APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL
CIVIL

Court of Appeal Record Numbers: 2022/222
2022/223
2022/224

High Court Record Number: 2020/625P
2020/628P
2020/5354P

Neutral Citation Number: [2022] IEHC 299
Neutral Citation Number [2024] IECA 80

Costello J.
Noonan J.
Butler J.

BETWEEN/

DONAL HURLEY

PLAINTIFF/
APPELLANT

- AND -

PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

DEFENDANT/
RESPONDENT

BETWEEN/

SHANE MOONEY AND BARBARA MOONEY (NEE O'CONNOR)

PLAINTIFFS/
APPELLANTS

-AND-
PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

DEFENDANT/ RESPONDENT

BETWEEN/

SIMON KELLEHER

PLAINTIFF/ APPELLANT

-AND-

PEPPER FINANCE CORPORATION (IRELAND) DESIGNATED ACTIVITY COMPANY

DEFENDANT/ RESPONDENT

JUDGMENT of Ms. Justice Butler delivered on the 18th day of April 2024

Introduction

1. This judgment deals with three appeals all of which raise an identical legal issue in identical procedural circumstances. The legal issue concerns the definition of "housing loan" contained in s.2 of the Consumer Credit Act, 1995 ("the 1995 Act") and whether it includes a loan made for the purposes of purchasing a site and building a house on that site, which house did not exist at the time the loan agreement was entered into.

2. This issue has arisen in proceedings taken by each of the appellants seeking declarations firstly, that they acted as consumers in entering into the loan agreements in

question and, secondly, that the loan agreements and the mortgages entered into on foot of the loan agreements are unenforceable by virtue of s.38 of the 1995 Act. The respondents do not dispute that the appellants are consumers for the purpose of the 1995 Act. It is common case that under s.30(2) of the 1995 Act a credit agreement must include a written statement advising the consumer that they have a right to withdraw from the agreement without penalty within ten days of receipt of a copy of it (i.e., a "cooling-off" period) and that under s.38 a creditor cannot enforce a credit agreement unless the requirements of Part III of the 1995 Act, which includes s.30, have been complied with. However, under s.29 of the 1995 Act, Part III is stated to apply to *"all credit agreements other than housing loans".*

3. It is also common case that the loan agreements did not include a cooling-off period. Therefore, if the loan agreements are not housing loans, then regardless of the appellants' default in repayment of them, they are unenforceable under s.38 by reason of the failure to comply with s.30(2). On the other hand, if they are housing loans, the requirements of s.30(2) do not apply and the respondent, being the successor-in-title to the original lenders and mortgagee can enforce them.

4. The procedural context in which these appeals come before this Court is the respondent's successful applications to the High Court under O.19, r.28 and/or pursuant to the court's inherent jurisdiction to strike out the appellants' proceedings on the basis that they disclose no reasonable cause of action, are bound to fail, are frivolous and vexatious and constitute an abuse of process. That application was allowed by the High Court in circumstances where the appellants contend that their pleadings raise a *bona fide* and serious legal issue which should have been permitted to proceed to a full trial.

5. As the issues are relatively net and the facts are undisputed, I propose to briefly set out the factual background and the relevant legislative provisions before looking at the grounds of appeal and considering how the issue should be determined.

Factual background and Transaction Documents

6. The appellants in these cases entered into loan agreements with two different financial institutions. Through various sales the loans have all ended up in the hands of Pepper Finance Corporation (Ireland) DAC ("Pepper" or "the respondent") but nothing turns on this save to note that because the loans originated with different lenders and were made at different times, the text of the loan documentation varies although not in ways that are material to the outcome of this case. The loans in each case were for the purposes of purchasing a site on which a dwelling house was to be constructed and the amount of money involved was intended to and did cover both the site purchase and building costs.

7. The dates of the loan agreements - using that phrase broadly to include the letter of offer, acceptance of the offer and the subsequent drawdown of the funds - range between 2000 and 2003. It is significant that all relevant steps were taken prior to 1 August 2004 when the definition of "housing loan" in the 1995 Act was amended by s.33 and the Third Schedule Part 12 of the Central Bank and Financial Services Authority of Ireland Act 2004 ("the 2004 Act"). The appellants argue that the amendments to the definition are material to the interpretation of the phrase "housing loan" in the 1995 Act.

8. In each case the appellants granted the original lenders security by way of a legal mortgage registered as a charge on the respective folios. The charges were registered subsequent to the drawdown or partial drawdown of the funds and, in at least one case, post August 2004 but again nothing turns on this. The subsequent transfer of these charges to Pepper is also registered on the respective folios.

9. Some of the arguments made, particularly on behalf of the appellants, are based on the fact that it seems what occurred on the ground did not precisely match what is reflected in the transaction documents. For this reason, I propose looking briefly at the salient parts of those documents. In the Hurley case, the loan of £112,500 was advanced pursuant to a letter

of offer from Irish Nationwide Building Society dated 19 November 2001 which was accepted by the appellant on 4 December 2001. The security for the loan is described as *"first legal mortgage over principal private residence".* The type of loan is a *"repayment mortgage (annuity)"* and the purpose of the loan is stated to be *"to purchase a principal private residence".* As regards the drawdown of funds, the borrower's solicitor was advised that *"drawdown of the facility will only be permitted on completion of the security ... and other requirements as detailed herein".* The offer was subject to a number of conditions including special condition 7.1 which provided as follows:

> *"That the applicant contacts the Society immediately on completion of the property in order to arrange a final inspection. No monies will be released until this report has been received and approved by the Society and an architect's certificate or opinion of compliance with planning, bylaws, Building Control Acts 1990 and the regulations made thereunder in the Law Society's format is lodged with and approved by the Society."*

10. All of this suggests that the funds the subject of the loan agreement would not be available to the Hurley appellant until both the construction of the proposed dwelling house had finished and the security, i.e., the mortgage over the dwelling house, had been completed. However, that is not what occurred on the ground, nor indeed would it make practical sense in circumstances where the loan was advanced to the appellant for the purposes of enabling him to purchase a site and to fund the construction of a dwelling house on that site.

11. Instead on 17 December 2001 the Hurley appellant entered into a building agreement with a construction firm for the construction of a dwelling house on the site. The building agreement provided for staged payment of the contract price of £90,000 commencing with a payment on the signing of the contract, with various larger sums falling due as the

substantive works progressed and a final payment falling due on practical completion. Mr. Hurley has averred that construction did not begin until after the date of the building contract. On the same date, i.e. 17 December 2001, the appellant entered into a contract for the purchase of the site for £35,000. It seems that the monies were available to be drawn down and were drawn down in tranches to facilitate closure of the site purchase and the progression of the building works through the first half of 2002. A mortgage was entered into between the appellant and Irish Nationwide Building Society on 11 March 2002 in which the mortgaged property was described as being the piece or plot of ground known as Site No. 10 at the relevant address. According to Mr. Hurley's affidavit, the house constructed on that site was completed in July 2002.

