing the exercise of the court's jurisdiction to grant summary judgment are "well settled" (per Clarke J. in the Supreme Court in *IBRC Limited v. McCaughey* [2014] 1 I.R. 749 ("*McCaughey*")). They have been set out, discussed and applied in numerous judgments of the Superior Courts in recent years. I think it is fair to say that there was no real dispute between the parties as to the test to be applied.
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> 15. The essence of the test was succinctly stated by Hardiman J. in the Supreme Court in *Aer Rianta CPT v. Ryanair Limited* [2001] 4 I.R. 607 ("*Aer Rianta*"), as follows:
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> > '…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?' (per Hardiman J. at 623).
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> 16. Having noted that earlier cases such as *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75 ("*Anglin*") focused on the issue of the credibility of the defence raised by the defendant in ascertaining whether there was a "fair or reasonable probability" of the defendants having a "real or *bona fide* defence", Hardiman J. noted that the issue of credibility arose very starkly in the cases referred to in *Anglin* and that ultimately the fundamental questions to be determined on an application for summary judgment were as set out by him. In the Supreme Court in *McCaughey,* Clarke J. reemphasised what is meant by the "credibility" of a defence. He stated:
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> > '(22) 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 v. O'Driscoll*…[2007] 1 ILRM 203, 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 a/s (t/a National Irish Bank) v. Durkan New Homes* [2010] IESC 22… (Per Clarke J. at para. 22, p. 759).'

17. Clarke J. continued:-

'[23] 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.' (Per Clarke J. at para. 23, p. 759).

18. This approach, derived from well-established authority, has been regularly and consistently applied by the Superior Courts."

The Five Net Issues on Appeal

31. As mentioned earlier, five net issues were identified by counsel for the appellant at the outset of this appeal. I propose dealing with each issue in turn.

The First Issue

32. The first issue put forward was described as a procedural argument, relating to the applications which were made on the hearing date by the appellant's solicitors to come off record, and the subsequent refusal of an adjournment. There were a number of limbs to this procedural argument. Firstly, the appellant made a technical argument that the appellant's former solicitors had never in fact validly come off record in the Mortgage Bank proceedings. This was on the basis that the name of the plaintiff in the title of the relevant notice of motion and grounding affidavit was "Allied Irish Bank PLC", rather than "AIB Mortgage Bank". I am, however, satisfied that any such typographical errors in the title of the motion papers was superseded by the relevant order of the High Court dated the 14th March, 2018, the title of which order bears the correct name of the plaintiff in those proceedings and which order has not been appealed.

33. Secondly, it was submitted that the trial judge erred in refusing to grant the appellant an adjournment after allowing her solicitor to come off record, and that it was inherently unfair to require the appellant to represent herself with very little time to prepare. I am satisfied that this is not a good ground of appeal. It is well settled that a trial judge has a wide discretion in deciding whether or not to grant an adjournment, and that an appellate court will be very slow to interfere with the exercise of that discretion, and will only do so where, for example, the decision is clearly shown to be unfair or unreasonable. In the present case the trial judge had granted the appellant an adjournment on a previous hearing date in October, 2017, when he allowed other former solicitors of hers to come off record, but had granted the adjournment on a peremptory basis as against the appellant, meaning that the case would have to go ahead on the next hearing date and

would not be adjourned again. In those circumstances the refusal of another adjournment could not be viewed as in any way unfair or unreasonable.

34. Thirdly, the appellant submitted that this matter was surrounded by fundamental unfairness, in terms of her right to a fair hearing and fair procedures. There was a specific complaint about the fact that the appellant started her submissions in the PLC proceedings, but then could not make additional submissions regarding the Mortgage Bank proceedings, as the trial judge's decision had already been made. As regards the general complaint, it is clear from the transcript that the trial judge had read all of the affidavits filed by the appellant, that he told her she could make any points she wished, and that he engaged fully with all of the points which she did make.

