

**APPROVED**

**[2021] IEHC 286**

THE HIGH COURT  
CIRCUIT APPEAL

2016 No. 278 CA

BETWEEN

START MORTGAGES DAC

PLAINTIFF

AND

JOHN KEATING  
GERTRUDE KEATING

DEFENDANTS

**JUDGMENT of Mr. Justice Garrett Simons delivered on 11 May 2021**

**INTRODUCTION**

1. These proceedings concern a loan agreement entered into between the plaintiff (“*the lender*”) and the defendants (“*the borrowers*”). The debt under the loan agreement is secured by way of a mortgage against the borrowers’ family home.
2. The dispute between the parties centres on the determination of the appropriate rate of interest under the loan agreement. The borrowers contend that the interest rate must be calculated by reference to the Euro Interbank Offered Rate (“EURIBOR”). On the borrowers’ analysis, they have been overcharged interest for many years. It is said that had the correct rate of interest been applied, then they would not, in fact, be in arrears under the loan agreement. Conversely, the lender’s position is that the determination of the rate of interest is, largely, a matter within its discretion as lender. The lender does accept, however, that it is required to pass on to the borrowers, *to some extent*, a fall in EURIBOR. It is accepted that there must be a correlation between the two interest rates.

This requirement is said to be distinguishable from a contractual obligation that there be a strict mathematical relationship between the rates.

3. The resolution of the dispute between the parties turns on the correct interpretation of the contractual clause governing the rate of interest, and, in particular, on the meaning and effect of the proviso that the interest rate will be “*directly affected by the rise and fall of the Euro Interbank Offer Rate*”.
4. This present judgment is confined to a number of procedural issues. The proceedings have come before the High Court by way of an appeal against an order for possession granted by the Circuit Court. The order had been granted in aid of the lender’s power of sale under the mortgage.
5. The parties are in disagreement as to the appropriate procedure to be adopted by the High Court in determining the appeal. The borrowers contend that the proceedings should not be disposed of summarily, and should, instead, be remitted to plenary hearing. The borrowers also object that there has been a failure on the part of the lender to comply with an earlier order for discovery made by the High Court. Conversely, the lender submits that the issues arising are capable of summary adjudication. The lender has, however, applied for leave to file a supplemental affidavit to address one specific issue arising, namely the fluctuations in EURIBOR over the relevant period.
6. For the reasons set out hereinafter, the proceedings are to be adjourned to plenary hearing, pursuant to Order 5B of the Circuit Court Rules. The plenary hearing will be before the High Court (*Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26). The borrowers are also to be permitted to pursue the question of whether the lender has complied with the earlier order for discovery.

## LOAN AGREEMENT

7. These proceedings arise out of a loan agreement entered into between the lender and the borrowers on 7 November 2007 (“*the loan agreement*”). The debt under the loan agreement is secured by a mortgage against the borrowers’ family home. The mortgage is also dated 7 November 2007. The borrowers have accepted, on affidavit, that they entered into the loan agreement and the mortgage. The dispute between the parties centres instead on the determination of the appropriate rate of interest under the loan agreement.
8. The loan agreement is for a term of 24 years. The structure of the loan agreement is that, over the course of its term, interest only payments were to be made on a monthly basis. The principal sum would then be payable at the expiry of the term (special condition 1001). This is subject to the possibility of the lender demanding repayment of the principal monies earlier, in certain specified circumstances. One such circumstance is where there has been default on behalf of the borrowers in making the monthly interest only payments.
9. Under the heading “*Statutory Loan Details*”, the loan agreement is identified as having an annual percentage rate of charge of 7.5%. Under the heading “*Additional Loan Details*”, it is stated that the interest rate is 7.25%. The type of interest rate is identified as a “*Standard Variable Rate*”.
10. The loan agreement consists of a number of what are described as special conditions, followed by general loan conditions. Special condition 402 reads as follows:

“CONDITION 402 – VARIABLE RATE

The rate of interest applicable to this loan will vary in line with market interest rates. It will be directly affected by the rise and fall of the Euro Interbank Offer Rate.”
11. The rate of interest is also addressed in the general loan conditions as follows:

