THE HIGH COURT

COMMERCIAL

[2023] IEHX 440

Record No. 2022/950P

BETWEEN

PEPPER FINANCE CORPORATION (IRELAND) DAC, DECLAN TAITE AND ANNE O'DWYER

PLAINTIFFS

AND

HELEN MCKENNY AND STEPHEN REID

DEFENDANTS

JUDGMENT OF Mr. Justice Twomey delivered on the 21st day of July, 2023

INTRODUCTION

1. This is one of the many unfortunate cases which have been heard by our courts in recent years dealing with people who borrowed money to buy property but who were unable to repay the loan in full.

2. The defendants are a married couple who live in Portmarnock (the "**Borrowers**") who borrowed €1.127 million in 2007 in order to finance three buy-to-let properties in Dublin as an investment for their financial future - a two-bedroom apartment in Swords (at The Elms, Boroimhe), a three-bedroom house in Malahide (in Kileen Park) and a three-bedroom house in Clarehall (in Templeview Avenue) (together the "**Properties**").

3. During most of the 15 years since borrowing the money in 2007, the Borrowers have been unable to meet the repayments, even when they were interest-only. This was for a variety of reasons, including the 2007/2008 property crash, the reduction in rents, the loss of tenants, the Covid-19 pandemic, the loss of employment by one the Borrowers, the effect of the rent-freeze zone restrictions on the income from the Properties, *etc*.

4. They are now facing the harsh realisation that, back in 2007, in order to persuade their bank at the time, IIB Homeloans Limited ("**IIB**"), to lend them €1.127 million ("**Loan**"), they had to grant it very extensive powers to sell the Properties, in the event that they did not meet their repayments. The successor to the lending bank is the plaintiff ("**Pepper**") and in these proceedings it is seeking orders pursuant to its powers to sell the Properties.

5. What is understandably disappointing for the Borrowers is that if the Properties are sold by Pepper, this will result in no return to the Borrowers on the repayments of €950,000, which sum they received from the tenants of the three properties over 15 years and used to pay down, in part, the Loan. There will be no return because, having borrowed €1.127 million on a 30-year term and after having made very significant repayments (*albeit* not full repayments) over a period of 15 years, there still remains *circa* €1.4 million unpaid on the Loan. Combined with this is the fact that the three properties are currently advertised for sale for a total value of €1.16 million. Accordingly, if the Properties are sold, not only will there be no return to the Borrowers on their investment, but they could owe approximately €250,000 to Pepper, depending on the price obtained.

6. This has led to a feeling of injustice on the part of the Borrowers. It is summarised by the first defendant ("**Ms. McKenny**") in her Witness Statement at para. 16 where she states:

> "We bear no ill will towards the Bank however given that the values of the properties are almost at par with the loan amount remaining **it appears that all our repayments since 2007 are in effect useless if this application succeeds**. I say, and **I believe this**

would be unjust for the reasons of having spent all of our income to retain the properties for our old age and retirement. In succinct language we borrowed €1.150 million. We have repaid €950,000. Our current balance is circa €1.4 million. **Had we placed our monies into a pension scheme we would be in a far better position**. It is indeed difficult to place the relief sought within the parameters of justice given the entire circumstances." (Emphasis added)

7. It is difficult not to feel considerable sympathy for Ms. McKenny and the second defendant ("**Mr. Reid**"), particularly in light of the honest approach of Ms. McKenny to their obligations. This is illustrated by the fact that, although the rent which they obtained from the Properties did not meet their loan repayment obligations over the years, the Borrowers always used whatever rent they were getting to pay-off the mortgage every single month. She also candidly admitted that a factor in the Borrowers falling into arrears was the introduction of rent-freeze restrictions in 2016 which affected them as landlords - the implication being that if they had been able to do so, they would have increased the rents and therefore this would have meant that the arrears in their repayments would have been reduced/eliminated.

8. The fact that the Borrowers were anything but 'strategic defaulters' is also evidenced by the fact that even after a receiver was appointed to the Properties on 1st November, 2021 and after these proceedings were issued on 9th March, 2022, the Borrowers continued, in the words of Ms. McKenny, to '*do the right thing',* since they continued to use the rental income to discharge their loan obligations. They also instructed the tenants to obey the letters received from Pepper (through its agent Kroll) to pay the rent to the receiver. The honest approach of the Borrowers is illustrated by the fact that, less than three weeks before this hearing, which commenced on the 20th June, 2023, the Borrowers had made a payment (in the sum of €3,500) in reduction of the outstanding balance on the Loan.

9. For its part, Pepper in its submissions acknowledged that the Borrowers had made significant efforts over the years to meet their repayment obligations. For this reason, Pepper had decided not to pursue its claim for damages for interference with its economic interests, which claim was originally contained in the Plenary Summons issued by Pepper.

10. However, it also must be observed that the reason for these proceedings is that, after a receiver was appointed to the Properties by Pepper, Mr. Reid entered into possession of one of the Properties and changed the locks. This has led to Pepper bringing this application for various court orders to enable it to enforce its security, including an order restraining the Borrowers from trespassing upon the Properties.

11. While this Court does have considerable sympathy for the Borrowers who have made 15 years of monthly repayments of €950,000 without any return (*albeit* this is less than the amounts due). However, it is not the role of this Court to make decisions based on sympathy. Rather, it is the role of this Court to reach a decision based on the law and, in particular, the contractual terms to which the Borrowers agreed, when they took out the loan.