35. The specific complaint of unfairness requires more detailed consideration. It is true, as set out above, that the appellant stated at the outset of her submissions that her points were for the PLC proceedings. It is also true that, after the trial judge gave his *ex tempore* judgment, she was not permitted to make other submissions in relation to the Mortgage Bank proceedings. Notwithstanding same, I do not think that there was any breach of fair procedures for the following reasons:

(a) Most significantly, in my opinion, the appellant at the hearing failed to identify any specific argument arising separately in the Mortgage Bank proceedings which she was unable to make separately under the heading of the Mortgage Bank proceedings. So, based upon the case as made by her on appeal, it appears that everything she wanted to say about the Mortgage Bank proceedings had been said. It is hard to see how, in those circumstances, there was any breach of fair procedures.

(b) It is clear that there was a very significant overlap between the issues arising in both sets of proceedings. Indeed, the appellant herself made a similar averment on affidavit in each case that the facts in the two proceedings were so inextricably linked

"that they cannot be looked at as different loans but are facilities made available on the strength of the potential quarry project". The appellant's averments overall were very similar, and to a large extent identical. If the appellant wished to raise a separate ground of defence in the Mortgage Bank Proceedings, then the general rule is that this should have been identified by her via her affidavits in those proceedings: *Onyenmezu v Firstcare Ireland Limited* [2022] IECA 11, at paras. 24 – 29.

(c) The submissions made by the appellant under the heading of the PLC proceedings, as summarised at paras. 20 and 21 above, all applied equally to the Mortgage Bank proceedings, with the exception of the submission regarding alleged abuse of power regarding drawdown and restructuring. Her submissions did not include any submissions regarding the Bank's alleged representations that the investment loans would only be repayable on the basis that she did in fact get planning permission for the quarry, which seemed to Noonan J. the core issue in the case. Notwithstanding same, Noonan J. engaged fully with this issue in his judgment, and he sets out clearly the arguments made by the appellant in her various affidavits.

The Second Issue

36. The second issue relied upon by the appellant was described as another procedural argument, relating to the sum claimed in the summary summons in the Mortgage Bank proceedings. It was submitted that counsel for the respondent never referred to the sum being claimed when opening that case, that it was a type of floating sum, and that the trial judge did not check the proofs to see if the evidence substantiated the sum claimed before granting judgment.

37. In my opinion these submissions are misconceived. While it is true that the trial judge did not require counsel for the Bank to take him through the essential proofs during the oral hearing of this application, he made it clear that he had read all of the papers. These papers

included a grounding affidavit on behalf of the Bank, with affidavit evidence as to the amount due on foot of the three investment loan facilities, which amount was slightly higher than the amount claimed in the summary summons which issued a couple of months earlier, in circumstances where interest had continued to accrue, which explained why the amount was slightly higher.

38. The trial judge was entitled to accept this *prima facie* evidence as to the amount due, in the absence of a *bona fide* dispute as to same. While the appellant did query (in her affidavit sworn on the 29th November, 2017) whether the second and third facilities had remained subject to a tracker interest rate, Ms. Collette Rooney then swore a replying affidavit on the 12th February, 2018. In that affidavit she averred that the appellant's loans were subject to a tracker interest rate that remained applicable at the date of swearing her affidavit, and that from a review of the appellant's file there was no evidence that the appellant was ever taken off a tracker rate. These averments were not subsequently controverted by the appellant.

39. At the end of the hearing counsel for the Bank mistakenly pointed the trial judge to the earlier sum evidenced in the first named respondent's grounding affidavit, rather than the lower sum evidenced in Ms. Rooney's subsequent affidavit, after the debt had been reduced after the motion issued by reason of the sale of secured property. This incorrect sum originally became the judgment sum, but the judgment sum was later amended by order of Noonan J. dated the 16th May, 2018, pursuant to the "slip rule".

40. In my opinion the trial judge was entitled to find that the proofs as regards the sum claimed were in order from reading the papers, and it was not necessary for counsel for the bank to take him through the proofs by way of oral submission. In the circumstances this ground of appeal must fail.

The Third Issue

41. The third issue advanced by the appellant was again described as a procedural matter, relating to the status of the appellant. She complains that the trial judge described her as sophisticated, whereas in fact she was a consumer when she took out these loans, acting outside of her business or profession. She relied on the fact that the respondent had deemed her to be a consumer in a credit report submitted to the Central Bank, and in the letters of demand sent to her in respect of the three investment loan facilities.