- “4. The rate of interest specified in the Particulars is the rate of interest charged by the Lender on the relevant category of home loans as of the date of the Letter of Offer. While this interest rate prevails the advance and interest (in the case of annuity mortgages) and the interest accruing on the advance (in the case of interest only mortgages) will be payable by the monthly instalments specified in the Particulars the first of such payments to be made on the specified date of the calendar month immediately following the month in which the advance to the Borrower’s Solicitor was issued and each subsequent payment to be made on each subsequent calendar month thereafter unless otherwise directed by the lender. However, this rate may vary before the advance is drawn down and will be subject to variation throughout the term. The amount of the monthly instalments will fluctuate in accordance with changes in the applicable interest rate. Payment of the monthly repayments must be made by Direct Debit.

The Loan shall bear interest at the current rate of the Lender for the relative account and be computed on a day to day basis and compoundable with monthly rests before as well as after Judgment. A certificate signed by an officer, at the date of the Certificate, of the Lender stating the current rate of interest applicable to the said account from time to time shall be prima facia evidence against the Borrower of the rate of interest applicable to the relative account from time to time. The Mortgage will be one for securing the payment of all monies for the time being due by the borrower to the lender on any account whatsoever.”

12. The position in respect of a fixed rate loan is addressed at general loan condition 6. This addresses *inter alia* the contingency of a borrower on a fixed interest rate seeking to make early repayment of a loan. The “*break funding cost*” is calculated by subtracting the fixed interest rate applicable at the date of repayment from the original fixed interest rate.
13. It is provided at general loan condition 16 that in the event of a conflict between the general conditions and any special conditions, the latter shall prevail.

## **PROCEDURAL HISTORY**

14. These proceedings commenced by way of Civil Bill for Possession issued out of the Circuit Court on 20 February 2015. The proceedings were amended by order dated

11 November 2016 to reflect the change in status of the lender to a designated activity company.

15. The application for an order for possession is grounded on demands for the repayment of the principal sum made by letters dated 5 August 2014. These letters assert that, as of 31 July 2014, the arrears under the loan agreement stood at €48,497.88. These letters were followed up on 8 September 2014 by written demands that the borrowers deliver up vacant possession of the mortgaged property.
16. The borrowers dispute the lender's entitlement to demand repayment of the principal sum. The borrowers have averred that—on their understanding of the appropriate rate of interest—the total amount paid by them to the lender over the life of the loan facility to the date of demand exceeds the amount of interest properly payable.
17. The borrowers' primary position is that the correct interpretation of special condition 402 is that the interest rate under the loan agreement would fluctuate directly in line with changes in EURIBOR over the course of the loan term. This interpretation is said to be borne out by a telephone conversation between Mr. Keating and a named official of the lender. It is said that this official confirmed that the loan agreement was subject to a margin of 2.65% over EURIBOR. An audio recording of this telephone conversation has since been obtained by the borrowers on discovery.
18. The borrowers' secondary position is that, even if the special condition does not require that the interest rate be at a constant margin over EURIBOR, the lender must, at the very least, calculate the interest rate by reference to EURIBOR.
19. Mr. Keating has expressed the belief that the lender has, since 2008, been making changes to the interest rate by reference to changes in the cost of funds, as opposed to by reference to changes in EURIBOR. It is said that this is "*completely at variance*" with the terms and conditions of the loan agreement.

20. The lender's position, as set out in the affidavit of Ms. Coen of 21 July 2016, is that the lender retained discretion to vary the interest it charged, and had not committed to calculate the interest rate based on a constant or fixed margin over EURIBOR. Ms. Coen says that not only is the interest rate affected by EURIBOR, it is also affected by market rates. It is further said that whilst EURIBOR is a factor which influences the setting of the interest rate, the interest rate is not exclusively determined by EURIBOR, and there is no requirement on the part of the lender to pass on the drop in EURIBOR to the borrowers.
21. Ms. Coen confirms that, as of 21 July 2016, the interest rate being applied to the loan agreement is 4.05%, and that this interest rate has applied since 1 December 2013.
22. The lender has exhibited earlier correspondence between the parties. The lender has stated that it is under no obligation to divulge its funding arrangements and that such information could be considered to be commercially sensitive.
23. The lender's approach to a series of requests from the borrowers for an explanation as to how the changes in interest rates were determined is typified by the following extract from a letter of 13 May 2011 to Mr. Keating. (Exhibit RSC1 of Ms. Coen's affidavit).