12. A similar pattern emerges in the other two cases save that the lender in both was Irish Life and Permanent TSB and therefore the loan documentation is somewhat different. The extent of divergence between what is reflected in those documents and what was happening on the ground is somewhat less. Significantly, in the Kelleher case the letter of offer dated 2 November 2000 expressly purports to offer that appellant "a housing loan". In a schedule to the letter the purpose of the loan is stated to be *"to assist in financing construction of the property".* The letter also includes the statutory warnings which at that time were required to be provided in respect of housing loans under the 1995 Act. The mortgage is dated 11 December 2000; the site was purchased in February 2001; the building contract was also entered into in February 2001 and the house was completed in July 2001. The original loan agreement in the Kelleher appeal was made to the appellant jointly with two other people who subsequently transferred their interest to Mr. Kelleher. Nothing turns on this.

13. The Mooney appellants received a loan offer from Permanent TSB on 9 April 2003. The loan type is described as a *"variable rate home loan"* and the letter contained the statutory warnings required for housing loans under the 1995 Act. A standard information

sheet, apparently provided on the same date, described the product as a *"mortgage on a property"* citing the address of the dwelling house and as a *"repayment home loan".* The loan was accepted on 23 April 2003; the contract for the purchase of the site was entered into on 6 June 2003 and the building agreement was signed on the same date. There is no averment from the Mooney appellants as to when the house was completed but presumably this was some date after June 2003.

14. In affidavits sworn in response to the respondent's motions, each of the appellants makes an averment to the effect that at the date of the acceptance of the loan offer (Mooney); the date of the loan offer, its acceptance and of the deed of mortgage (Kelleher) and the date of each of these and the building agreement (Hurley) either that there was no building or any part of a building on the site (Kelleher) or the construction of the dwelling house had not reached a stage where it was suitable for use as a dwelling and, in particular, that the roof had not been placed on it (Mooney, Hurley). These averments are key to the appellants' argument that there could not have been a housing loan within the then-meaning of the 1995 Act unless there was a house in existence at the time of the loan agreement. The averment that there was no roof on the structure (which is also made by Mr. Kelleher) seems designed to bring the factual circumstances of the cases into line with those dealt with by Baker J in *ACC v Browne* [2015] IEHC 722, a case to which I will return.

15. The appellants in each case served a notice of trial and set the cases down for hearing. The response of the respondent was to issue the motions which are the subject of this appeal. Before doing so, full discovery was made by the respondent. The respondent argues, as a result of this, that its motion to strike out should be dealt with by the court on the basis that there is no likelihood of further material emerging through the use of the procedural mechanisms available under the Rules which could assist the appellants' case.

16. Although the language used in the respondent's motions asserting that the proceedings are frivolous and vexatious and an abuse of process may seem pejorative, the argument made is purely a legal one. The respondent contends that as a matter of law when the definition of "housing loan" in the 1995 Act is properly construed, it is clear that the appellants' loans are housing loans. Consequently, the obligations under s.30(2) did not apply to the loans and enforcement of them by the respondent is not precluded by s.38. Therefore, proceedings which are premised on the contention that the loans in question cannot be enforced because they are housing loans which do not comply with s.30(2) are misconceived and do not give rise to a stateable cause of action.

17. The jurisprudence makes it clear that the concept of proceedings being frivolous and vexatious or an abuse of process does not necessarily import any *mala fides* on the part of the litigant. That said, it has to be acknowledged that motions of this type are frequently brought where there is an element of abusive behaviour involved such as where points which have already been decided are raised repeatedly by a serial litigant. Clearly, this is not that type of case. Whilst there may well be a threat of enforcement action by Pepper in circumstances where all of the appellants have defaulted in the repayment of their loans, as far as the Court is aware these are the only proceedings to date between these parties. The issue raised in the proceedings is a net point of statutory interpretation and, regardless of its merits, it is one raised *bona fide* by the appellants. The appellants have not attempted to obfuscate or delay the proceedings with a view to avoiding the point being determined. Indeed, at the time at which the respondent brought its motions, the appellants had set their proceedings down for trial. One of the significant issues raised on the appeal is whether the point of statutory interpretation should be decided by way of this preliminary motion to strike out the proceedings or should be allowed to proceed to a full hearing.

18. **Statutory Context**

The issue in this appeal essentially concerns the scope of Part III of the Consumer Credit Act 1995 by reason of the exclusion of housing loans from its provisions. It may be useful to look firstly at the relevant provisions at Part III and then at those parts of the interpretation section of the 1995 Act (i.e., section 2) which define housing loan.

19. Under s.30(1) of the 1995 Act a credit agreement must be made in writing and signed by the consumer. Section 30(2) then provides as follows:-

> *"(2) A credit agreement shall contain a statement in respect of the cooling-off period that the consumer –*
>
> *(a) has a right to withdraw from the agreement without penalty if the consumer gives written notice to this effect to the creditor within a period of ten days of the date of receipt by the consumer of a copy of the agreement, or*
>
> *(b) may indicate that he does not wish to exercise this right by signing a statement to this effect …"*

The cooling-off period itself is provided for under s.50 of the 1995 Act which creates a statutory entitlement for a consumer to withdraw from an agreement within ten days of receiving a copy of it. Significantly, s.50(4) provides that s.50 does not apply to a housing loan.

20. The provisions as to enforceability upon which the appellants seek to rely are contained in s.38 of the 1995 Act which provides as follows:-

> "*38. A creditor shall not be entitled to enforce a credit agreement or any contract of guarantee relating thereto, and no security given by the consumer in respect of money payable under the credit agreement or given by a guarantor in respect of money*

payable under such contract of guarantee as aforesaid shall be enforceable against the consumer or guarantor by any holder thereof, unless the requirements specified in this Part have been complied with:

Provided that if a court is satisfied in any action that a failure to comply with any of the aforesaid requirements, other than section 30, was not deliberate and has not prejudiced the consumer, and that it would be just and equitable to dispense with the requirement, the court may, subject to any conditions that it sees fit to impose, decide that the agreement shall be enforceable."