12. In this regard, as noted in further detail below, from the very first day in 2007 when the Borrowers took out the 30-year loan, it was stated in clear terms in the facility letter that the *'amount of credit advanced'* was €1.127 million, but that on that loan of €1.127 million, the *'total amount repayable'* was €2.252 million. This point was further emphasised by the fact that it was also stated in the facility letter that the difference between these two amounts was €1.125 million, which was stated to be the '*cost of this credit'*. This simply highlights that the mathematics of the application of a relatively low interest rate of 5.41% on a large sum over a long period of time is that one ends up paying back to a bank a multiple of the amount borrowed.

13. It appears to this Court that because the Borrowers perceive that this results in their getting no return on €950,000 of loan repayments, which they say is 'unjust', they are resisting

Pepper's application on a number of legal grounds presented by their legal team (i.e. their solicitor, Mr. Geoffrey Nwadike, who issued the written legal submissions, Ms. Tara Sallar B.L. who drafted the pleadings and Ms. Ruschitzko B.L. who made oral submissions at the hearing).

14. For the reasons set out below, this Court has found that these legal claims are unsustainable. Unfortunately from the Borrowers' perspective, this means that their decision to litigate in the High Court means that in addition to the shortfall of *circa* €250,000 on the loan (for which they are liable to Pepper), it is likely that the Borrowers will be liable to Pepper for the costs of the hearing. This is because, as noted below, the normal rule is that the loser pays the legal costs of the winner. When lawyers lose cases (and in most cases one set of lawyers will lose), it is not the lawyers who pay the legal costs, but the clients. Since Ireland '*ranks among the highest-cost jurisdictions internationally'* (see the *Review of the Administration of Civil Justice in Ireland* at p. 267 chaired by Kelly P.), this is likely to add tens/hundreds of thousands of euro to the amount owed by the Borrowers to Pepper. While this Court does feel additional sympathy for the Borrowers as a result, it is important to point out that no criticism is being made of the lawyers in this regard, since the lawyers are simply acting on the instructions of their clients in pursuing legal claims which this Court has found to be unsustainable.

15. In this regard, at the very opening of the hearing, this Court raised the fact that the sale of the Properties would not clear the Loan and for this reason, it raised for consideration by the parties the additional costs involved in a four-day hearing in the High Court, which the losing party would have to bear. It enquired about whether there was any prospect of those costs being saved and in particular whether attempts had been made to settle the matter. It was advised that there had been some discussions but not between counsel. Accordingly, at the end of the first day, this Court asked the parties to consider whether there might be further efforts to resolve

the dispute, in order to save the tens/hundreds of thousands of euro in costs, which one party would be likely to have to pay. At the commencement of the second day, it was clear that there had been no resolution of the dispute. However, the case did at least reduce from four days to two days of hearing (with a consequent saving of tens of thousands of euro), in part because Pepper reached the conclusion that it did not need to call two witnesses.

BACKGROUND

16. Under the terms of a facility letter dated 9th May, 2007 ("**Facility Letter**") between IIB and the Borrowers, the Borrowers agreed to borrow the sum of €1.127million at an interest rate of 5.41% (APR) over a 30 year period. The Loan was made to the Borrowers as part of the re-structuring of the finance which had previously been provided to them for the purchase of the Properties.

17. Under Special Condition 333 of the Facility Letter the Borrowers warranted that they were not consumers within the meaning of the Consumer Credit Act, 1995.

18. Under Special Condition 34 of the Facility Letter, IIB consented to the Properties being let out to tenants. It is also relevant to note that in an Income and Expenditure statement dated 1st October, 2021, which was completed and signed by the Borrowers, the Properties are described as buy-to-let properties.

19. Under Special Condition 353 of the Facility Letter, the repayments of the Loan were to be interest-only for the first five years of the 30-year term and then they were to revert to capital and interest. The interest-only payments at this time came to a total of *circa* €5,500 per month.

20. In her evidence, Ms. McKenny said she was under the impression that the Loan was to be interest only for its entire 30-year term.

21. However, there was no evidence provided to support this contention and the terms of the Facility Letter say the exact contrary. This is because Special Condition 353 states that the '*monthly repayments will revert to Capital and Interest'* after the expiry of the initial five years. In addition, the Borrowers were legally advised before they signed the Facility Letter and it is important to note that there was no suggestion by the Borrowers that their legal advisers at that time did not properly advise Ms. McKenny regarding the length of the interest-only period or any of the other terms of the Facility Letter.

22. As security for the Loan, the Borrowers entered a Mortgage with IIB dated 11th June, 2007 ("**Mortgage**") in which they charged the Properties, as security for the repayment of the Loan.