“Prior to the financial crises (*sic*) there was relative stability in the financial markets and movements in EURIBOR would have been the most observable driver of change to interest rates charged on standard variable rate mortgages by financial institutions. However, since the onset of the financial crises market rates paid by financial institutions operating in Ireland have increased dramatically, over and above increases in Euribor, as the domestic and international banking community has perceived substantially greater risk to attach to Irish institutions. Start sources funds in the market at a rate of interest which reflects market conditions. You will be aware that market conditions have been, and continue to be, fraught leading to higher funding costs for all Irish financial institutions notwithstanding declines in EURIBOR. We hope you find that the information above serves to clarify the issues raised however should you have any further queries, please do not hesitate to contact the undersigned directly at [...].”

24. The proceedings ultimately came on for hearing before the Circuit Court (Her Honour Judge Linnane) on 1 December 2016. The Circuit Court granted an order for possession. A stay of three months was placed on the execution of the order.
25. The borrowers filed an appeal to the High Court. On 30 January 2017, the Deputy Master of the High Court, on consent of the parties, placed a stay on the execution of the order for possession pending the determination of the within appeal.
26. The High Court (Faherty J.) made an order for discovery in favour of the borrowers on 24 April 2017. The order was subsequently amended pursuant to the slip rule on 26 July 2017. The amended order requires the lender to make discovery of the following categories of documents.
  - “1. All documents evidencing or relating to the interest rates and the interest rate margin which was being charged and/or which ought to be charged to the Appellants’ mortgage loan account with the Respondent during the period 1<sup>st</sup> January 2007 to 1<sup>st</sup> January 2017, including but not limited to any document which classifies the said loan account by reference to the interest rate and or the interest rate margin applicable thereto, and/or the margin over EURIBOR which applies thereto.
  2. All documents evidencing or relating to the manner in which the interest rate applicable to the Appellants’ mortgage loan account with the Respondent was calculated, including but not limited to the relationship between the said interest rate and EURIBOR, market interest rates and/or any other factor external to the Respondent’s control during the period 7<sup>th</sup> November 2007 to 31<sup>st</sup> January 2017.
  3. All documents evidencing or relating to conversations and/or correspondence of any kind between Pdraig Collery and the First Appellant during February 2010.”
27. The lender purported to bring an appeal against the order for discovery to the Court of Appeal. This appeal had been misconceived in circumstances where an order of the High Court, which is made in the exercise of its statutory appellate jurisdiction in the context of an appeal from the Circuit Court, is final and conclusive. This is subject only to the possibility of an application for leave to appeal to the Supreme Court. (*ACC Loan*

*Management v. Fagan* [2021] IESC 20). The appeal to the Court of Appeal was ultimately struck out, on consent, on 7 December 2018.

28. An affidavit of discovery was sworn on behalf of the lenders on 26 July 2019. The documents discovered appear to be confined largely to the borrowers' internal file within the lender.
29. The borrowers subsequently brought a motion seeking to have the action dismissed for failure to comply adequately with the order for discovery. This motion came on for hearing on 15 June 2020. Humphreys J. adjourned the motion to the trial judge. Certain directions were made by order dated 6 July 2020. These directions have, to an extent, been overtaken by the subsequent clarification of the procedures applicable to Circuit Court appeals provided by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26.
30. The appeal came on for hearing before me last week (4 May 2021). The parties were in agreement that additional evidence is required in order to allow this court to adjudicate properly on the appeal. The parties are in disagreement, however, as to the extent of the evidence required. Counsel on behalf of the lender submits that it is sufficient to the purpose that a supplemental affidavit be filed confirming the progression of EURIBOR over the relevant period. Counsel explained that the lender has previously carried out the exercise of preparing a document, for other proceedings, which shows that the contractual interest rate correlates with EURIBOR.
31. Whereas counsel was careful to emphasise that the interest rate is not a "*tracker mortgage*", he did accept that, given the wording of the special condition, if the interest rate charged to the borrowers was not affected in any way by the rise and fall in EURIBOR then there could be difficulties. Counsel sought an adjournment to put in affidavit