The "Part" referred to in s.38 is Part III of the 1995 Act which is entitled "*Requirements relating to Credit Agreements and Form and Contents thereof*" and includes all sections from s.29 to s.39 inclusive of the Act. Crucially, s.29 determines the scope of Part III and provides that it *"shall apply to all credit agreements other than housing loans".* Thus, the statutory entitlement of a consumer to a cooling-off period under s.50 does not apply to housing loans and the requirement that a credit agreement contain a statement in respect of the consumer's right to that cooling-off period equally does not apply to housing loans by virtue of s.29. Therefore, if the loans made to the appellants in these cases were housing loans, they are not affected by the limitation on the enforceability of credit agreements which do not comply with the statutory requirements as to form and content provided for in Part III. On the other hand, if as the appellants contend, they are not housing loans then they were required to contain a statement in respect of the consumer's entitlement to a cooling-off period and the court has no discretion to waive the consequences of that failure thus rendering the agreements and the security provided under the agreements (i.e., the mortgages) entirely unenforceable. The appellants emphasise the importance to the consumer of receipt of a written statement of the entitlement to a cooling-off period which

is evident from the proviso to s.38 in that whilst non-compliance with other elements of Part III may be excused by a court, non-compliance with s.30 cannot be so excused.

21. There is no doubt that a loan of the nature of those advanced to the appellants constitutes a "credit agreement" within the meaning of that term under s. 2 of the 1995 Act which includes *"a cash loan or other similar financial accommodation"*. Equally, no issue is taken by Pepper but that the appellants were *"consumers"* within the meaning of s. 2 when they entered into the loan agreements. The contentious definitions are those of *"house"* and *"housing loan"*. As originally provided for in s. 2 of the 1995 Act these were as follows: -

> *"'House' includes any building or part of a building used or suitable for use as a dwelling and any out office, yard, garden or other land appurtenant thereto or usually enjoyed therewith;*
>
> *'Housing loan' means an agreement for credit on the security of a mortgage of a freehold or leasehold estate or interest in a house where -*
>
> *(a) the loan is made for the purpose of enabling the borrower to provide or improve the house or to purchase the said estate or interest, or*
>
> *(b) the loan is made for the purpose of refinancing a loan within the meaning of paragraph (a), or*
>
> *(c) the house is to be used or to continue to be used as the principal residence of the borrower or his dependants;"*

22. As noted, this is the definition of housing loan as it stood when the loan agreements in issue were entered into by the appellants. The definition was subsequently amended with effect from August 2004 by s.33 and the Third Schedule, Part 12 of the Central Bank and Financial Services Authority Act, 2004. The substituted definition now reads: -

> *"'Housing loan' means -*

(a) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land -

(i) for the purpose of enabling the person to have a house constructed on the land as the principal residence of that person or that person's dependents, or

(ii) for the purpose of enabling the person to improve a house that is already used as the principal residence of that person or that person's dependants, or

(iii) for the purpose of enabling the person to buy a house that is already constructed on the land for use as the principal residence of that person or that person's dependants, or

(b) an agreement for refinancing credit provided to a person for a purpose specified in paragraph (a)(i), (ii) or (iii), or

(c) an agreement for the provision of credit to a person on the security of a mortgage of freehold or leasehold estate or interest in land on which a house is constructed where the house is to be used, or to continue to be used, as the principal residence of the person or the person's dependants, or

(d) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land on which a house is, or is to be, constructed where the person to whom the credit is provided is a consumer."

The definition of *"house"* was not altered.

23. The appellants accept that had their loans post-dated the 2004 amendments, they would fall within the substituted definition of housing loan as the loans were made for the purpose of enabling them to have a house constructed on the sites which they purchased. However,

they argue that the introduction of this additional element at subparagraph (a)(i) of the new definition and, by way of distinction, the reference to a house that is already constructed at subparagraph (a)(iii) and the fact that this distinction is reflected in the phrase *"land on which a house is, or is to be, constructed"* in subparagraph (d) demonstrates that a loan for the purpose of enabling a house to be constructed did not come within the 1995 definition. This is the core issue to be decided on this appeal.

High Court Judgment

24. In his judgment delivered on 20th May, 2022 Allen J. acceded to the defendant's application and struck out the statements of claim and dismissed the actions. I do not propose to summarise the High Court judgment at this juncture as I will consider the relevant passages in more detail when dealing with the issues raised on the appeal. Suffice to say firstly, while Allen J. had some concerns regarding the procedure adopted by the respondent, he accepted that if a case is based on a net proposition of law which is legally incorrect, then the proceedings can be struck out as disclosing no cause of action or as being bound to fail.

25. Secondly, the proceedings in this case did raise a net issue, namely whether the provision of credit to a consumer to allow them to build a new house rather than buy an existing house is a *"housing loan"* for the purposes of the 1995 Act. Crucially, at para. 55 of the judgment Allen J. identified the issue on the motion as follows: -

> *"The issue on the motion, then, strictly speaking, is not whether the loan agreement of 19th November 2001 was a housing loan but whether Mr. Hurley has an arguable case which has a reasonable prospect of establishing that it was not."*

Thus, Allen J. properly acknowledged that on an application to strike out proceedings for failing to disclose a reasonable cause of action or as otherwise being bound to fail, the court is not engaged in the exercise of determining whether the legal issue raised will or will not

succeed, but on determining the arguability of that legal issue and, by extension, that the case must be permitted to proceed to a full hearing if the issue is arguable, even though the arguments to be made in its favour are weak and unlikely to succeed.

26. Thirdly, having analysed the relevant sections of the 1995 Act and the 2004 amendments Allen J. concluded that the use of the phrase *"to provide"* a house when describing the purpose of a housing loan in the 1995 definition was not limited to the purchase of a house. Consequently, the respondent had met the threshold necessary to establish that the appellant had no reasonable prospect of making out their case that the original loan agreements were ones to which Part III of the 1995 Act applied.

27. Finally, between paras. 76 and 79 of the judgment Allen J. considers the appellants' argument that the house must have been in existence on the date of the agreement for the loan to constitute a *"housing loan"*. In considering this argument, Allen J. placed reliance on the fact that the credit agreement which arose on acceptance of the loan offer was executory in nature. The appellants' argument was predicated on the terms of the loan offer which provided that drawdown of the funds would only be permitted on completion of the security and that the security could not be completed until the house was in existence. Allen J. rejected the appellants' arguments on this point.

Grounds of Appeal

28. The grounds of appeal raised by the appellants are identical in all three cases save in one minor respect. Most of the grounds are directed at one or other of the two central issues, namely whether the High Court should have struck out the proceedings under O. 19, r. 28 and/or the court's inherent jurisdiction in circumstances where it is contended that the proceedings raise a substantive issue of law which should be permitted to go to plenary hearing and the correct interpretation of the term *"housing loan"* under s. 2 of the 1995 Act.

