

THE HIGH COURT

[2022] IEHC 299
[2020 No. 625P.]

BETWEEN

DONAL HURLEY

PLAINTIFF

AND

**PEPPER FINANCE CORPORATION (IRELAND)
DESIGNATED ACTIVITY COMPANY**

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 20th day of May, 2022

Introduction

1. This case raises an interesting question as to the correct interpretation of the Consumer Credit Act, 1995, as enacted.
2. The core legal issue in the action is whether a loan agreement made in 2001, the purpose of which was to fund the purchase of a site and the building of a house – as opposed to the purchase of an existing house – was a “housing loan” for the purposes of the Act. Or, as it was put by counsel, the issue is whether the existence of a house is a prerequisite to the existence of a housing loan.
3. As I will come to, the Act of 1995 has been amended since the loan agreement the subject of these proceedings was made by the substitution of a new definition of “housing loan”. This judgment deals with the construction of the original definition.

The agreed facts

4. By a mortgage offer dated 19th November, 2001 Irish Nationwide Building Society (“INBS”) offered to Mr. Donal Hurley a loan in the sum of IR£112,500, repayable with interest over 25 years by instalments of combined principal and interest, on the security of a first legal mortgage over what was to be Mr. Hurley’s principal private residence at 10 Tallon Heights, Castletownbere, County Cork. The stated purpose of the loan was “To Purchase a Principal Private Residence”. Mr. Hurley accepted the offer by endorsement on 4th December, 2001.
5. By agreement in writing in the Law Society of Ireland standard form (1991 edition) dated 17th December, 2001, made between John Power and Margaret Power as vendor and Mr. Hurley as purchaser, Mr. and Mrs. Power agreed to sell and Mr. Hurley to purchase that part of the property comprised in Folios 27298 and 26876 of the Register of Freeholders, County Cork, as therein more particularly described and known as No. 10 Tallon Heights, Castletownbere, Co. Cork for the price of IR£35,000. The contract provided for the payment of a deposit of IR£3,500 which, by the special conditions, was to be released to the vendors rather than held by their solicitor as stakeholder. The site purchase contract was tied by the special conditions to a building agreement to be executed by the parties but provided for completion of the site purchase within two weeks from the date thereof.
6. By a building agreement in the Law Society of Ireland and Construction Industry Federation printed standard form of the same date, 17th December, 2001, between Mr. Hurley and SWD Properties Limited (“SWD”), Mr. Hurley agreed to employ SWD and SWD

agreed to build and finish in a good, substantial and workmanlike manner the house specified in the plans agreed on the site at Tallon Heights for the sum of IR£90,000, inclusive of VAT. The agreement provided for the payment of the contract price by seven instalments as the building work progressed, between the date of the signing of the agreement and the practical completion of the works.

7. On 11th March, 2002 Mr. Hurley duly executed a deed of mortgage in the INBS printed standard form over:-

"ALL THAT AND THOSE piece or plot of ground being part of the lands at Derreenataggart Middle and Cametringane, Barony of Beara and County of Cork being part of the property comprised in Folio 92889F of the Register of Freeholders, County of Cork as more particularly delineated and described on the map attaching to the Deed of Transfer dated 11th March 2002 made between Joseph Power and Margaret Power of the One Part and Donal Hurley of the Other Part and thereon outlined in red and known as Site No. 10, Tallon Heights, Castletownbere, Co. Cork."

8. The mortgage deed defined "The Mortgaged Property" as meaning "that land described in the Third Schedule hereto with any buildings now erected or in the course of erection thereon and every part thereof."
9. It is evident from the date of the transfer in the description of the property in the mortgage that the site purchase was not completed within two weeks.
10. Mr. Hurley was in due course registered as the owner of the property in a new Folio 105723F, County Cork and on 6th February, 2004 the charge over the property in favour of INBS was duly registered on that folio. In about 2019 Mr. Hurley's loan and mortgage were transferred to Pepper Finance Corporation (Ireland) DAC ("Pepper") and on 25th July, 2019 Pepper was duly registered as the owner of the charge.

The pleadings

11. This is one of a number of actions in which borrowers have challenged the enforceability of loans which have been assigned to Pepper on the same ground and there are a couple of glitches in the statement of claim as to dates and lenders which appear to be attributable to copying and pasting.
12. Although the statement of claim does not say so, the plaintiff's case is that as of the date of the loan agreement there was no building or part of a building on the site at 10 Tallon Heights which was used or was suitable for use as a dwelling: and that is accepted by Pepper for the purposes of the application now before the court.
13. Mr. Hurley's case is that at the time of the loan agreement, and at the time of the mortgage, INBS failed to comply with the requirements of s. 30 of the Consumer Credit Act, 1995 and that in consequence Pepper, as the assignee of INBS, is not entitled to enforce the loan agreement or any security given for it. For the purpose of this application, Pepper admits that the requirements of s. 30 of the Act of 1995 were not

complied with: or more accurately, that what s. 30 requires to be done was not done. The issue is whether s. 30 applied to the loan.