23. On 26th June, 2009, IIB transferred its rights in the Loan and the Mortgage to KBC Bank Ireland plc ("**KBCI**").

24. After only five years of the Loan, and despite paying interest-only during that period, the Borrowers had already fallen into significant arrears of €157,939. This led to KBCI agreeing in 2013 to a reduction in repayments for a six-month period. During this period, the repayments were reduced to €3,500 per month and this was achieved by means of a variation letter dated 20th June, 2013. This arrangement is described by KBCI in its letter to the Borrowers dated 9th August, 2013 in the following terms:

> "As per the terms of the Letter of Variation, we are pleased to advise you that the terms and conditions applicable to this Loan have now been amended to provide a **Less Than Interest Only period on the Loan for 6 months** from 1st June, 2013." (Emphasis added)

Thus it is to be noted that this repayment was not even interest-only, but was 'less than' interest only. Despite this reprieve, some two years later, the arrears had increased further, to €229,697,

and this led KBCI to agreeing a second variation letter, dated 16th September, 2015, whereby the repayments were set at €5,562.96 as a payment of '*interest and partial capital'.*

25. However, it seems that the Borrowers were not able to meet these repayment terms as a year later, the arrears had increased to €254,404. This then led to the third and final variation letter of 14th October, 2016 ("**Variation Letter**"), which is the focus of the Borrowers' complaints. This Variation Letter sets the monthly repayments at €5,583.24. Ms. McKenny explained that this repayment level of €5,583.24 was set at this level to match the rent roll on the Properties. This Variation Letter stated that it was to apply for a period of five years and that it was in respect of '*capital and interest'*, but that at the end of the period, it would revert to '*full capital and interest'.* At the end of the five-year period, this duly happened and the monthly repayments increased to *circa* €10,000.

26. During the course of the five-year period, on 30th November, 2018, Pepper acquired the Loan and the Mortgage from KBCI under the terms of a deed of transfer.

27. Unfortunately, the Borrowers could not meet the repayments of *circa* €10,000 and by letter dated 23rd September, 2021, Pepper made a formal demand of the Borrowers for repayment of €1,385,857 as the Loan was in default, which demand was not met by the Borrowers.

28. Thereafter, Pepper appointed the second named plaintiff, ("**Mr. Taite**") as a receiver ("**Receiver**") by a Deed of Appointment dated 1st November, 2021.

29. Pepper also appointed the third named plaintiff ("**Ms. O'Dwyer**") as its agent to take possession of the Properties and complete their sale under the terms of an Agency Agreement dated 2nd February, 2022.

30. In opposing the exercise by Pepper of its rights under the Mortgage, the Borrowers are claiming that Mr. Reid was a consumer in relation to the Loan and so S.I. No. 27/1995 – European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 ("**Unfair**

Terms Regulations") applies. They claim that under those Regulations, the Variation Letter contains unfair contract terms and so the Variation Letter is unenforceable. For this reason, it is necessary to set out some of the terms of the Variation Letter.

31. However, it is first important to note that Mr. Reid is claiming that he was a consumer for the purpose of the Loan and that for this reason the Unfair Terms Regulations apply, even though, as previously noted, the Borrowers had warranted in the Facility Letter that they were not consumers within the meaning of the Consumer Credit Act, 1995.

32. As a preliminary point, it is relevant to note that the Borrowers are claiming that Mr. Reid is a consumer for the *purpose of the Unfair Terms Regulations*, with Pepper pointing out that he warranted that he was not a consumer *for the purposes of the Consumer Credit Act*, 1995. In this regard, the definition of consumer in Regulation 2 of the Unfair Terms Regulations is *'a natural person who is acting for purposes which are outside his business'* and the term '*business'* is defined as including a '*trade or profession'*.

33. In the Consumer Credit Act, 1995 (s. 2), the definition of consumer is practically identical, since it states that a consumer is '*a natural person acting outside the person's business'* and it is stated that the term *'"business" includes trade and profession'.* The Borrowers did not make any issue regarding these minor differences in the definition of '*consumer'* and so it seems that the Borrowers accept that they warranted, in effect, that Mr. Reid was not a consumer for the purposes of the Unfair Terms Regulations. Nonetheless they claim that, despite this warranty, he is in fact a consumer for the purposes of the Unfair Terms Regulations.

34. It is also relevant to note that at page 11 of the Variation Letter, the Borrowers '*in addition to any other covenants contained in'* the Facility Letter made additional covenants and represented and warranted that '*all information in relation to the Loan or the application for this restructure is true, accurate and not misleading'.* The Borrowers did not make any

change to the warranties contained in the Facility Letter and so, in this way, the Borrowers affirmed in 2016 the warranty they had given in 2007 that they were not consumers for the purposes of the Unfair Terms Regulations.

35. Since the Borrowers are alleging that the Variation Letter contains unfair terms, it is important next to set out in some detail what is stated therein. At page 2 of the Variation Letter, the following is stated:

> "How does the arrangement work?
>
> Your mortgage is an annuity mortgage which means **monthly repayments are made up of capital and interest.**
>
> For **the term of the arrangement** KBCI is agreeable to you repaying the interest only element of your monthly repayment.
>
> The **unpaid capital amount will be deferred during this time and repaid over the remaining term of the mortgage.**
>
> **After the arrangement, your repayments will return to full capital and interest** (annuity) and, if your circumstances permit, your mortgage will be repaid over the remaining term of your mortgage.
>
> As part of this arrangement, KBCI may capitalise the arrears on your account either at the outset of the arrangement or after a period of sustained repayments (where applicable). Further details of this are contained in the attached letter of variation**. If your arrears are capitalised, this means that the arrears will be added to your existing mortgage balance and repaid over the remaining term of the mortgage.** The principal amount you owe KBCI does not change as a result of the capitalisation. The advantage of capitalisation is that the arrears balance will be cleared over the

remaining term of the mortgage. **The disadvantage of capitalisation is that your monthly repayments on the remaining mortgage will increase.**

Why is this being offered to you?

KBCI considers there is currently sufficient equity in your property to facilitate the repayment of the mortgage through the sale by you of the property. If you are aware of anything particular to your property that may negatively affect its value, it is important that you let us know.