Encompassed within the statutory interpretation issue are a number of subsidiary points in which it is contended, *inter alia*, that the trial judge failed to have sufficient regard to the terms of the 2004 amended definition, described by the appellants as *"transformative"*, when construing the meaning of the original definition.

29. The appellants also argue that, as a matter of law, you cannot have a *"freehold or leasehold estate or interest in a house"* meaning a building or part of a building (*per* the definition of a house under s. 2) as you can only have such an interest or estate in land - which is coincidentally the terminology used in the 2004 amended definition. Consequently, they contend that it was not possible for the plaintiff, nor presumably anyone else, to comply with the 1995 definition of housing loan since no-one could offer the security of a mortgage on a freehold or leasehold estate or interest in a house. This is in effect an argument that the statutory definition is legally flawed such that the concept which it is intended to describe can have no application. On the basis of this argument, no loan entered into prior to August 2004 could be properly described as a housing loan and all such loans must be treated as credit agreements to which Part III of the 1995 Act apply and thus are unenforceable unless they included a written statement as to the consumer's right to a cooling-off period.

30. Finally, there are two grounds of appeal specifically directed at the trial judge's conclusion that the loan agreements in issue were executory in nature. These contend that the trial judge erred in drawing a distinction between executory and executed consumer credit contracts when no such distinction is to be found in the 1995 Act; that the distinction as drawn by the trial judge failed to have due regard to the fact that the building agreement was a staged payment agreement and that the relevant date of the credit agreement was the date of the contract (presumably meaning the date of acceptance of the loan offer by the appellants) and not the date of the drawdown of the monies. There is a slight difference between the way in which one of the grounds relevant to this issue is expressed in the

Mooney case as compared to the other two cases, but I do not think this difference is material to the consideration of the issue.

31. All grounds of appeal are denied by the respondent which contends that the trial judge properly considered the statutory provisions, the case law and the submissions of the parties on each issue. It is also pointed out that given the nature of the respondent's applications to strike out, the trial judge correctly accepted the facts as pleaded and deposed to by the appellants, that he applied the correct legal test, that he correctly imposed the burden of establishing that the appellants' cases were bound to fail on the respondent and that he reached the correct conclusion.

32. I propose to address the issues raised in this appeal by looking first, at whether it was appropriate for the High Court to have dismissed the proceedings on the basis of this preliminary application rather than permitting them to proceed to trial, second, at the correct interpretation of *"housing loan"* as it stood prior to August 2004 including all of the subsidiary issues raised by the appellant under this heading and finally, insofar as they remain relevant, at the other grounds.

Order Striking Out Proceedings

33. There was significant engagement between the parties as to whether it was appropriate for the respondent to have brought these motions in circumstances where the outcome of the appellant's proceedings depends on the construction of a statutory provision which was *bona fide* raised by them in their pleadings. It is easy to be sympathetic to the appellants in this regard. They have not delayed or prevaricated in the conduct of their cases and, in each case, they had set the proceedings down for hearing with the intention that the point be determined, prior to the respondent issuing its motions. As the underlying facts are largely dependent on undisputed transaction documents, the extent of the evidence on any plenary hearing would

necessarily be limited. As a result, one might ask what the respondent's purpose was in seeking to have the proceedings struck out before they could be heard when a hearing was imminent anyway? The only obvious benefit is a saving in costs which, in light of the limited factual dispute, is likely to be small.

34. However, the utility or apparent fairness of the procedure is not the basis upon which this Court must assess whether the trial judge was correct to strike out the proceedings on foot of the respondent's motions. Nonetheless, I should be mindful of the concern expressed by Murray J. (as he then was) in *Jodifern v Fitzgerald* [2000] 3 IR 321 to the effect that the court should not permit the hearing of an application to strike out proceedings to become a form of summary disposal of a case where there are disputed issues of fact or substantial questions of law to be resolved.

35. It was accepted by the respondent that the jurisdiction to strike out proceedings is one which should be exercised sparingly and that the respondent bore the burden of establishing that the appellants' cases were bound to fail. The respondent contended that the legal issue in these proceedings was not a complex one, nor was the court being asked to engage in any factual analysis of the parties' respective positions. The respondent accepted (at least for the purposes of these applications) all of the factual elements underlying the appellants' claims. The key factual proposition upon which the appellants rely is that the houses to which the loans related were not in existence at the time of the loan agreements as they had not yet been constructed. They rely on this factual proposition to make the legal argument that the loans could not have been housing loans as, on the interpretation they advance of the definition of this term, the house must be in existence in order for it to be provided to them or purchased by them as borrowers.

36. As Allen J. correctly pointed out at para. 17 of his judgment, this key fact is not actually pleaded in the appellants' statements of claim. He accepted, in my view correctly, that the

respondent's application was not an attack on the statement of claim *per se* (which could in any event have been amended to deal with such an omission) but on the underlying legal proposition. Although the respondent accepted that this legal proposition could equally have been the subject of a motion for the trial of a preliminary issue, it was nonetheless one which could be disposed of under O. 19, r. 28 or by dismissal pursuant to the court's inherent jurisdiction as being bound to fail.

37. In making this argument the respondent relied on the views of Clarke J. in *McGrath v O'Driscoll* [2007] ILRM 203 (as approved by the Supreme Court, Denham J. in *Danske Bank v Durkan New Homes* [2010] IESC 22), *Keohane v Hynes* [2014] IESC 66 and *Moylist Construction v Doherty* [2016] 2 IR 283.

38. *Keohane v Hynes*, upon which the appellants also rely, reviews a number of authorities and makes some general observations regarding the underlying basis of the court's inherent jurisdiction to dismiss proceedings as being bound to fail in order to prevent an abuse of the court's process. The focus of the decision is, however, on the extent of the court's entitlement to look at the facts underlying the case in which such an application is brought. Clarke J. reiterates his observations in *Lopes v Minister for Justice* [2014] IESC 21 to the effect that if a plaintiff puts forward a credible basis for suggesting that it may at trial be possible to establish the facts which are asserted and necessary to succeed in the proceedings, then the proceedings should not be struck out. He then considers specifically the extent to which the court can look at what he terms *"documentary facts"* and concludes (at para. 6.9 of the judgment): -

> *"In summary, it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider*

whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegation. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion, and if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail, ordinarily, go beyond the limited form of factual analysis to which I have referred."

39. In my view the analysis in *Keohane v Hynes* focusing on the court's entitlement to examine the underlying facts is not really relevant in this case where the underlying facts are not in dispute. The respondent's application proceeded on the basis that those facts would be established by the appellants but challenged the underlying legal proposition upon which it was contended that those facts necessarily resulted in a situation where the loans could not be enforced under s.38 of the 1995 Act. Further, as full discovery had been made by the respondent in advance of bringing its motions, these are not cases in which it can be said that the appellants factual position might change or more particularly improve through the invocation of the procedures provided by the Rules of Court before the matter comes to trial.