14. The action was commenced by plenary summons issued on 27th January, 2020 by which the plaintiff claimed a declaration that for the purposes of a loan agreement dated 19th November, 2001 he was a consumer for the purposes of the Consumer Credit Act, 1995; and a declaration that the credit agreement and mortgage were unenforceable by reason of the provisions of s. 38 of the Act of 1995. Following the delivery of the statement of claim on 11th March, 2020 and a request for particulars which was duly replied to, a defence was delivered on 26th February, 2021, which commenced with a preliminary objection that the claim that the loan and security were unenforceable was bound to fail.
15. The action was set down for trial on 27th July, 2021 but before it was certified the motion now before the court was issued on behalf of Pepper.

The motion

16. The case now comes before the court on foot of a notice of motion issued on 1st October, 2021 by which Pepper asks for an order pursuant to the inherent jurisdiction of the court and/or pursuant to O. 19, r. 28 dismissing the proceedings on the grounds that they disclose no reasonable cause of action, are bound to fail, are frivolous and/or vexatious and/or constitute an abuse of the process of the court.
17. From the time I first read the papers I was engaged by the procedure adopted by Pepper. The plenary summons and statement of claim were settled by responsible counsel and appeared to me to raise an question of law. While in this particular case the statement of claim did not lay the ground in fact for the legal argument, it was one of a number in which the facts – that there was no house on the site at the date of the loan agreement – had been pleaded and, correctly as it turned out, I did not understand the attack to be on the statement of claim as opposed to the underlying proposition of law. Counsel for Pepper agreed that the question of law which is at the heart of the action might have been the subject of a motion for the trial of a preliminary issue of law, which would have been dispositive of the action, but stood over the procedure adopted.
18. In support of his argument that the issue could be disposed of by the exercise by the court of its jurisdiction under O. 19, 28 and its inherent jurisdiction to strike out actions which are bound to fail, counsel relied on the judgment of the Supreme Court in *Moylist Construction Limited v. Doheny* [2016] 2 I.R. 283 in which Clarke J. (as he then was) examined the “bound to fail” jurisdiction. Starting with the decision of Costello J. in *Barry v. Buckley* [1981] I.R. 306, Clarke J. traced the evolution of the inherent jurisdiction through *Salthill Properties Ltd. v. Royal Bank of Scotland plc* [2009] IEHC 207, *Lopes v. Minister for Justice* [2014] 2 I.R. 301 and *Keohane v. Hynes* [2014] IESC 66.
19. At para. 14, Clarke J. recalled a passage from his judgment in *McGrath v. O’Driscoll* [2007] I.L.R.M. 203, which had been approved by the Supreme Court in *Danske Bank v. Durkan New Homes* [2010] IESC 22, where he said:-

"So far as questions of law or construction are concerned the court can, on a motion for summary judgment, resolve such questions (including, where appropriate, questions of the construction of documents), but should only do so where the issues which arise are relatively straightforward and where there is no real risk of injustice being done by determining those questions within the somewhat limited framework of a motion for summary judgment."

20. There was, said Clarke J., at least a partial analogy between the position of a defendant faced with an application for summary judgment and a plaintiff faced with an application to dismiss under the inherent jurisdiction. In both cases the suggestion is that the relevant party should not get a full plenary hearing. In both cases the reason why it is said that there should not be a full hearing is that there would be no point, either because there is no defence or no claim. He continued, at para. 17:-

"However, it is clear from McGrath v. O'Driscoll [2007] I.L.R.M. 203 that, while the court has an entitlement in a summary summons application for judgment to resolve questions of law or the interpretation of documents, that entitlement should only be exercised where it is possible and appropriate to do so within the confines of a motion without running the risk of injustice. It seems to me that a similar consideration necessarily applies concerning the extent to which it is appropriate to get into complex issues of law or construction on an application to dismiss a case as being bound to fail. Like the summary judgment motion, such an application will be heard on affidavit and within the confines of a motion rather than at a full hearing. The test which the court is required to apply is very similar. In a summary judgment application, it is whether it is very clear that the defendant has no defence (this test is now well established, going back at least to Aer Rianta cpt v. Ryanair Ltd. [2001] 4 I.R. 607). That is very similar to the test applied in a Barry v. Buckley application which requires the court to be satisfied that the claim is bound to fail or, to use the language of the summary judgment jurisprudence, that it is very clear that the plaintiff has no case and thus that the plaintiff's case is bound to fail (see Barry v. Buckley [1981] I.R. 306)."