evidence of the fluctuations in EURIBOR for the relevant period of time. Counsel submitted that the case can still be decided without oral evidence.

32. Conversely, counsel on behalf of the borrowers submits that a plenary hearing is required. In particular, reliance is placed on the content of the telephone conversation between Mr. Keating and a named official within the lender. (See paragraph 17 above). Counsel submits that the informal transcript of the audio recording suggests that there was some linear connection between the interest rate under the loan agreement and EURIBOR. Attention is drawn, in particular, to the reference of a margin of 2.65%. It is submitted that this can only be tested by way of oral evidence and that this official should be available for cross-examination.
33. Counsel also places emphasis on the fact that the question of the adequacy of the discovery made by the lender to date has not yet been determined.
34. In response to a direct question, both parties confirmed that they do not regard the order of 6 July 2020 as precluding me from directing that the appeal be adjourned to plenary hearing (should I consider that it is necessary to do so in the interests of justice).

## **DISCUSSION**

35. The central question which will, ultimately, fall for determination in these proceedings is as to the correct interpretation of the contractual condition governing the rate of interest applicable under the loan agreement.
36. In interpreting the loan agreement, it is necessary to have regard to Council Directive 93/13/EEC on unfair terms in consumer contracts (“*the Directive*”). The Court of Justice (sitting as a Grand Chamber) has recently had to consider the implications of the Directive for contractual terms relating to variable interest rates. (Judgment of 3 March 2020, Case C-125/18, *Gómez del Moral Guasch*, EU:C:2019:695). The Court of Justice

confirmed, first, that a Member State is required to verify that a contractual term relating to the main subject matter of the agreement is in plain and intelligible language, irrespective of whether or not Article 4(2) of the Directive has been transposed into the legal order of that Member State.

37. The Court of Justice went on to hold that a contractual term, which provides for a variable rate of interest under a mortgage loan agreement, must not only be formally and grammatically intelligible to the consumer. It must also enable an average consumer, who is reasonably well-informed and reasonably observant and circumspect, to be in a position to understand the specific functioning of the method used for calculating that rate and thus evaluate, on the basis of clear, intelligible criteria, the potentially significant economic consequences of such a term on his or her financial obligations.
38. The Court of Justice held that, in assessing whether a contractual term, which provides for a variable rate of interest, fulfils these requirements, a national court must consider the promotional material and information provided by the lender in the negotiation of a loan agreement. A national court must also consider information which is easily accessible to anyone intending to take out a mortgage loan. On the particular facts of Case C-125/18, the Court of Justice drew attention to the fact that Spanish banks had been required, under domestic legislation, to publish data relating to past fluctuations of the index on the basis of which the contractual rate of interest was to be calculated.
39. It is convenient, at this point, to recall the precise terms of the special condition applicable to the loan agreement in the present case. The special condition provides as follows:

“CONDITION 402 – VARIABLE RATE

The rate of interest applicable to this loan will vary in line with market interest rates. It will be directly affected by the rise and fall of the Euro Interbank Offer Rate.”

40. Without in any way predetermining the question of contractual interpretation, it can fairly be observed that the wording of special condition 402 is unusual. Typically, a variable rate of interest will be defined in terms which expressly confer a *discretion* on the relevant lending institution to change the rate. Similarly, the variable rate policy statements, which regulated lending institutions have been required to publish since 2017, tend to be couched in general terms.
41. For example, the considerations identified in the variable rate policy statement published by the lender in these proceedings, i.e. Start Mortgages DAC, are stated in very general terms.