You could choose to sell your property now to facilitate the repayment of your mortgage. However, if you do not wish to sell your property at this time, KBCI is willing to offer a repayment plan (detailed in the attached letter of variation) which is based on an assessment of your current personal and financial circumstances and level of affordability **after which your facility will return to monthly capital and interest repayments.**

Where you are not in a position to return to full monthly capital and interest payments at the end of the arrangement you may be required to sell your property in order to repay your mortgage. The value of your property will be determined by market conditions prevailing at the time of sale. The value may have deteriorated during the period of the arrangement **and you may not be in a position to repay your mortgage from the sale of the property alone. In such circumstances, we will work with you to find a solution that is affordable for you to deal with any balance remaining**.

What are the advantages and disadvantages of this arrangement?

Advantages

The arrangement is affordable based on your current financial circumstances.

By making interest only repayments, you ensure that the interest portion of your mortgage repayments is maintained.

During the period of the arrangement, you have time to stabilise your financial position.

Disadvantages

By deferring the repayment of your capital balance for the period of the arrangement, the **overall balance will not reduce as originally scheduled**. It is important to note that this will **mean higher monthly repayments and a higher cost of credit after the term of the arrangement**.

Where you are not in a position to return to monthly capital and interest payments at the end of the arrangement **you may be required to sell your property in order to repay your mortgage.**

Your account at the Irish Credit Bureau will be recorded as "Terms Amended". This may affect your ability to obtain further credit from financial institutions." (Emphasis added)

36. It is clear from the foregoing that the Borrowers could have chosen to sell the Properties in 2016, when KBCI estimated that the sale would have discharged the entire Loan due. However, Ms. McKenny indicated that they wished to hold on to the Properties at that time. This is despite their clear difficulties since the very early days of the loan term in meeting the repayments, as evidenced by the fact that even when on interest-only, they had fallen into arrears and when on interest and partial capital, they had also fallen into arrears. This decision was taken also in spite of the fact, as acknowledged by Ms. McKenny in her evidence, that the only source of income during the 15 years that the Borrowers had to repay the Loan was the

rent from the Properties and her acknowledgment that this rent is still insufficient to discharge the repayments on the Loan.

37. In passing, it remains to be observed that one of Ms. McKenny's key grievances appears to be a commercial rather than a legal one, namely that Pepper is selling the Properties, rather than letting matters continue for the remainder of the 30-year term, by which stage property prices should have increased, in her opinion, although this is obviously not guaranteed. While it is not this Court's role to decide matters on a commercial basis, if it were, it is hard to see the commercial merits for a financial institution to continue with a loan where a borrower could not in the past meet the repayments, when they were interest-only, and is still unable to meet the loan repayments, when they are interest and capital, on the basis of a possible/probable increase in property prices.

38. However, looking at this from a legal perspective, as this Court must, it is relevant to note that this Variation Letter spells out that the repayments at the end of the five-year period will be greater, because full capital was *not* being paid during the five years covered by the Variation Letter. It also sets out in very clear terms the '*disadvantage*' of the Variation Letter, namely that by deferring the repayment of capital, this will mean higher monthly repayments after the end of the five-year arrangement.

39. It also spells out that if the Borrowers cannot meet these increased payments at the end of the five years:

> '*you may be required to sell your property to repay your mortgage'.*

It goes on to explicitly state that:

> '*you may not be in a position to repay your mortgage from the sale of the property alone'.*

This will would then lead to a balance being owed to Pepper, even after the Properties have been sold and the Variation Letter states:

> "In such circumstances, we will work with you to find a solution that is affordable for you to deal with any balance remaining."

All of this is exactly what happened, because at the end of the five years, the repayments increased to *circa* €10,000, which the Borrowers could not pay and which led to Pepper seeking to exercise its rights under the Mortgage. In addition, as explicitly envisaged as a possibility under the Variation Letter, it seems that the sale of the Properties will not discharge the Loan in full and so there will be a balance owing from the Borrowers to Pepper (which as noted above could be *circa* €250,000).

40. Despite having the option to sell the Property in 2016 and clearing the mortgage (based on KBCI's estimate at the time), the Borrowers decided to enter into this Variation Letter for another period of interest and partial capital repayments.

41. In addition, despite the explicit terms of the Facility Letter, in which it is stated that the Borrowers are not consumers and the clear terms regarding the sale of the Properties, the Borrowers are now claiming that Mr. Reid is in fact a consumer and that the Unfair Terms Regulations apply and so the Properties cannot be sold. In particular, on the basis that the Unfair Terms Regulations apply, they claim that the Variation Letter, despite being so explicit in its terms, contains a '*concealed pitfall'* and so is unfair and so is not binding on the Borrowers under Regulation 6(1) of the Unfair Terms Regulations, which states:

> "An unfair term in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer".

ANALYSIS

42. No issue is taken by the Borrowers regarding the facts underlying this case, namely the validity of the Loan or the Mortgage, its transfer to Pepper, the fact that the Borrowers defaulted on the Loan, the appointment of the Receiver, *etc*.

43. As already noted, a key reason provided by Ms. McKenny in her witness statement, for Pepper not to be granted the orders it seeks is that *'[w]e have paid the bank €950,000 with no benefit whatsoever*' (para. 24).

44. While the Borrowers may have hoped that they would have three valuable mortgage-free properties at the end of the term of the Loan, it is important to remember that they agreed that if they failed to meet the repayments of the Loan, the lender (or its successors) would be entitled to sell the Properties.