21. Counsel referred also to the exposition of the law by Irvine J. in *Kelly v. Allied Irish Banks plc* [2019] IESC 72, focussing on para. 29 where she said:-

"It is also well established that when considering an application to dismiss a claim on the grounds that it is bound to fail, the court may also resolve disputes which concern issues of law or construction. However, should these prove complex or should it be established that they cannot conveniently be dealt with otherwise than on a plenary hearing, the court should decline its jurisdiction to entertain an application for summary dismissal of the proceedings (see [Moylist Construction Limited v. Doheny [2016] 2 I.R. 283] and McGrath v. O'Driscoll [2007] I.L.R.M. 203)."

22. Acutely conscious of the caution repeatedly emphasised by the Supreme Court in *Moylist*, as well, indeed, as in the other cases, it seems to me that no sensible assessment can be

made of the difficulty or complexity of the issue of law on which the claim turns without first identifying what the issue is and then looking at the arguments advanced on either side.

23. The issue is net. It is whether an agreement for the provision of credit to a consumer to allow the consumer to build, rather than to buy, a house is a "housing loan" for the purposes of the Consumer Credit Act, 1995.

The relevant provisions of the Consumer Credit Act, 1995

24. I pause here to note that with effect from 1st August, 2004, s. 33 of the Central Bank and Financial Services Authority Act, 2004 substituted a new definition of "housing loan". This case falls to be decided by reference to the original definition, which was that which applied at the date of the agreement the subject of the proceedings but the new definition is a matter to which I will need to return.
25. Part III of the Consumer Credit Act, 1995 sets out a number of requirements relating to credit agreements and the form and contents thereof. According to the shoulder note, s. 30 sets out a number of general requirements relating to the contents of credit agreements. The first of these is that the credit agreement must be in writing and the second is that a copy of the agreement must be handed to the consumer personally upon the making of the agreement or sent to him or her within ten days: which are not really requirements relating to the contents of the agreement. Section 30, sub-s. 2 – which is the particular focus of Mr. Hurley's claim – requires that a credit agreement shall contain a statement in respect of the cooling-off period that the consumer has a right to withdraw from the agreement without penalty if the consumer gives written notice to that effect within ten days of the receipt by him of a copy of the agreement, or may, by his signature separate from and additional to his signature in relation to the terms of the agreement, indicate that he does not wish to exercise that right.
26. Section 38 of the Act of 1995 provides that a creditor shall not be entitled to enforce a credit agreement, and no security given by the consumer shall be enforceable against the consumer by any holder thereof, unless the requirements of Part III have been complied with. There is a proviso to s. 38 which allows a court, if satisfied that a failure to comply with any of the requirements of Part III, other than those in s. 30, was not deliberate and has not prejudiced the consumer and that it would be just and equitable to dispense with the requirement, to decide, subject to any conditions it sees fit to impose, that the agreement shall be enforceable.
27. Section 29 provides that Part III shall apply to all credit agreements other than housing loans.
28. While the statement of claim alleges that the requirements of s. 30, generally, and of sub-s. 2(a) in particular, were not complied with, the focus of the claim is that the loan agreement did not contain a statement in respect of the cooling off period – which it did not. In any event, if the credit agreement in this case was a housing loan none of the requirements of s. 30 were applicable.

29. Section 2 of the Act of 1995 lists a number of definitions.
30. A "credit agreement" is defined as "an agreement whereby a creditor grants or promises to grant to a consumer a credit in the form of a deferred payment, a cash loan or other similar financial accommodation."
31. "House" is defined as including "any building or part of a building used or suitable for use as a dwelling and any outoffice, yard, garden or other land appurtenant thereto or usually enjoyed therewith."
32. The Act of 1995, as originally enacted, and as it applied at the time of the transactions the subject of these proceedings, provided that:-