40. The comments subsequently made by Clarke J. in *Moylist Construction Limited v Doheny* are of more direct relevance here. In considering the court's jurisdiction to strike

out proceedings as bound to fail, he pointed to the analogous jurisdiction on the question of whether summary proceedings should be adjourned for plenary hearing. He acknowledged that the court has an entitlement in exercising the jurisdiction to strike out to *"resolve questions of law or the interpretation of documents"* but must consider whether it is appropriate to do so within the confines of such a motion in the particular case. He went on to identify, in broad terms, circumstances in which it may or may not be appropriate to strike out proceedings, stating:-

> *"18. It seems to me to follow from that analysis that there are cases which are just not suitable for an application to dismiss under the inherent jurisdiction. Clearly, cases involving factual disputes (save to the very limited extent to which it is appropriate to engage with the facts as identified in Keohane v. Hynes…) have already been held to fall into that category. However, it seems to me that there are also limitations on the extent to which cases which involve issues of law or construction can properly be the subject of an application to dismiss under the inherent jurisdiction. The limitation is similar to that which was identified in McGrath v O'Driscoll…as applying in the context of summary judgment motions. A court should not entertain an application to dismiss where the legal issues or questions of construction arising are themselves complex and such as would require the type of careful analysis which can only be carried out safely at a full trial and in circumstances where the facts can be fully explored…*
>
> *21. That is not, of course, to say that there will not be cases where the legal or documentary issues may be clear and straightforward such that it is safe for the court to reach a conclusion on those questions on the hearing of a motion to dismiss. That is also not to say that the fact that a plaintiff may make a large number of points, each*

one of which is clearly unstateable, should not prevent a dismissal from being ordered….

22. But I would caution against the appropriateness of the use of the application to dismiss under the inherent jurisdiction of the court in relation to proceedings where, even if there are no factual disputes or any such factual issues as might come within the strictures identified in Keohane v. Hynes… nonetheless the legal issues or questions concerning the proper interpretation of documentation are complex. In such cases, the very complexity of the issues (even if the court has a fairly clear view on them) makes it difficult to determine, within the confines of a motion heard on affidavit, that the plaintiff's case is such that it can safely be said that it is bound to fail."

41. Notwithstanding Allen J.'s express reference to these judgments at paras. 18 – 22 of his judgment, counsel for the appellants contends that his summary at para. 55 of the issue which the court had to decide on the motion was legally incorrect. In particular, counsel argued that by requiring it to be shown that the appellant had an arguable case which had a reasonable prospect of establishing that the loan was not a housing loan, Allen J. erred in two respects.

42. First, it is contended that this formulation had the effect of shifting the onus onto the appellants when the jurisprudence establishes that it lies on the respondent throughout. I do not accept that it had this effect. In the immediately preceding paragraph Allen J. expressly accepted the appellants' argument that, having invoked the inherent jurisdiction of the court, the onus lay on the respondent to satisfy the court that it met the threshold required of such applications. In his conclusions (at para. 85) he held that the respondent had met that threshold. Regardless of the manner in which the issue was phrased at para. 55, it is clear throughout his analysis that Allen J. required the respondent to establish that the appellant

did not have an arguable case which has a reasonable prospect of establishing that the loan was a housing loan rather than requiring the appellants to establish that they did.

43. The second argument made by counsel for the appellants was that by requiring the arguable case to have a reasonable prospect of success, Allen J. introduced an additional layer to the existing test. When the issue was teased out, counsel accepted that for the case to be arguable it had to have some prospect of success and thus the argument was reduced to the assertion that by using the word "reasonable" the standard was impermissibly raised by the trial judge.

44. Whilst perhaps pedantic, I should point out that Allen J. does not in fact use the term "reasonable prospect of success". Rather he talks of there being a reasonable prospect of establishing that the loan was a housing loan which refers to the legal proposition underlying the claim rather than to the claim itself. If, as counsel acknowledges, there must be some prospect of establishing this proposition in order for the case to be arguable, it begs the question as to whether the case can be arguable if the prospect of establishing it is unreasonable or, in other words, if there is no reasonable prospect of it being established. In my view the appellants are arguing over semantics.

45. The notion of whether something is arguable is necessarily linked to whether the arguments made are reasonable. Allen J. points to two judgments of Charleton J. where he made observations to this effect namely *Esmé v Minister for Justice* [2015] IESC 26 and *Hoey v Waterways Ireland* [2021] IESC 34. The thrust of these judgments is to acknowledge that in principle almost anything can be argued so the real issue is whether the point is one which may, as Charleton J. put it in *Esmé "by the standards of a rational preliminary analysis, ultimately have a prospect of success".* Thus, whether the threshold is defined as arguability or reasonableness, it connotes something more than just being technically stateable but does not require there to be any specific degree of likelihood of success. This

does not alter the existing jurisprudence as it has always been accepted that the test is not to ask whether the proceedings are likely to or will succeed but rather whether they are capable of or could succeed.

46. It is clear from the judgment read as a whole that the trial judge was cognisant of and understood the test to be applied in an application to strike out proceedings as being bound to fail. In describing the issue he had to decide as being whether the appellants had an arguable case which had a reasonable prospect of establishing the loans were not housing loans, he did not alter the applicable threshold nor did he shift an onus properly borne by the respondent to the appellants. I note that Clarke J. at para. 6.10 in *Keohane v. Hynes* on two occasions describes something as an abuse of process where there is no reasonable basis for a suggestion or a belief. The use of the word reasonable in that context is similar to the use of the same word by Allen J. in para. 55 of his judgment. It does not impose a quantitative obligation on a plaintiff to show that proceedings are likely to succeed to any particular extent but rather imposes the converse obligation on the moving party to show that there is no likelihood of success. In other words, the appellant did not have to show that the proceedings were likely to succeed, the respondent had to show that they could not.

47. That of course leaves the core question as to whether the legal issue was sufficiently straightforward to be decided in a summary manner on foot of the respondent's motions to strike out the proceedings. With some hesitation I am satisfied that it was. The proceedings raise a net issue on the construction of a single statutory definition. Whilst the legal issue is a serious one, it is not a complex one in the sense meant by Clarke J. in *Moylist* and the authorities to which he refers. The factual matters pleaded by the appellants in the averments made on affidavit were accepted in full by the respondent so there are no facts which remained to be resolved and upon which the outcome of the case could vary notwithstanding the court's determination of the legal issue. Full discovery has been made and the appellants

do not assert that their case could change or improve by their coming into possession of additional evidence or material before a full hearing could take place. As a result, apart from the obvious fact that the cases will not now proceed to a full trial, the appellants have not pointed to any unfairness to them arising from the procedure adopted by the respondent.