45. Thus, when they signed up to the Loan, they knew or should have known (and they were legally advised at that time) that if they failed to meet their repayments, they could end up in exactly the position they now find themselves *i.e.* having made considerable repayments on the Loan but with nothing to show for that.

46. In particular, the Facility Letter provided at page 8 that it was a condition of the Loan that the Borrowers sign the Mortgage. While the Mortgage was signed by IIB it is clear from the parties clause that it includes any successors to IIB:

> "IIB HOMELOANS LIMITED having its registered office at Sandwith Street, Dublin 2 (hereinafter called "the Lender" which expression shall where the context so admits or requires **include its successors** and assigns) of the other part". (Emphasis added)

As already noted, IIB's successors in this case are Pepper and the key clause in the Mortgage, upon which Pepper is relying for the orders it seeks, is Clause 11(viii) which states that:

"At any time or times after the execution of these presents the Lender may without any further consent from or notice to the Borrower or any other person do all or any of the following acts or things that is to say: -

(a) **enter into possession** of the Mortgaged Premises or any part thereof or **into receipt of the rent and profits of the Mortgaged Premises** or any part thereof;

(b) whether the Lender shall or shall not have entered into possession or receipt of such rents and profits **appoint at the cost and sole risk of the Borrower a person to collect and receive such rents and profits for the use and benefit of the Lender** at such commission as the Lender shall think fit so that the statutory provisions respecting the appointment of Receivers over property in mortgage and the powers and duties of such Receivers or otherwise in relation thereto shall apply to this security except so far as the same are hereby varied and subject to the provisions hereinafter contained;

(c) **absolutely sell or dispose or concur in the selling or disposition of all or any of the Mortgaged Premises** at such time or times and in such manner and subject to such conditions as the Lender in its absolute discretion may deem expedient (notwithstanding the state of repair or condition thereof) and buy in or rescind or vary any contract for sale and resell the Mortgaged Premises without being responsible for loss occasioned thereby and on any such sale or resale the provisions of the Conveyancing Acts, 1881 to 1911 (save the restriction contained in Section 20 of the Conveyancing Act, 1881) except so far as the same are hereby varied or extended shall apply to this security;" (Emphasis added)

In light of this clause, there can be no doubt that Pepper has a right to appoint a receiver and to sell the Properties in the event of any default on the part of the Borrowers in meeting their repayments.

47. That was the bargain the Borrowers agreed to, when they got IIB to lend them €1.127 million to finance the purchase of the Properties. Uncontroverted submissions were made on behalf of Pepper that these were standard mortgage terms for such lending by financial institutions in Ireland. In this regard therefore, the Borrowers are in the same position as everyone else who gets a bank to lend them money in return for security over assets, *i.e.* those assets may be sold to discharge the loan if the repayment terms are not honoured.

48. However, the Borrowers' lawyers have raised a number of reasons why they believe Pepper should not be entitled to enforce its rights under the Mortgage. Each of them will be considered in turn.

Mr. Reid was a 'consumer' and the terms of the Loan were unfair?

49. The primary reason why the Borrowers claim that Pepper should not be entitled to enforce its security is because they claim that Mr. Reid was a consumer and that the Unfair Terms Regulations apply and that the terms of the Variation Letter are unfair and so are not binding on the Borrowers pursuant to Regulation 6(1) of those regulations.

50. In support of this claim, the Borrowers point out that Ms. McKenny is a letting agent and so is in the property business, but that her husband, Mr. Reid was involved in the clothing retail business. On this basis, they claim that this investment by him in three buy-to-let properties was outside his trade or profession and therefore he was a consumer for the purposes of the Unfair Terms Regulations. On this basis, they say that these Regulations apply to the terms of the Variation Letter, which they say are unfair and therefore not binding on them.

51. In order for the Unfair Terms Regulations to apply, Mr. Reid must be a consumer. In considering whether Mr. Reid is a *'consumer'* or not, it is clear from *Allied Irish Banks plc v.*

Fahey [2015] IEHC 334 at para. 156 (*per* O'Malley J.) that the onus is on the Borrowers to prove that Mr. Reid is a consumer:

> "As far as the burden of proof in relation to the status of the borrower is concerned, I see no reason to depart from the general principle that 'he who asserts must prove'".

When one considers that the onus is on the Borrowers to prove that Mr. Reid was a consumer, it is striking that Mr. Reid chose not to give any evidence on his own behalf in this case in support of this claim, particularly where he had signed the Facility Letter stating the exact opposite, *i.e.* that he was *not* a consumer.

52. However, in any event, the basis upon which the Borrowers seek to discharge this onus of proof is flawed. This is because they rely on the fact that Mr. Reid, unlike his wife, is not engaged in the property business as part of his trade or profession. On this basis they claim that his investment in the Properties is outside his trade or profession (unlike his wife) and therefore he was acting as a consumer.

53. This is flawed because it is clear from the case of *Allied Irish Banks plc v. Murphy* [2020] IEHC 300 (*per* Murphy J.) that this is not how a person discharges the onus of proving that he is a consumer. This is because it is not what a person does in their day job that determines whether they have entered a transaction as a consumer, rather

> "*it is the borrower's purpose in taking out the loan that is determinative of the issue of whether the borrower is acting as a consumer."* (at para. 100).