"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."*

The arguments

33. It is common case that Mr. Hurley was a "consumer" for the purposes of the Act of 1995. It is common case that the loan agreement between INBS and Mr. Hurley was a "credit agreement". And it is common case that Pepper is the "holder" of the loan and security and so bound by any failure on the part of INBS to comply with the requirements of Part III.
34. Mr. Hurley's case is, and it is accepted by Pepper for the purposes of this application, that at the date of the loan agreement there was no house on the site.
35. Mr. Boyle Harper, for Pepper, relied on the decision of Baker J. in *ACC Loan Management Ltd. v. Browne* [2015] IEHC 722. That was a judgment on a motion for summary judgment against two brothers on foot of a loan agreement made on 9th April, 2008. Among the defences that the defendants put forward was an argument that the loan agreement was not enforceable because the requirements of the Act of 1995 had not been complied with. The plaintiff countered that the defendants were not consumers and, in any event, that the provisions of the Act relied on by the defendants were not applicable because the loan was a housing loan as defined by the Act.
36. The stated purpose of the loan in *Browne* was to refinance an existing loan and to release equity in lands at Meenreagh, Killygordon, County Donegal, to finance renovations to "the borrowers'" primary dwelling-house. Not the least problem was the fact that, as was common case, the borrowers had never shared a residence. Baker J. carefully unravelled

the borrowing history of the Messrs. Browne which was sometimes several and sometimes joint and several, sometimes for several purposes and sometimes for joint purposes, until it was eventually wrapped up in a joint and several loan, and concluded that they had made out an arguable and *bona fide* case that they were consumers for the purposes of the 2008 loan.

37. Part of the security for the loan in Browne was a charge over the thirteen hectares at Meenreagh, Killygordon, County Donegal, which had previously been owned by the brothers' grandfather and which they had bought for sentimental reasons. At the time the Browne brothers bought the Donegal lands there was a ruin on them. The house – or what had been the house – was derelict. It had no roof and the walls had collapsed and all that remained was an outline of about three blocks in height. There was no evidence that the 2008 loan had been obtained for the purpose of enabling the brothers to improve the ruin and so the issue identified by the judge was whether the security for the 2008 loan was in respect of land on which there was a house. On the evidence, Baker J. found that the ruin or structure on the Donegal lands was not a building and that there was no evidence of any intention to construct a house on the land. She concluded that the loan was not a housing loan and that what she referred to as the provisions of the Act which were protective of the borrowers did apply.
38. By the time of the *Browne* loan in 2008 the original definition of "housing loan" in the Consumer Credit Act, 1995 had been substituted by s. 33, Schedule 3, Part 12 of the Central Bank and Financial Services Authority of Ireland Act, 2004. For present purposes *Browne* is authority for what amounts to a "house" – for the definition of "house" is unaltered – but not necessarily for what may or may not constitute a "housing loan". Mr. Boyle Harper's reliance on it, however, is slightly nuanced. *Browne*, he submits, is authority for the proposition that on a motion for summary judgment the court can decide on uncontested facts whether a loan was, or was not, a "housing loan". That, he says, is precisely what the court is invited to do, and is entitled to do, in this case.
39. The submission on behalf of Pepper is that the facts pleaded disclose no cause of action when considered in relation to the law. Accordingly, it is said, the case falls squarely within the jurisdiction conferred by O. 19, rule 28.
40. Mr. Boyle Harper submits that it is not a prerequisite of a "housing loan" that the house should already exist.
41. As to the approach that ought to be taken in construing the definition, the court was referred to the judgment of Finlay-Geoghegan J. in *McGuinness v. Ulster Bank Ltd.* [2019] IESC 20. That was a case which turned on the correct construction of a section of the Land and Conveyancing Law Reform Act, 2009 but what the Supreme Court had to say was of general application. At para. 20 of her judgment Finlay-Geoghegan J. said:-

"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."

42. The definition of "house" it is submitted, must include a future house as well as an existing house. The declared purpose of the loan agreement in this case, it is said, was "To Purchase a Principal Private Residence" and the agreed security was to be "First Legal Mortgage over Principal Private residence @ 10 Tallon Heights, Castletownbere, Co. Cork." As a matter of plain English, the word "provide" contemplates the construction of a house as well as the purchase of an existing house. The construction contended for by Mr. Hurley, it is said, would entail reading into the definition of "house" the words "already constructed".

43. Counsel referred to a passage in *Bird Consumer Credit Law* (1998) at p. 433 where the author offers the view that:-

"It will be noted that the definition of a 'housing loan' comprises three formulations, of which two, section 2(1)(a) and (b) CCA 1995, are interlinked. First, a 'housing loan' may be a loan to provide or improve the house or to purchase the estate in it, be that either the freehold or the leasehold estate. The use of the words 'provide' and 'purchase' in section 2(1)(a) are to cover situations in which the loan may be made either to purchase an existing house or to finance the improvement of a house or to cover the building of a house by the borrower himself."