“WARNING: We may change the interest rate on this loan. This means the cost of your monthly repayments may increase or decrease.

What do we consider when setting our variable interest rates?

Start Mortgages currently considers the following when setting variable interest rates:

- The terms and conditions of your letter of loan offer including, where relevant, agreed variations to those terms;
- The requirements of applicable law and regulation, including Central Bank of Ireland conduct of business requirements, and good industry practice;
- Market interest rates; and
- Commercial factors including the cost of funding your loan.

Changes in any of these factors and criteria could result in changes to your variable interest rate.

[...]”

42. The wording of the special condition in the loan agreement in the present case is far more specific. The phrase “*directly affected by the rise and fall of*” tends to suggest that there is a relationship between the contractual interest rate and EURIBOR.

43. Counsel on behalf of the lender submits that the wording of the special condition has the virtue of transparency. But such transparency may well have contractual implications. If the terms of a loan agreement impose constraints or limits on the discretion of a lending institution to change the interest rate, then a borrower may legitimately be able to complain that they have been overcharged. This could have consequences for the ability of the lending institution to call in the loan, i.e. by demanding repayment of the principal amount by reference to arrears in the monthly payments.
44. There appears to be little domestic case law on the interpretation of clauses governing the calculation of interest rates under loan agreements. As it happens, the case closest in point is one in which I delivered judgment last year, *Start Mortgages v. McNair* [2020] IEHC 140. The issue in *McNair* had been whether the relevant loan agreement was void for uncertainty. The loan agreement in that case had provided that the interest rate would be directly affected by the rise and fall of the European Central Bank rate. It had been argued that the failure to specify which of the European Central Bank's various rates applied meant that the loan agreement had "*no defined product*", and that the contract must fall. It had been further argued that, in the absence of a definition of which of the European Central Bank's various rates would govern the loan, it was not possible to calculate the sums owing.
45. In addressing these specific arguments, I had observed that the interest rate is not mathematically defined by reference to the ECB rate. This was sufficient to dispose of the arguments advanced on behalf of the borrower in that case. Relevantly, the judgment expressly adverts to the possibility of a borrower, in other proceedings, challenging the basis upon which the interest rate had been varied over the period of the loan. The judgment in *McNair* is not determinative of the issues which arise in the present

proceedings. It is also to be noted that the condition in issue in *McNair* had been less specific, referring simply to the European Central Bank rate.

## DECISION

46. For the reasons which follow, I have concluded that it would not be in the interests of justice for these proceedings to be determined on a summary basis. Instead, the appeal will be adjourned to plenary hearing, with directions as to the exchange of pleadings. In reaching this conclusion, I have had regard to the principles governing the exercise of the court's discretion under Order 5B of the Circuit Court Rules as stated by the Supreme Court in *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26.
47. First, the meaning and effect of special condition 402 cannot be determined on a standalone basis, by reference solely to the wording of the condition. Rather, it will be necessary to apply the "*text in context*" approach to interpretation. Certain of the terms employed in the condition are not self-explanatory and will require evidence. In particular, the term "*Euro Interbank Offer Rate*" requires elaboration. It appears that this term applies to a number of different rates applicable to interbank lending, which differ depending on the length of the facility required. Evidence will be required as to what would have been understood by the term. Does it, for example, refer to the EURIBOR one month rate.
48. The lender itself has sought an adjournment to allow it file further affidavit evidence on the fluctuations of EURIBOR during the relevant period. Counsel on behalf of the lender confirmed that his client accepts that it is required to pass on a fall in EURIBOR, *to some extent*, to the borrowers. It is accepted that there must be a correlation between the two interest rates. Counsel submits that the evidence of the fluctuations of EURIBOR will demonstrate this correlation.