48. The reasons for my hesitation are twofold. The first is that there is no suggestion that the appellants have behaved improperly in bringing these proceedings. They believe there is a legal issue to be determined and they have prosecuted their proceedings with reasonable expedition to the point of setting them down for trial before the motions issued. The second follows from the first and is that because the appellants had progressed the proceedings, the legal point would or certainly could, have been determined in early course in any event. In my experience applications of this nature are frequently brought where the proceedings are abusive in a colloquial sense rather than in a purely legal one. However, the exercise of the court's inherent jurisdiction is not dependent on a plaintiff having engaged in behaviour of which the court disapproves nor in there being an underlying improper purpose to the proceedings. If the proceedings are bound to fail or if they do not raise a reasonable cause of action under O.19, r.28 then the court has jurisdiction to strike them out no matter how *bona fide* the plaintiff may be. Thus, notwithstanding my hesitation, I would dismiss the appeal on this ground.

Statutory Interpretation – General

49. It is unnecessary to consider in any detail the principles applicable to the interpretation of statutes in Ireland which are set out in the Interpretation Act 2005 and have been addressed in a number of recent Supreme Court decisions including *Dunnes Stores v. Revenue Commissioners* [2020] 3 IR 480, *Bookfinders Limited v. Revenue Commissioners* [2020] IESC 60 and *Heather Hill Management Company CLG v. An Bord Pleanála* [2022] IESC

43. Indeed, although the core issue on this appeal is one of statutory construction, the parties did not address the Court on these principles and the only reference to them in the written submissions was by the respondent who referred to the following passage from the judgment of Finlay Geoghegan J. in *McGuinness v. Ulster Bank* [2019] IESC 20:-

> *"The starting point of any construction of an Act of the Oireachtas is of course a consideration of the plain meaning of the words used: Howard v. Commissioners of Public Works [1994] 1 I.R. 101. However, the construction must also be, as was put by the Supreme Court per McGuinness J. in Fuller v. Minister for Agriculture [2005] 1 I.R. 529 at p. 548, 'in the contextual light of the surrounding provisions of the statute'. It is also presumed that words are not used in a statute without a meaning and, accordingly, effect must be given, if possible, to all the words used: Goulding Chemicals Ltd. v. Bolger [1977] I.R. 211, O'Higgins C.J. at p. 223. The Court, in construing the provision, must have regard to the use of different words, here 'executed' and 'made', which may indicate an intention of a different meaning."*

50. More recently Murray J. has summarised the position at para. 109 of *Heather Hill* as follows:-

> *"What, in fact, the modern authorities now make clear is that with or without the intervention of [s.5 of the Interpretation Act 2005], in no case can the process of ascertaining the 'legislative intent' or the 'will of the Oireachtas' be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of the plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and the purpose for which, it was enacted."*

51. Thus, the meaning of *"housing loan"* must be ascertained from the text of the statutory definition but, more particularly, from that text read in the context of the 1995 Act as a whole and the purpose for which that Act was enacted. Clearly, the purpose of the 1995

Act was, as stated in its long title, to "*revise and extend the law relating to consumer credit, hire-purchase, hiring and money lending and to enable effect to be given to Council Directive No. 87/102/EEC…*" The purpose of the Consumer Credit Directive is set out in its recitals which, apart from the harmonisation element of the Directive, referred to the protection of the consumer against unfair credit terms. Interestingly, I note that the scope of the Directive is defined in Article 11 as applying to credit agreements. This is subject to Article 2 which provides that the Directive shall not apply to a range of different types of agreements including, at Article 2(1)(a), credit agreements intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected building. Of course, as is the case in any national measures adopted for the purposes of implementing a harmonisation directive, it was open to Ireland to adopt legislation imposing higher standards or to make the terms of the legislation applicable in a broader range of circumstances than those required by the Directive. Nonetheless it is, I think, instructive to note that the Directive from which the relevant provisions of the 1995 Act derive does not in its terms apply to credit agreements intended primarily to finance the purchase of land or buildings.

52. It is clear from the structure of the 1995 Act, which I have described above, that the particular entitlement of consumers to a cooling-off period does not apply in the case of housing loans and the requirement under s.30 that the terms of a credit agreement, including notice of the consumer's entitlement to a cooling-off period, be provided in written form under s.30 do not, by virtue of s.29, apply to a housing loan. Therefore, the definition of housing loan is relevant insofar as it carves out an exception from the rights and entitlement of consumers under Part III of the 1995 Act. That exception reflects the scope of application of the Consumer Credit Directive save that the Directive excludes credit agreements for the purpose of acquiring rights in land or buildings generally whereas the 1995 Act is more

specific in requiring not only that the building be a house capable of use as a dwelling but also that it is to be used as the principal residence of the borrower or his dependants.

Statutory Interpretation - Meaning of "Housing Loan"

53. The appellants argue for a literal interpretation of the definition of housing loan relying, *inter alia,* on s.5 of the Interpretation Act and the lack of any ambiguity in the provision itself. On the appellants' argument the meaning of the word "house", which is separately defined in the 1995 Act, is central to understanding the definition of housing loan as the word house is used three times in the latter definition. The appellants acknowledge that the definition of house, which is phrased as "including" certain matters, is not exhaustive. Nonetheless as the definition requires the building in issue to be "*used or suitable for use as a dwelling*", it is contended that a building which is not yet in existence cannot be a house as it cannot be used nor is it suitable for use as a dwelling. Therefore, a loan cannot be a housing loan until the house is complete which was not the case at the time these loans were taken out.

54. I should note at this point that the appellants specifically contend that the trial judge erred in making an assumption that the houses had been built by the time the loans were drawn down. I do not read the High Court judgment as having made such an assumption although the hypothetical possibility that a house may have been built by the date of drawdown is adverted to at para. 76. Allen J. states categorically at para. 77 that he sees no reason why the purpose of the agreement could not have been to enable the borrower *"to build a house which – necessarily – did not yet exist".* Similarly, at para. 79 he expresses the view that the existence of the house at the time of the housing loan agreement is irrelevant as *"it is perfectly sensible to contemplate a loan on the security of a house that has not yet been built".* Therefore, although the trial judge does tease out the arguments made by

reference, *inter alia*, to the hypothesis that a house which was not in existence at the date of the loan agreement might have been built by the date the loan was drawn down, it is abundantly clear that his conclusions are not based on this hypothesis.