44. Counsel referred to the long title to the Consumer Credit Act, 1995 which recites several purposes, amongst which are to enable effect to be given to Council Directive No. 87/102/EEC of 22nd December, 1986, as amended by Council Directive No. 98/88/EEC of 22nd February, 1990. Article 2(1)(a) of Directive 87/102/EEC provides that:-

"1. *This Directive shall not apply to:*

(a) *Credit agreements or agreements promising to grant credit:*

- *Intended primarily for the purpose of acquiring or retaining property rights in land or in an existing or projected building,*

- *Intended for the purpose of renovating or improving a building as such;"*

45. The Act of 1995, it is said, largely mirrors the Directive, which clearly excludes from its scope credit agreements to fund the construction of projected buildings. This, it is said, is consistent with the construction of the legislation urged on behalf of Pepper.

46. Mr. Boyle Harper then moved to the revised definition of "housing loan" which was introduced by s. 33 of the Central Bank and Financial Services Authority Act, 2004, which is:-

"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 dependants, 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."*

47. Plainly, it is said, the revised definition captures a loan agreement for the purpose of enabling a person to have a house constructed on land, as well as for the purpose on enabling the purchase of an existing house. However, so the argument goes, when the definition of housing loan was amended there was no amendment to the definition of "house", so the definition of house now clearly includes a future house. If a "house" since 2014 includes a future house, and the definition is no different now than it previously was, a "house" before as well as after 2014 must encompass a future house.
48. Mr. Hayden and Mr. Clein, for Mr. Hurley, were rather miffed by the manner in which the issue was brought before the court. If it is any consolation, I initially shared their surprise. Counsel for Mr. Hurley had anticipated - not altogether unreasonably - that written submissions would have been filed on behalf of Pepper and absent such submissions, filed their own in which they endeavoured to anticipate the argument that

would be made on behalf of Pepper and addressed at some length the jurisdiction under O. 19, r. 28 to strike out pleadings and the inherent jurisdiction of the court to strike out proceedings.

49. As to the jurisdiction of the court under O. 19, r. 28 and as to inherent jurisdiction of the court, counsel for Mr. Hurley cited extensively from Chapter 16 of *Delany and McGrath on Civil Procedure (4th Edition)* and from a recent judgment of Butler J. Two passages from *Delany and McGrath* appear to me to be particularly relevant. At para. 16-13 the authors observe:-

"16-13 However, as Clarke J. also pointed out in Keohane v. Hynes,

'the jurisdiction is to be sparingly exercised and only adopted when it is very clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law.'

50. And at para. 16-32 the authors suggest that:-

"16-32 There is a degree of overlap between claims that are unsustainable or bound to fail and those that are regarded as frivolous or vexatious. It is also evident that the category of proceedings that would be considered to be frivolous and vexatious is broader and extends to proceedings which, although they have a reasonable prospect of success will not confer any tangible benefit on the plaintiff or are taken for collateral or improper motives. In his judgment in the Supreme Court in Farley v. Ireland [(Unreported, Supreme Court, 1st May, 1997)] Barron J. noted that the words 'frivolous and vexatious' have a legal meaning in this context and that they are not pejorative in any sense. In his view, in using the former term, the court is simply saying that if the plaintiff has no reasonable prospect of succeeding in his claim it is frivolous to bring the case."

51. As Butler J. put it in *Somers v. Kennedy* [2022] IEHC 27, at para. 47:-

"Frivolous or vexatious in this context means that the proceedings have no reasonable chance of succeeding in the sense that the complaint is futile, misconceived or hopeless."

52. Counsel for Mr. Hurley rely on *Somers v. Kennedy*, emphasising a sentence later in para. 47 that:-

"Either jurisdiction is to be exercised sparingly as the effect of striking out proceedings will be to deprive the intending litigant of what would otherwise be a constitutional right of access to the courts."

53. To this, Butler J. immediately added:-

"Notwithstanding this, an order can be made in appropriate circumstances because it would be an abuse of the court's process to permit litigation to proceed in circumstances where it has no prospect of success and it would be unfair to the defendant to require them to defend it."