49. It is also not obvious from the wording of the special condition as to what is meant by “*market interest rates*”. In particular, it is not immediately apparent whether it refers to the interest rates being charged to consumers by other lending institutions in the market, or whether it refers to the rates being charged to lending institutions, i.e. their cost of funding. It is notable that the variable rate policy statement published by the lender post-2017, on one reading at least, seems to distinguish between “*market interest rates*” and “*cost of funding*”.
50. It may also be relevant to have regard to how Start Mortgages advertised its rates at the time the loan agreement had been entered into, and whether there were differently worded rates available to potential borrowers at the time. This is because, as discussed under the previous heading, the Court of Justice has confirmed that the promotional material and information provided by the lender in the negotiation of a loan agreement, and other information, which is easily accessible to anyone intending to take out a mortgage loan, are relevant considerations. Such evidence is best brought out at a plenary hearing.
51. In this regard, counsel for the lender had referred during the course of the hearing on 4 May 2021 to a non-statutory description of a “*standard variable rate*” published by the Competition and Consumer Protection Commission on its website. It was confirmed in subsequent correspondence with the High Court Registrar that the reference was to the website as it stood on 14 November 2017. This being the date upon which the website had been accessed by the lender for the purpose of preparing submissions in *other* proceedings. Whereas this non-statutory description could not be relevant to a loan agreement entered into a decade earlier, it may well be that each side may wish to refer, at the hearing of the appeal, to the type of information which would have been available to consumers at the time the loan agreement had been entered into in 2007. Again, such evidence is best brought out at a plenary hearing.

52. Secondly, there is a factual controversy as to whether the interest rate had been calculated by the application of a fixed margin to EURIBOR. The borrowers have obtained, by way of discovery, an audio recording which, on one understanding at least, might appear to confirm that this is the approach adopted. This factual controversy can only be resolved by way of oral evidence and cross-examination.
53. Thirdly, these proceedings present a difficult question of law in relation to the interpretation of a key contractual provision, namely that governing the calculation of the appropriate rate of interest. It seems to me that such a difficult question of law would benefit from an exchange of pleadings, wherein the parties could clearly identify precisely what they say is the correct interpretation of, and the legal implications of, the disputed contractual provision. Part of the problems in the case to date stem from the fact that there have been no pleadings, and each side is, instead, seizing upon paragraphs in individual affidavits in an attempt to identify the precise parameters of the other side's case. Whereas the normal purpose of directing a plenary hearing is to allow factual matters to be determined, it seems to me that it is also appropriate where there are difficult legal issues.
54. Fourthly, the very fact that the High Court has already granted an order directing the making of discovery tends to confirm that the issues arising are not ones which can be dealt with in a summary manner. There is a dispute outstanding between the parties as to whether or not the lender has complied with the terms of the order for discovery made by Faherty J. It may be of assistance in determining whether to direct further and better discovery, i.e. over and above the limited discovery provided by the lender to date, if there are pleadings against which relevance and necessity can be assessed.

**CONCLUSION AND FORM OF ORDER**

55. These appeal proceedings are to be adjourned for plenary hearing pursuant to Order 5B, rule 8 of the Circuit Court Rules. The plenary hearing will be before the High Court, in accordance with *Bank of Ireland Mortgage Bank v. Cody* [2021] IESC 26.
56. The following directions are given in respect of the exchange of pleadings. The plaintiff/lender is to deliver points of claim by 8 June 2021. The defendants/borrowers are to deliver points of defence by 6 July 2021. The plaintiff/lender is to deliver its reply, if any, by 31 July 2021. The case will then be listed before me for further case management on Tuesday, 31 August 2021. I will also hear the parties on that date as to what costs order should be made in respect of the hearing before me on 4 May 2021.
57. For the avoidance of any doubt, the question of whether the plaintiff/lender has properly complied with the order for discovery made on 24 April 2017 (as amended on 26 July 2017) remains undetermined. The defendants/borrowers are to indicate at the directions hearing whether they wish to pursue their motion in this regard.

*Appearances*

Andrew Walker for the plaintiff instructed by BHSM LLP Solicitors  
Shaula Connaughton-Deeny for the defendants instructed by Dodd & Company Solicitors (Dublin)

Approved  
Gemma S.M.S.