42. The appellant submitted that the consequences for being a consumer were twofold. Firstly, she could have availed of certain protections under the Consumer Protection Code. Secondly, she could now rely on the 1995 Regulations regarding unfair terms. When pressed during the hearing to identify which precise terms were said to be unfair, the appellant's counsel referred only to the terms providing for surcharge interest on arrears.

43. The first named respondents submitted that the test for being a consumer under EU law was an objective test. He relied on the decision of Kelly J. in *AIB v. Higgins* [2010] IEHC 219. In that case Kelly J. adopted EU law authority to the effect that only contracts concluded for the purposes of satisfying a 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. He submitted that in the present case there was no evidence that the loan contracts for the quarry and for the buy to let investments were concluded for the purpose of satisfying the appellant's own needs in terms of private consumption, and in fact they were for business purposes.

44. Even if the appellant was held to have been acting as a consumer in relation to the loans at issue, the first named respondents argue that the this simply requires the Court to consider whether any terms of the loan contracts are unfair, and if so to release the consumer from any

such terms. In the present case the trial judge considered this scenario, in the event that the appellant was a consumer, and he could discern no term which could be deemed to be unfair. The appellant had never identified any unfair terms up to now, and the terms as to surcharge interest were among the terms examined by Noonan J. and were not deemed to be unfair by him.

45. The first question which arises under this ground is whether the appellant was acting as a consumer in relation to the loans at issue, and is thereby entitled to the protection of the 1995 Regulations, which transpose the provisions of Council Directive No. 93/13/EEC ("the Directive"). Given that the purpose of the loans was for the development of a quarry business and for the purchase of investment properties, it is understandable why Noonan J. had doubts about whether the appellant had entered into these contracts while acting as a consumer. On the other hand, the English High Court held in *Standard Bank London Limited v Apostolakis* [2002] CLC 93 that a professional couple were acting as consumers where they made what was described as a "pure investment" involving foreign exchange transactions. The appellant has asked this Court to consider making a reference to the Court of Justice of the European Union ("CJEU") under Article 267 of the Treaty on the Function of the European Union, for a preliminary ruling on the interpretation of "consumer".

46. It may not, however, be necessary for this Court to give a definite answer on this question. Assuming for present purposes that the appellant was acting as a consumer, the issue of unfair terms was one addressed by McDermott J. in *Permanent TSB Plc v. Davis* [2019] IEHC 184 ("*Davis*"), which case considered the decision of the CJEU in *Aziz v. Caixa d'Estalvis de Catalunya* (Case C-415/11). In *Davis*, having considered the terms of the mortgage and the loan agreement, McDermott J. highlighted the provisions of Article 4(2) of the Directive, which provides as follows:

> "Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on

the one hand, as against the services or goods supplied in exchange, on the other, insofar as these terms are in plain intelligible language."

47. In *Davis*, McDermott J. held that the alleged unfair terms as to the repayment of the loan and the variable interest rate were "core terms" of the agreement, and thus fell outside the scope of the 1995 Regulations, and were in any event not found to be unfair. In the present case the appellant has identified only the terms relating to surcharge interest on arrears as terms which could be viewed as being outside the core terms of the loan agreements between the parties, and which could be viewed as unfair. Insofar as this Court is required to assess of its own motion whether any other terms of the agreements outside the core terms are unfair, I agree with the finding of the trial judge who could discern no term which could be deemed to be unfair.

48. Returning to the terms providing for surcharge interest on arrears, the issues of whether such terms do in fact fall outside the core terms of the loan agreements and, if so, whether such terms are unfair were not argued in any detail in this Court. From a perusal of the account statements exhibited, it appears to me that surcharge interest was in fact probably not charged on the accounts arrears which arose, other than the overdraft facility, but the Court will seek confirmation of this from the respondents. If the respondents wish to maintain any claim for surcharge interest, it seems to me that it will be necessary to hear further submissions on these issues.