54. I accept Mr. Hurley's submission that Pepper, having invoked the inherent jurisdiction of the court, must satisfy the court that it meets the very high threshold required of such applications. I accept also that the issue might have been brought before the court by way of an application for the trial of a preliminary point of law or a special case.
55. 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.
56. That said, Mr. Hurley's position is that the legislation is absolutely clear and that absent a house the loan agreement could not have been a housing loan. Pepper agrees that the legislation is absolutely clear but its position is that the presence or absence of a house at the time of the making of the agreement is neither here nor there.
57. As I understand the arguments, the parties are more or less in agreement that the substantive issue – as to whether the loan agreement was a housing loan – can be determined summarily and differ only in their submission as to which way it should be determined. If they are right in that, the substantive issue may very well be one which can be determined on a motion such as this, without running any risk of injustice.
58. As to the substantive issue – or the arguability of the substantive issue – counsel for Mr. Hurley devoted some attention to the definition of "house" and the judgment of Baker J. in *Browne*.
59. I observed earlier that the conclusion in *Browne* was that the ruin or structure on the Donegal lands was not a building and that there was no evidence of any intention on the part of the borrowers to construct a house on the land. In this case counsel stressed that the analysis and decision in *Browne* was based on the revised definition of "housing loan" which expressly contemplated a projected house. It was submitted by counsel for Mr. Hurley that the reference by Baker J. to an intention to construct a house was obiter. I cannot agree. The very careful examination of the brothers' borrowing history and the purpose of the ultimate loan was directed not only to the defendants' argument that they were consumers but also to the plaintiff's argument that the loan was a housing loan, to which the provisions of Part III of the Act of 1995 did not apply. Whether the loan in *Browne* was a "housing loan" within the meaning of the new definition clearly required an examination as to whether the purpose of the loan was to enable the defendants to have a house constructed on the lands.
60. As to the correct construction of the Act of 1995 – specifically the definition of "housing loan" – counsel for Mr. Hurley submitted that the words used by the Oireachtas should be interpreted literally and cautioned that the court should not be tempted to deviate from

the literal meaning of the words to achieve what might be thought to be a more desirable result. Reference was made to a passage in the judgment of Finlay C.J. in *McGrath v. McDermott* [1988] I.R. 258 where it was said, at p. 275 that:-

"The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts have not got a function to add to or delete from express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective."

61. In this case, it was submitted there is no uncertainty or ambiguity and however desirable it might be thought to have been that borrowing in respect of houses to be built should be treated in the same way as borrowing for houses that had been built, the definition should not be stretched beyond its clear meaning. If, it was submitted, there was a lacuna in the original definition, the court is not entitled to fill it.
62. The requirement that the court should make a literal interpretation, it was said, was underlined by the provision made in s. 5 of the Interpretation Act, 2005 for the construction of ambiguous or obscure provisions. Reference was made to *Director of Public Prosecutions v. C.* [2021] IESC 74.
63. It was further submitted that the use of the disjunctive "or" between "freehold" and "leasehold", and between "estate" and "interest" must have the result that the definition of "housing loan" did not include a building contract.
64. Counsel for Mr. Hurley examined the revised definition of "housing loan" introduced in 2014 and emphasised the inclusion in the new definition of a house to be constructed on land as well as a house that is already constructed. If, it was said, the Oireachtas had intended that the legislation as originally enacted should extend to houses to be constructed, it would have been easy to have said so. Going back to the original definition, it was submitted that the court ought to infer the legislative intention not only from the text but from omissions from the text. The ease with which the draftsman could have included a particular expression, if intended, should add weight to be attributed to the omission: *Dodd Statutory Interpretation in Ireland* para. 5.78.

Analysis and conclusions

65. The parties, as will have been seen, had a lot to say but were agreed that the issue was a straightforward matter of statutory interpretation.
66. If a good deal of the argument focussed on the jurisdiction invoked by Pepper, the parties appeared to me to be in agreement that substantive issue was suitable for summary determination. Mr. Hurley emphasised, and Pepper agreed, that Pepper had given itself a

high bar but it was not said that the issue of law was complicated or that the legal arguments could be developed or expanded at a plenary hearing of the action or a trial of the substantive issue as a preliminary issue of law or a special case. Specifically, while Mr. Hurley's argument emphasised the burden which Pepper had assumed by adopting the procedure which it had, it was not said that a determination of the substantive issue might give rise to a risk of injustice. While the peroration in Mr. Hurley's written submission was that he had, at the very least, an arguable case that the loan agreement was not a housing loan, the substance of his argument was that it plainly was not.