55. The appellants also made a number of supplemental arguments. First, it was argued that the words *"to provide"* in para. (a) cannot be treated as a synonym of either "to purchase" or of "to construct". Instead, it is suggested that to provide means to give, presumably to somebody else, and that the ordinary meanings of to provide - in the sense of to give something to somebody else - and to purchase - meaning to acquire something for yourself - are mutually exclusive. Again, it is contended that, in order for a house to be provided by the borrower to somebody else, it must already be in existence.

56. In support of this argument the appellants relied on the revised definition of housing loan which was substituted in 2004. This revised definition makes it clear that the term covers both loans in respect of the purchase of existing houses and loans for the purpose of enabling the borrower to have a house constructed on land. Whilst acknowledging the general proposition that a court should not have regard to subsequent amendments in interpreting the unamended statutory text, counsel for the appellants referred in passing to a number of unspecified cases in which the court looked at changes brought about by the amendment of statutory provisions. These cases were not identified in the appellant's written submissions nor included in the book of authorities. Consequently, even if the Court accepts that there may be circumstances in which it would, exceptionally, be appropriate to look at a later amendment to clarify the meaning of an earlier, unamended text, no argument was made as to what these circumstances are or whether this particular case falls within them. Therefore, I am reluctant to place significant reliance on the subsequent amendment of the 1995 definition in attempting to ascertain its intended scope.

57. The second argument made by the appellants is that the definition is simply incorrect in talking of security on *"a freehold or leasehold estate or interest in a house"* (which is defined as a building or part of a building) because a freehold or leasehold estate or interest can only be held in land and not in buildings. It seems to be contended that if the definition is legally incorrect it simply cannot be applied at all. Consequently, no loan is capable of constituting a housing loan, as a result of which *all* loans for the purpose of the acquisition of residential property (to use neutral language) must comply with the requirements of Part III of the 1995 Act.

58. I reject this argument for two reasons. First, it is a general principle of statutory interpretation that the Oireachtas should not be taken to have legislated in vain. A construction of a definition which would render entire sections of the Act in which it is contained futile (in this case s. 29 and s. 50(4)) should be avoided, unless it is clear that such a result was intended - (see McKechnie J. in *Deely v Information Commissioner* [2001] 3 IR 439).

59. Secondly, and perhaps more importantly, it is by no means clear that the very technical distinction contended for by the appellant has any legal reality. No authority or academic text was cited in support of it. Ownership of land, whether a freehold or leasehold estate or interest, carries with it ownership of any buildings on the land. The definition of house in the 1995 Act includes any *"yard, garden or other land appurtenant"* to the house. Thus, from both a conveyancing perspective and from the perspective of this legislation, ownership of land includes ownership of any house on the land and *vice versa*. The distinction sought to be drawn by the appellant is not meritorious and certainly does not justify giving an interpretation to the definition of housing loan which renders it incapable of *any* application within the scheme of the 1995 Act.

60. The respondent on the other hand argues that there is nothing in the definition of a house, which in its terms is not an exhaustive definition, that renders it incapable of applying to houses which are yet to be built. The 2004 definition of housing loan is explicit in its application to loans for the purpose of constructing a house, but it does not follow from this that the 1995 definition did not apply to prospective as well as existing houses. Further, the respondent makes an interesting interpretive argument based on the fact that although the definition of housing loan was amended in 2004 in a manner which clearly includes loans for the construction of a house, the definition of house was not amended. Therefore, the definition of house cannot be read as excluding a house which is yet to be built as that would mean that paragraphs (a)(i) and (d) of the 2004 definition could not have any practical effect. In other words, the unamended definition of *"house"* must be capable of applying equally to both the 1995 and 2004 definitions of *"housing loan"*. I find this logic compelling.

61. As regards the meaning of *"to provide"*, the respondent agrees with the appellant that this is not a synonym of *"to purchase"* but disagrees with the argument that the two words are mutually exclusive. Instead, the respondent argues that *"to provide"* is a phrase with a broader meaning. A house can be provided through a range of mechanisms which include both its purchase and its construction. I agree that this is the most natural meaning of *"to provide"* in the context of the 1995 Act. The contrary argument made by the appellant that *"to provide"* means giving a house to a third party does not fit comfortably within the scheme of the 1995 Act. It is important to bear in mind that a borrower must be acting as a consumer in order for a credit agreement to benefit from protection under the 1995 Act. It is difficult to envisage circumstances in which a natural person would be providing -in the sense of giving a house to a third party (who is not a dependant)- but not acting in the course of a business, trade or profession in doing so (and therefore not a consumer).

62. Accepting, as I do, that *"to provide"* can encompass the building of a house, then there is no basis for treating the non-exhaustive definition of *"house"* as necessarily only referring to an existing house. Insofar as the appellant relies on the decision of Baker J. to argue that this must be so in *ACC v Browne* [2015] IEHC 722 such reliance is misplaced. Baker J. was considering the definition of *"housing loan"* in the 1995 Act in the context of a loan the purpose of which was to refurbish a residential premises, but which was secured on an entirely separate parcel of lands. The lands offered as security contained the ruin of a house which had been derelict for nearly 20 years. The structure, as it remained on the land, was roofless and the walls had collapsed. In that context Baker J. held *"for the purposes of the legislation that a house must have at least some structures which would provide shelter including, at least, some walls, windows or window opes, and a roof, even if that roof was not watertight."* She went on to state that in order to qualify as a house, a building must offer some degree of enclosure or shelter and that the ruin on the lands in question did not meet these criteria. Itis important to note that on the facts of that case there was no intention on the part of the borrowers to restore or reconstruct the (ruined) house and Baker J.'s conclusion that the loan was not a housing loan was premised both on the contention that the ruin was not a building and on the lack of evidence of any intention to construct a house on the lands. However, at an earlier point in her judgment when looking at the definition of housing loan she had described a housing loan as *"a loan which a person enters into to buy a house as his or her principle residence, or to buy land on which to construct a house where none already exists on the land, or to improve a house already used by that person or his or her dependants as a principal residence"*.

63. On the basis of this analysis, I am satisfied that the loans made to the appellants in these cases were housing loans. Consequently, they were not credit agreements to which the provisions of Part III of the 1995 Act applied and the failure to advise the appellants in

writing of their entitlement to a cooling-off period (which did not in any event apply by virtue of the provisions of s. 50(4)) does not preclude enforcement of the loans.

64. In light of the conclusions which I have reached on the interpretation issue, it is not necessary to address in any detail the arguments made by the appellants on the trial judge's analysis of whether the loan agreements were executory contracts or not. This was linked to the argument made by the appellants that the trial judge assumed the houses would be built by the time the loans were drawn down, an argument which I have already rejected.