Thus, the fact that Mr. Reid's own profession was not a letting agent, like his wife, does not mean that his investment in buy-to-let properties amounted to him acting as a consumer. Rather it is the transaction that he is investing in that must be examined, *i.e.* the purchase of the buy-to-let properties. This is clear from *Allied Irish Bank plc v. Higgins* [2010] IEHC 219 at p. 26,

where Kelly J. quotes from the European Court of Justice in *Benincasa v. Dentalkit* (Case C-269/95), which states at paras. 15 *et seq*:

> "As far as the concept of 'consumer' is concerned, the first paragraph of Article 13 if the Convention defines a 'consumer' as a person acting 'for a purpose which can be regarded as being outside his trade or profession'. According to settled case-law, it follows from the wording and the function of that provision that it affects only a private final consumer, not engaged in trade or professional activities.
>
> **It follows from the foregoing that, in order to determine whether a person has the capacity of a consumer, a concept which must be strictly construed, reference must be made to the position of the person concerned in a particular contract, having regard to the nature and aim of that contract, and not to the subjective situation of the person concerned.** As the Advocate General rightly observed in point 38 of his Opinion, the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.
>
> Consequently, **only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer** as the party deemed to be the weaker party economically. The specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character." (Emphasis added)

Thus, the Borrowers could not discharge the onus of proving that Mr. Reid was a consumer by concentrating on *his* trade and profession, as being one that is not involved in property

investment, unlike his wife. Rather it is the '*nature and aim'* of the Facility Letter which establishes whether they were consumers, and its aim was to finance three properties for renting out to third parties in order to make a financial/business return on that investment for the Borrowers.

54. It is also relevant to note that Mr. Reid warranted that he was not a consumer. In this regard, it is clear from *AIB v. Murphy* [2020] IEHC 300 (*per* Murphy J.) at para. 100 that the label that is attached by a person to himself is not *'determinative of the issue of whether the borrower is acting as a consumer'*. This is because it is clear from that case that it is the '*borrower's purpose in taking out the loan'*, (at para. 100) which is determinative, not the label they use to described themselves. However, it is important to bear in mind that just because Mr. Reid's warranty that he is not a consumer is not *determinative*, does not mean that it is *not relevant*. This is because the onus is on Mr. Reid to establish that he was a consumer and his warranty that he was not a consumer makes that task more difficult since the starting point is that Mr. Reid *himself said he was not a consumer*.

55. In this regard, it cannot be ignored that Mr. Reid, having given the warranty that he was not a consumer, in order to obtain a loan of €1.127 million, and having affirmed that warranty in 2016 and in 2017 (to get further financial concessions from KBCI), is now seeking to deny the truth of that representation, now that the investment did not turn out as he had anticipated and in order to prevent Pepper enforcing its security.

56. Similarly, it cannot be ignored (since the onus of proof is on Mr. Reid and Ms. McKenny) that Mr. Reid chose not to give evidence and so Pepper did not have an opportunity to question him as to why he is now saying that he is a consumer, when he warranted that he was not a consumer.

57. As regards the Borrowers discharging the onus of proof on them to establish that Mr. Reid was not a consumer, all that they could produce to support this claim were two statements

in two High Court judgments which are of very limited assistance. The first is a decision of Barrett J. in *Ulster Bank Ireland Limited v. Healy* [2014] IEHC 96 at para. 13 where he stated that:

> "[…] the court considers **that it is arguable** that: Mr. Healy has never had the additional business, trade or profession of professional property investor; and thus that he was acting outside his business, trade and profession, and so as a consumer, when he borrowed from Ulster Bank the loan monies that have led to the current proceedings." (Emphasis added)

First it is important to note that this statement was made in the context of summary proceedings, which were sent to plenary hearing, and secondly it is clear that all that Barrett J. is saying is that it was *'arguable'* that Mr. Healy was a consumer in that case and so that he is entitled to make that argument at a full trial of the action, if he wants. It certainly is not sufficient to discharge the onus on the Borrowers to prove, in their case, that Mr. Reid was a consumer. The limited value of this statement is evident from the opening paragraph of the judgment where Barrett J. emphasises that:

> "any **views expressed herein are tentative** in terms of the strength or weaknesses of the case that either party might seek to make at plenary hearing." (Emphasis added)

58. The Borrowers also relied upon the statement of McDonald J. in *McCarthy v. Moroney* [2018] IEHC 379 at para. 118 where he stated that:

> "[Mrs. Moroney] may well wish to make a different case to that put forward by Mr. Moroney. For example, while Mr. Moroney has very fairly conceded that the loans were business loans, Mrs. Moroney may not be prepared to make such a concession. **For all I know, therefore, she may wish to raise an issue in relation to the 1995 Regulations**." (Emphasis added)

Again this judgment is also of little or no support to the Borrowers since it simply states that a borrower in that case *may decide to make an argument* that she is a consumer. It says nothing more than that and so it does not provide any support for the claim that, in this case, Mr. Reid was a consumer.

59. For all these reasons, this Court concludes that these *'tentative'* arguments that '*may'* be made in other cases, do little or nothing to assist the Borrowers in discharging the onus upon them to establish that Mr. Reid was a consumer.