67. I am acutely conscious of the *dictum* of Clarke J. in *Keohane v. Hynes* that the inherent jurisdiction of the court is not to be adopted where the plaintiff's case is thought to be weak or to have an early determination on a point of law. I take into account, also, that the court should be very much alive to the risk that the procedure may be chosen in the hope of achieving an unfair strategic advantage. On one view it might be said that the procedure adopted puts the plaintiff's case on the hazard – inasmuch as a decision against him would result in the dismissal of his case – while all that the defendant has risked is the costs of the motion, if it were to fail. On the other hand, if, truly, the action is bound to fail it must be in the plaintiff's as well as the defendant's interest that that should be established sooner rather than later and the costs kept to a minimum.
68. Pepper's notice of motion invoked the inherent jurisdiction of the court as well as the jurisdiction under O.19, r. 28 and the argument was not absolutely focussed on each or either but when analysed I think that it becomes clear that the application is an application under O. 19, r. 28 to strike out the statement of claim as disclosing no cause of action.
69. Mr. Hurley's case is that because, at the date of his loan agreement with INBS, there was no house on the site which he then intended to buy, and on which he then intended that he would later build a house, the loan agreement was not a "housing loan". If it was not, the failure of INBS to comply with the requirements of s. 30 of the Consumer Credit Act, 1995 has the effect in law that the loan agreement and the security given for it are unenforceable. Mr. Hurley was a consumer and Pepper is the holder of the security. The critical fact subtending Mr. Hurley's case that there was no house in existence at the time of the agreement was not pleaded but the motion was argued on both sides – quite rightly – as if it had been. The requirements of Part III of the Act of 1995 apply to all credit agreements other than housing loans. And so the legal premise of the action – and of the statement of claim – is that Mr. Hurley's credit agreement was not a housing loan. If it was, Part III did not apply to it and Mr. Hurley has no case. If it is plain beyond doubt or argument that it was, the sooner the parties know, the better it will be for both of them.
70. With no disrespect to counsel, the argument that the construction of the Act of 1995 contended for by Pepper was consistent with Council Directive 87/102/EEC is easily disposed of. The argument, it will be recalled, is that the long title to the Act of 1995 shows that one of the objects of the Act was to give effect to the Directive, and that the

Directive did not apply to agreements intended primarily for the purpose of acquiring property rights in land or in a projected building. But the long title shows that this was one only of a number of objects starting with the revision and extension of the law relating to consumer credit, generally. If the obligation to give effect to the Directive did not require the regulation of credit agreements intended for the purpose of acquiring rights in a projected building, there was no reason why the Oireachtas might not have decided to do so. The fact that the construction of the Act contended for by Pepper was consistent with the Directive, or not inconsistent with the Directive, does not really advance matters. In fairness to counsel, although the argument was made it was not really pressed.

71. To a greater or lesser extent, both parties suggested that in construing the definition of "housing loan" in the Act as originally enacted, regard could usefully be had to the revised definition introduced in 2004. When the court queried whether this could be done, counsel quickly turned up the relevant part of Chapter 4 of *Dodd* which treats of "Reference to amendments when interpreting the original." As *Dodd* observes, at paras. 4.34 and 4.35:-

"4.34 This approach is not generally permitted in Ireland. One difficulty with it is that the drafter may labour under an erroneous view of the original law. Secondly, the Oireachtas has no jurisdiction to make authoritative interpretive determinations. ..."

4.35 In addition, submissions that rely on amendment to draw inferences about the original have been rejected on the basis that the later amendment is declaratory only. ..."

72. To the first and second difficulties of attempting to infer the original intention by reference to amendment, identified by *Dodd*, I would add – perhaps it is by way of elaboration – that the view might later have been wrongly taken that earlier legislation might not have sufficiently expressed an unchanged intention, or the view might later have been rightly taken that the unchanged clear intention might have been more elegantly expressed.
73. It was suggested in argument that the reason for the amendment in 2004 might have been the prevalence of combined site purchase and building agreements in the boom years of the Celtic tiger. To see that the error in this proposition one need look no further than Article 2(1)(a) of Council Directive 87/102/EEC of 22nd December, 1986 from which it is evident that the use of credit agreements to fund building – as opposed to the purchase of existing buildings – was at that time well established in the then EEC. Moreover, any Irish lawyer who was in practice at the time would be able to say that separate site purchase and building contracts were the invariably means by which new houses were sold in Ireland at that time, and for long before.
74. I come, at last, to the construction of the definition of "housing loan" in the Consumer Credit Act, 1995, as enacted. For the reasons given, I have no regard to the Council

Directive or the later revised definition. It is so long ago that I set out the definition, on which the case turns, that I will do so again.

"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."*

75. The first canon of construction of statutes is that the words are to be given their ordinary meaning.
76. The foundation of Mr. Hurley's case is that the house must exist at the date of the agreement. That foundation, in my view, is shown to be sand when it is recognised that the nature of the loan is determined by its purpose. It is true that the definition speaks of a loan that "is" made but the agreement in this case was purely executory. The INBS letter of 19th November, 2001 was expressed to be a "Mortgage offer" which, by the attached general conditions, would be automatically cancelled if not accepted. The letter of offer provided that drawdown would only be permitted on completion of the security, and the general conditions provided that the sanction would automatically lapse if the loan was not drawn down within three months of the date of the letter of offer. If there was no house on the site at the date of the agreement, there might very well have been a house by the date of drawdown.
77. Much of the argument focussed on the word "provide" in the definition. According to Pepper, Mr. Hurley's claim would conflate "provide" with "purchase". According to Mr. Hurley, it was not possible to provide a house which did not exist. Again, I think, the fundamental flaw in Mr. Hurley's argument is exposed when it is seen that the credit agreement which arose on the acceptance of the loan offer was executory. Moreover, I see absolutely no reason why the purpose of the agreement could not have been – as it was – to enable Mr. Hurley to build a house which – necessarily – did not yet exist. If the building agreement which Mr. Hurley made with SWD Properties Limited on 19th December, 2001 might pedantically have been described as a contract for the construction of what was to be his house, it was nevertheless a contract to build a house. In the same way that I can see no sensible difficulty with a contract for the building of a house that does not exist, I can see no sensible difficulty with a contract the purpose of which is to fund the construction of, or, for that matter, to eventually fund the purchase in the future of, a house that has yet to be built.