65. In simple terms an executory contract is one under which the parties have continuing obligations to each other or where there are unperformed obligations on both sides or, occasionally, only on one side. Insofar as the loan agreement is a contract entered into at the point in time where the borrower accepts the terms of the loan offered by the lender, it is clearly an executory contract. The lender has yet to provide the money and the borrower has yet to provide the security and to repay the loan on the agreed terms. Even when the loan funds are drawn down and the mortgage has been executed, the borrower remains under a continuing obligation to repay the loan.

66. Further, as the respondent points out, there is a necessary sequence in which the steps relevant to the furnishing of credit for the purpose of acquiring a property must take place. This is so whether the property is already in existence or yet to be constructed. The borrower must receive the funds from the lender in order to acquire the property. The borrower must also acquire the property before they can provide it as security to the lender. In practice these sequential steps may take place almost contemporaneously and on a single occasion, but this does not alter the legal reality that the lender must provide the funds to the borrower before the borrower can acquire the property and in turn provide it to the lender as security. This is so even in the case of a loan for the purchase of an existing house. In addition, both

of these steps can only be taken after the parties have agreed the terms on which the loan is to be advanced and to be repaid.

67. In light of this rather obvious analysis, it is difficult to understand the emphasis placed by the appellants in the notice of appeal in asserting that the trial judge erred in law in stating that the loan agreement was executory. The appellant argues that the definition of housing loan under the 1995 Act as a *"an agreement for credit"* makes the date of the loan agreement the relevant date for establishing its purpose and in turn whether it is a housing loan rather than the date of the drawdown of the funds. I do not disagree with this in principle but note that as of that date it is clearly an executory contract since the obligation of the lender to provide the funds and the obligation of the borrower to provide security and to repay the loan are all -and must be- unperformed obligations.

68. The rationale behind these arguments appears to be the contention that the trial judge made his decision on the erroneous assumption that even if there was no house on the site at the date of the contract, there might well be one by the time the funds were drawn down. As previously indicated, I do not accept that the trial judge made this error. This hypothesis was raised in Allen J.'s analysis of the significance of the use of the present tense (*"the loan <u>is</u> made for the purpose…"*) in subparagraphs (a) and (b) of the definition of housing loan. He was, in my view, correct to dissociate the requirement to consider the purpose of the loan at the time the loan agreement is made from the asserted requirement that the house be in existence at the time of the loan agreement. Pointing to the fact that the loan agreement could relate to a house, as yet to be constructed, but which might be completed by the time the funds were drawn down simply illustrated the fallacy of the appellants' argument rather than constituting a finding of fact on the appellants' case.

69. Some of these difficulties undoubtedly arise from the fact that, as previously noted, the terms of the letter of offer do not neatly mirror what appears to have happened on the

ground. In particular it would seem that the stipulation that the drawdown of the facility would only be permitted on completion of the security was not adhered to by the lender. Whilst the dates on which the various tranches of the loans were drawn down are not set out in the papers before the court, the Mr. Hurley gives the end of July 2002 as the date upon which the house was completed. That portion of the loan which was used to purchase the site was presumably drawn down some time around 31 December, 2001 in order to complete the contract of sale entered into on 17 December, 2001. The mortgage was executed on 11 March 2002. Pursuant to the building agreement, six instalments were due to be paid the builder as work progressed before a final payment on practical completion of the house which would complete payment of the entire contract price. Special condition 7.1 suggested that the monies would not be released until a final inspection report of the completed property and an architect's certificate had been received by the lender. Clearly the drawdown of the loan had commenced before the mortgage was executed and the drawdown had both commenced and was substantially concluded before a final inspection could take place of the completed property.

70. However, in my view these discrepancies and the fact that the lender may not have adhered to its own stipulated contractual requirements do not alter the nature of the loan as a housing loan.

Conclusions

71. For the reasons set out in this judgment I am satisfied that this appeal must be rejected.

72. I accept that a court should not lightly exercise the jurisdiction to strike out proceedings as being bound to fail and that the onus was at all times on the respondent to demonstrate that the proceedings were bound to fail rather than on the appellants to establish that they had meritorious claims. Neither O. 19, r. 28 nor the jurisprudence on the court's inherent

jurisdiction to strike out proceedings stipulate any time frame within which such an application must be brought. Therefore, although the benefit of bringing such an application in cases that were already set down for trial might be questioned, neither the lateness of the application nor the proximity of a trial have a bearing on whether the proceedings disclose a reasonable cause of action or are otherwise bound to fail.

73. These proceedings are entirely dependent on the legal proposition that the loan agreements between the appellants and the respondent do not fall within the definition of a housing loan under the 1995 Act. The appellants' case is only arguable if that legal proposition is capable of being sustained. As a legal proposition it is either right or wrong and its chances of success will not increase (or indeed decrease) through the furnishing of additional evidence or the making available of additional material. In any event, because the application was brought at a very late stage the appellant has already availed of the pre-trial procedures available under the Rules including discovery. The arguments have been assessed on the basis of the factual position asserted by the appellants taken at its height - *i.e.*, that the houses the subject matter of the loan agreements were not in existence at the date of the loan agreements and were not completed until a number of months later in each case.

74. As a matter of statutory construction, the definition of *"housing loan"* in s. 2 of the 1995 Act does not require that the house to which the loan relates be in existence at the time of the loan agreement. The loan may be one made for the purposes of enabling the borrower to provide the house. *"Provide"* in this context has a broader meaning than purchase and can include the provision of a house through its construction.

75. Therefore, even taking the appellants' cases at their height, the statutory provision upon which they depend does not bear the meaning contended for by the appellants.

Consequently, the pleadings do not disclose a reasonable cause of action and the cases are bound to fail.

76. In circumstances where these appeals have been entirely unsuccessful my provisional view is that the respondent should be entitled for an order for the costs of the appeals. However, although there were three appeals the circumstances of each were identical, the pleadings were almost identical and the appeals were heard together. Therefore, I propose that the respondent should get the costs of the paperwork associated with each appeal against each appellant but a single set of costs in respect of the written legal submissions and hearing costs to be taxed jointly and severally against all the appellants. If the appellants wish to contend for an alternative order they are at liberty to file written submissions on the issue of costs (limited to 1,000 words) within 14 days of the date of this judgment and the respondent will have a further period of 14 days to file any responding submissions. In default of submissions being filed the proposed order will issue in the terms suggested above.

77. As this judgment is being delivered electronically, my colleagues Costello and Noonan JJ. have indicated their agreement with it and the orders I have proposed.