<u>If Mr. Reid was a consumer, are the terms of the Variation Letter unfair?</u>

60. However, it is worth observing that *even if* Mr. Reid was a consumer, the basis upon which the Borrowers claim that the Variation Letter was unfair is as follows:

> "The 2016 facility [i.e. the Variation Letter] as was deemed appropriate in writing by the Bank resulted in the [Borrowers] **30 year interest only facility terminating after nine years**. It is submitted that the 2016 facility was not an appropriate document to place before the [Borrowers] as it **had concealed pitfalls** and was put to the [Borrowers] by the stronger party." (Emphasis added, at para. 10 of the Borrowers' written submissions)

However, it is important to observe that the Borrowers never had a 30-year interest only facility. It is clear from the terms of the Facility Letter that IIB granted the Borrowers a concession for the first five years of the 30 years, during which full capital and interest would not have to be repaid. However, it is also clear that at the end of that period, full capital and interest would have to be paid. Thus, insofar as the Borrowers claim that the Variation Letter *deprived* them of their interest-only facility for the 30-year term of the loan (such that it is an unfair term and not binding on them), this is incorrect as they never had an interest only facility,

of which they were being deprived, in the first place. Ironically, the Variation Letter was granting them a five-year *reprieve* from full capital and interest payments, to which they were otherwise not entitled. Accordingly, the Variation Letter was the opposite of a term that is 'unfair', since it was treating them in a fairer way than they were legally entitled to be treated.

61. Insofar as the Borrowers claim that the Variation Letter contained '*concealed pitfalls'*, this is patently not the case since it was spelt out in express terms what the 'pitfalls' of the arrangement were, i.e. that by opting not to sell the Properties but instead agreeing to a five-year period *without paying full capital and interest*, this meant that monthly repayments after the expiry of the five years would be higher and that they may be required to sell the Properties and that the prices obtained may not cover the mortgage.

62. All of this did in fact occur, as forewarned by the Variation Letter, so rather than these being 'concealed' pitfalls, these pitfalls were stated in express terms in the Variation Letter and they are described as '*disadvantages'.* Accordingly, the claim that the Variation Letter contains unfair terms because of these alleged '*concealed pitfalls'* is unsustainable.

Pepper is not a 'Lender' under the Mortgage?

63. The second legal point made on behalf of the Borrowers is that Pepper is not authorised to lend money in Ireland. Reference was made to the 'Hello Letter' dated 11th December, 2018 from Pepper to the Borrowers (i.e. the letter from Pepper to the Borrowers after Pepper acquired the Loan and the Mortgage) in which it is stated that '*Pepper is your new Lender of record'.* This statement, the Borrowers say, conflicts with an email from Pepper, which the Court was brought to by the Borrowers for the first-time during closing submissions. This email is dated 6th December, 2022 and it is from Pepper to Mr. Reid and in it, it is stated that Pepper '*are not a lender'* (in reply to a request from the Borrowers that the interest rate on the loan might be changed).

64. It is important to point out that this email is of limited, if any, evidential value as it was not put to Mr. Gerard McHugh when he gave evidence on behalf of Pepper.

65. In addition, counsel for Pepper submitted that there was a change in the law in May 2022 (an apparent reference to the *Consumer Protection (Regulation of Retail Credit and Credit Servicing Firms) Act, 2022*) whereby regulated credit firms, such as Pepper, could not make loans, which he said could have been explained by Mr. McHugh if this email had been put to him.

66. Thus, it seems to this Court that this is evidence which this Court cannot rely upon as evidence of an 'apparent' conflict regarding the status of Pepper as a lender, between 2018, when it acquired the Loan, and its email to the Borrowers in 2022.

67. However, even if this Court concluded that there was such a conflict, it is not clear to this Court how it helps the Borrowers, when this is not a case about whether Pepper can today lend money. Rather this is a case about whether Pepper can enforce its security against the Borrowers, who have failed to meet their repayment obligations under the Loan.

68. Furthermore, the only reference in the pleadings to any of these issues leads to the conclusion that the status of Pepper is not an issue in this case. This is because at paras. 30 and 31 of the Statement of Claim, Pepper claims that the Borrowers made payments to Pepper and so are estopped from challenging the validity of the transfer of the Loan and Mortgage to Pepper. In its Defence, the fact that the Borrowers are estopped from making this point is clearly accepted by the Borrowers as it is stated at para. 28 of the Defence that *'paragraphs 28 to 35 are admitted.'* Thus, not only is there nothing in the pleadings regarding the status of Pepper as a lender, but what reference there is to these matters indicates that none of this is an issue in this case.

69. In addition, in their written submissions the Borrowers' lawyers state:

> "Paragraph 11.5. of the Plaintiffs submissions addresses the right of Pepper as Lender to absolutely sell or dispose or concur in the selling or disposition of all or any of the Secured Properties as the Lender in its absolute discretion may deem expedient. It is submitted that Pepper, absent any inquiry from the Defendants as to its status as that of a Lender has candidly admitted it is not a Lender, therefore on the premise of this representation **Pepper is not entitled to invoke the powers bestowed upon the use of the word Lender** in the Mortgage Deed." (Emphasis added)

The point being made here appears to be the same point that Pepper is not 'a lender' (according, it seems to the email of 6th December, 2022). On this basis, it appears to be claimed that Pepper cannot exercise the powers bestowed '*upon the use of the word Lender'* in the Mortgage.

70. This argument is without any merit. The term *'Lender'* as used in the Mortgage is a defined term. It is defined as referring to an entity *i.e.* IIB *and its successors*. Pepper is the successor of IIB. That is the end of the issue since it is clear therefore that, as a matter of contract, Pepper can exercise the rights of the party defined as Lender under the Mortgage. No plausible argument can be made that Pepper is not entitled to exercise its rights as a successor to IIB, irrespective of whether it is entitled to make loans or not.