78. The heavy emphasis that Mr. Hurley would place on the words in para. (a)(iii) of the revised definition "a house that *is already constructed*" can readily be seen to be obviously misplaced when account is taken of the purpose in that sub-paragraph which is to "buy" such a house, and of the alternative qualifying purpose in para. (a)(i), which is "to have a house constructed".
79. If one were to contemplate the case of a would-be purchaser of an existing house, it seems to me that the existence of the house at the time of the housing loan agreement is no less irrelevant. In such a case, the purpose of the proposed borrowing is to fund, at some time in the future, of a house that, at the time of the agreement, is owned by someone else. The sensible would-be purchaser will not bind himself to buy the house unless and until he has loan approval in place. The house which the would-be purchaser wishes to buy will be identifiable and will have been identified but the house which is to be the security for the loan will first become available to the borrower as such security on completion of the purchase. It seems to me that it is perfectly sensible to contemplate a loan on the security of a house that has not yet been built but it makes no sense to contemplate a loan on the security of a stranger's house.
80. In the natural and ordinary meaning of the word "provide" is not limited to purchase. If, as is submitted by Mr. Hurley, it is inelegant to speak of a freehold or leasehold interest in a house, as opposed to land, or to distinguish between the provision or improvement of the house, on the one hand, and the purchase of the estate or interest in the house, on the other, the definition nevertheless contemplates that the borrowed may either "provide" or "purchase". The presumption is that different words have different meanings and it would do violence to the definition to conflate them.
81. On this motion, it is submitted that Mr. Hurley has, at the very least, an arguable case.
82. In *Esme v Minister for Justice and Law Reform* [2015] IESC 26, in, it has to be said at the outset the quite different context of an application for judicial review, Charleton J. observed that:-

"Any issue in law can be argued: but that is not the test. A point of law is only arguable within the meaning of the relevant decisions if it could, by the standards of a rational preliminary analysis, ultimately have a prospect of success. It is required for an applicant for leave to commence judicial review proceedings to demonstrate that an argument can be made which indicates that the argument is not empty."

83. More recently, in *Hoey v. Waterways Ireland* [2021] IESC 34, Charleton J. returned to the same theme in his judgment on an appeal against the refusal of an interlocutory injunction where he said, at para. 39 that:-

"It should also be remembered that literally anything may be argued."

84. If, in that sense, the statement of claim discloses an arguable question of law, the true test is whether the argument has a reasonable prospect of success. In the application of that test it is submitted on behalf of Mr. Hurley, and accepted on behalf of Pepper, that the onus is not on Mr. Hurley to demonstrate that he has a reasonable prospect of success, but on Pepper to show that he plainly and clearly does not.
85. I am persuaded that Pepper has met the requisite threshold and that Mr. Hurley has no prospect of making out his case that his credit agreement with INBS was an agreement to which the requirements of Part III of the Consumer Credit Act, 1995 applied.
86. There will be an order in the terms of the notice of motion striking out the statement of claim and dismissing the action.
87. I will list the matter for mention on 31st May, 2022 at 10:30 a.m. to deal with any application for costs. Two matters occur.
88. This was one of three materially identical cases which travelled together and were listed for hearing together but which in the end was the only one argued. I understand that there are others in the background. I do not know the basis on which Mr. Hurley's case was selected or identified as the pathfinder. If it can confidently be said that Pepper has prevailed, it is not an immediately attractive proposition that Mr. Hurley should have to bear all of the costs.
89. I outlined earlier the progress of the litigation. Provisionally, it seems to me that while Pepper identified a fundamental flaw in the action which was capable of being – and in the event was – dealt with on a motion, it nevertheless delivered a defence and waited until after the action had been set down for trial before issuing its motion and thereby added to its own costs, as well, perhaps, as Mr. Hurley's costs.
90. I will hear counsel as to the appropriate order as to costs.