49. At the end of her third point, counsel for the appellant made another point which she said "tagged on" to her third point. She sought to introduce a copy of the mortgage deed executed by the appellant to secure one of the investment loans, and to rely on Clause 5.2 which provided that Allied Irish Banks Plc shall not take any steps to enforce the mortgage without the prior written consent of AIB Mortgage Bank. The respondent objected on the basis that this document was not part of the evidence before the Court, and was a new argument not made in the High Court. Irrespective of that valid objection, I am satisfied that the document has no relevance to

the present proceedings, which are not mortgage suits, and could not give rise to any arguable defence.

The Fourth Issue

50. The fourth argument sought to be advanced by the appellant, again described by her counsel as a procedural matter, was that the letters of demand in both cases were sent by a "non-existent entity". For example, the letter of demand in the PLC proceedings bore a letterhead which referred to "AIB Financial Solutions Group". The respondent submits that no such issue was ever raised by the appellant before the appeal hearing. Irrespective of that important aspect, in my opinion this argument is misconceived. It is clearly stated at the foot of each letter that it is written "for and on behalf of" Allied Irish Banks Plc or AIB Mortgage Bank, as the case may be. In the circumstances this issue could not give rise to any arguable defence.

The Fifth Issue

51. The fifth ground sought to be advanced by the appellant related to the status of Everyday as a party to these proceedings. It was acknowledged that Everyday had been added as a co-plaintiff to the proceedings and as a co-respondent to the within appeals, by order of this Court (Costello J.) dated the 19th March, 2021. Notwithstanding same, it was still submitted that Everyday had no status, because of errors in the motion papers leading to those orders. In my opinion this ground is entirely misconceived. The appellant was represented at the hearing of the motions by her solicitor, who was in a position to make any appropriate submissions regarding any defects in the motion papers. In circumstances where the orders were not sought to be appealed, it is not possible for the appellant to now seek to question the effect of same.

Other Grounds of Appeal

52. After counsel for the appellant concluded dealing with her five main net issues, she stated that these grounds were in addition to the other grounds set out in the notice of appeal, save that she was no longer pressing grounds four and five. It is therefore necessary to consider any remaining grounds of appeal.

53. Ground six is that the trial judge erred by appearing biased in favour of the bank when allowing the case a one hour hearing timeframe in agreement with counsel, while excluding her from this decision. The transcript does not record any discussion regarding the allocation of time for the hearing, and there is no evidence before this Court of any matters giving rise to an appearance of bias on the part of the trial judge.

54. Ground eight is that the trial judge erred by granting summary judgment when the appellant had a *bona fide* arguable case and should have been granted a plenary hearing. The appellant confirmed that this ground of appeal related to what Noonan J. described as her core point, that it was represented to her that these loans would only be repayable on the basis that she did in fact get planning permission for the quarry, and that this was term of the loan contracts which rendered them now unenforceable. I am satisfied that Noonan J. was correct in holding that the appellant's assertions in this regard could not, as a matter of law, amount to a fair reasonable probability of having a *bona fide* defence. As stated by him, these assertions were in themselves inconsistent with uncontested documentation, and were also contradicted by the subsequent conduct of the appellant.

55. Ground nine is that the trial judge erred by not ordering the bank to verify that a review of her tracker mortgages for overcharging and other issues "as per the bank's undertakings to the CBI and the Oireachtas Committee" had taken place. It does not appear that this matter was ever raised by the appellant in the court below. In any event, this ground could not, in my opinion, establish an arguable defence.

56. Ground ten is that the trial judge erred by not reviewing the purported contracts which the bank was relying upon. She argues that some of these are (a) not signed, (b) not stamped or (c) neither signed nor stamped. In my opinion the trial judge was correct in holding that the fact that some of the loan contracts were not signed by the bank nor stamped was immaterial. Again, in my opinion this ground could not establish an arguable defence.

57. Ground eleven is that the trial judge erred by not giving credence to the fact that much of the appellant's dealings with the bank were verbal in nature, and therefore the need to cross-examine the deponents was paramount to establishing all the facts of her case. As the trial judge pointed out, this amounts to no more than saying that the case should go to plenary hearing. However, before that can happen the test for remittal to plenary hearing must be satisfied and the appellant has not done so in this case.

Conclusion

58. In my view, the appellant has not established that the learned trial judge erred in any way in the conclusions he arrived at, or in the manner in which he arrived at same. Accordingly, I would dismiss the appeal and affirm the decision of the learned trial judge.