71. This is because there is no concept of powers being '*bestowed on the use of a word'*, whether that word is 'Lender' or some other word.

72. To take an example, an employment contract might define Sean Citizen as a "Self-employed Consultant". As a matter of law, he might in fact be an employee. After the contract comes to an end, Sean Citizen might seek to enforce the rights granted to him under that contract. For example, the contract might state that the "Self-employed Consultant" (i.e. Sean Citizen) is entitled to commission for sales. Just because Sean Citizen is not self-employed, but is an employee, as a matter of law, does not mean he loses his right to commission which are granted to the party, which is defined as a "Self-employed Consultant", as matter of contract.

Similarly in this case, if Pepper was not entitled to lend, this has no bearing on the exercise by Pepper of the rights exercisable, as a matter of contract, by the party which is defined using the term 'Lender'.

Pepper was not entitled to put Properties on market or appoint Ms. O'Dwyer as agent?

73. The third legal point pursued by the lawyers for the Borrowers was that Pepper was not entitled to put the Properties up for sale, as the Receiver did not have a power of sale.

74. It was not disputed by the Receiver that he did not have a power of sale. However, the Receiver has not sold the Properties. Accordingly, there has therefore been no exercise by the Receiver of powers which he does not have, since the Properties have not been sold.

75. Ms. McKenny gave evidence of internet search results she obtained in January 2023 which evidenced that the Properties were *on the market for sale* during that month. She pointed out that Ms. O'Dwyer was not appointed as an agent until 2nd February, 2023 and under her agency agreement she was granted power to '*market the [Properties] for sale'* and to *'complete the sale of the [Properties]'.* The point being made is apparently that Pepper jumped the gun in advertising the Properties for sale on the internet. However, Pepper has a power to sell the Properties under the Mortgage and therefore there was nothing unlawful in Pepper marketing the Properties in January 2023.

Pepper was not entitled to appoint Ms. O'Dwyer as an agent?

76. Related to this point was the claim that Pepper did not have the power to appoint an agent as this was not provided for in the Mortgage Deed. First, as a matter of agency law, there is nothing to prevent any person, whether an individual or a company, from appointing an agent. Secondly, the Borrowers could point to no authority which supports the proposition that a mortgagee is not entitled to appoint an agent to exercise its rights under a mortgage, unless it is specifically authorised by the mortgage to do so.

77. Thirdly, there is nothing in the Mortgage which prevents Pepper from appointing an agent for the exercise of *any of its powers* under the Mortgage.

78. Fourthly, under Clause 11 (viii) (c), the Mortgagee has very extensive powers to sell the Properties and in particular to do so *'at such time or times and in such manner and subject to such conditions'* as it '*in its absolute discretion may deem expedient'.* Thus no restriction is put on the power of Pepper regarding the manner in which it decides to sell the Properties and in particular, there is no basis for claiming that it is not entitled to appoint an agent to undertake the sale of the Properties.

The Borrowers are entitled to damages?

79. The Borrowers counterclaimed in these proceedings that they are entitled to damages from Pepper. However, Mr. Reid chose not to give evidence and in Ms. McKenny's evidence, no basis was set out for the financial loss which they claim was incurred by the Borrowers. In this regard, a reference in Ms. McKenny's testimony to the amount of tenants' rents, in the sum of €950,00, which they paid over in discharge of their Loan is not a quantification of a financial loss. They were contractually obliged to make mortgage repayments in excess of these amounts. Therefore, the amount they actually paid, i.e. €950,000, is not evidence of damages to which they are entitled. It is simply evidence of the amount of tenants' rental income which they invested in repaying loans for Properties, which did not make a return on the investment that they had hoped, because they failed to meet their repayment obligations.

80. Similarly the Borrowers counterclaimed that they are entitled to damages from Mr. Taite in respect of misrepresentation. However, while a witness statement was provided in this regard, no witness gave any evidence to support a claim of misrepresentation. In addition, no basis was set out in evidence for damages of any kind having being incurred by the Borrowers in this regard.

81. The Borrowers also counterclaimed that they are entitled to damages from Ms. O'Dwyer in respect of misrepresentation. Again, while a witness statement was provided in this regard, no witness gave any evidence to support a claim of misrepresentation. In addition, no basis was set out in evidence for damages of any kind having being incurred by the Borrowers.

CONCLUSION

82. For the foregoing reasons, none of the legal points made by the Borrowers' lawyers on their behalf are valid.

83. Unfortunately, before these proceedings ever issued, the Borrowers were already in a position, where the sale of the Properties was not going to clear their debt obligations to Pepper. As they have chosen to instruct lawyers to challenge Pepper's entitlement to enforce its security and have lost this challenge, it means that that they are likely to owe even more money to Pepper. This is because of the normal rule, that costs follow the event/the loser pays. Because of this rule, this Court's provisional view, subject to any oral submissions which the parties wish to make, is that the Borrowers will have to pay Pepper's legal costs for successfully bringing these proceedings.

84. This Court orders the parties to engage with each other to see if agreement can be reached regarding all outstanding matters (including any costs orders) without the need for further court time, with the terms of any draft agreed court order to be provided to the Registrar. In case it is necessary for this Court to deal with final orders, this case will be provisionally put in for mention one week from the date of delivery of this judgment, at 10.45 am (with liberty to the parties to notify the Registrar, in the event of such listing being unnecessary).