[2020] IEHC 300

THE HIGH COURT

[RECORD NO. 2016 1585 S]

BETWEEN

ALLIED IRISH BANKS PLC

PLAINTIFF

AND

TIMOTHY MURPHY AND MARGARET MURPHY

DEFENDANTS

JUDGMENT of Ms. Justice Murphy delivered on the 16th day of June, 2020

1. This is the Plaintiff's application for summary judgment in the sum of €111,704.48 arising from a loan agreement made with the Defendants on or about the 11th September 2009. The amount of the loan was €95,000. Its purpose was to restructure existing debts arising from the first named Defendant's business as a builder. The uncontroverted evidence of the first named Defendant is that at the time of the granting of the loan, he had an existing business loan of €70,000 an overdrawn balance on his current account of €21,000 and arrears on a financing and leasing account of €4,000. The total of his indebtedness to the bank was therefore € 95,000. The first Defendant has averred that he was advised by a bank official that all of his debt should be restructured under the umbrella of one loan. The loan was issued to Timothy Murphy and to his wife Margaret Murphy. Security for the credit facility was an all sums mortgage from Mr. Timothy Murphy and Mrs. Margaret Murphy over 0.74 acres at Kilmihil, Ballingarry, Co. Limerick, of which they were joint owners.

2. There is no dispute as to the fact of the loan, nor the fact of default in repayment, nor is the amount claimed by the Plaintiff in dispute. At the outset of the application for summary judgment, the first Defendant, Timothy Murphy, consented to judgment in the sum claimed together with appropriate costs. The second Defendant Margaret Murphy, who is the wife of the first Defendant, seeks to contest the entitlement of the Plaintiff to judgment against her for the said sum. Essentially she asserts that she contracted for the said loan as a consumer within the meaning of the Consumer Credit Act 1995 and that the Plaintiff failed to afford her the mandatory protection of s. 30 of that Act ,which stipulates that a "cooling off" period must be provided to consumers. In her affidavit the second Defendant raises issues of unfair pressure being applied by the bank in securing her and her husband's agreement to the restructured loan, but the main defence advanced on her behalf is the bank's failure to afford her the relevant protection under the Consumer Credit Act. Non-compliance with the obligations under s. 30(4) of the Act cannot be disregarded by a Court and in effect results in the loan contract being unenforceable. The issue for the Court therefore on this application is whether or not the second Defendant Mary Murphy has an arguable case that in entering this loan agreement she was acting as a consumer.

Facts

3. The Defendants are married to each other, and live in Ballingarry, Co. Limerick. The first Defendant is a builder and the purpose of the loan was to restructure existing debts that he had incurred in the course of his building business, which he operated as a sole trader.

The pre-existing debts amounted to €95,000. As a condition of the facility, the bank required security over 0.74 acres at Kilmihil, Ballingarry, Co. Limerick, which property was in the joint names of both Defendants. The Second Named Defendant, Margaret Murphy, is a nurse by profession and is employed as such by the University Maternity Hospital in Limerick. Prior to qualifying as a nurse, Margaret Murphy had been a teacher. The evidence of Margaret Murphy on affidavit and that of her husband is that Margaret Murphy is not involved in her husband's business and has not received a salary or any other remuneration from her husband's business. Margaret Murphy was advised by the bank, to obtain independent legal advice before entering the loan agreement. At all times, Margaret Murphy had her own independent income and independent bank account separate from her husband's accounts. The Plaintiff bank does not accept that Margaret Murphy had no involvement in her husband's business and has pointed to the fact that in May 2001 Margaret Murphy was appointed as a director and company secretary of a company named BGM Construction Limited, a company formed by her husband in 2001. The second Defendant has averred that this company was formed on the basis of taxation advice received by her husband and that she was nominated as a director simply to comply with the requirements of company law. It is averred that the company never transacted any business and that Mr. Murphy continued to conduct all his business as a builder in his capacity as a sole trader and not through the corporate entity. The company was dissolved in 2004 and remains so. The Court has affidavit evidence from Alexandra Moore, solicitor, in which she exhibits a report on BGM Construction Limited, which shows the incorporation of the company on the 14th of May 2001 and its dissolution on the 23rd January 2004. There were no annual returns made by the company during its short existence. In her affidavit, Mrs. Murphy has averred that she is a nurse by profession and is employed by the University Maternity Hospital in Limerick. She says that she does not have any role or part in her husband's business and that the company BGM Construction Limited was set up on the advice of an accountant for tax reasons and never in fact traded.

4. By 2013, difficulties had arisen with the restructured loan repayments. On the 9th October 2013 the second Defendant, Margaret Murphy, wrote a handwritten letter to a woman in the bank named Anne. Both parties place reliance on the content of the letter. It reads: -

> "Anne,
>
> *Sorry this has taken so long to get back to you. In reply to your letter of the 18th September 2013 in relation to the loan in both our names. I have spoken to Ted and he tells me he is dealing with the matter. The loan in question was in relation to his business and my name was added so as to be able to access details should anything happen to him. I have always had my own account and independent work. That said, I have filled out the paperwork to verify our income status.*
>
> *I would appreciate it if you could send me a copy of the paperwork relating to that loan as I need to get advice as to where I am in relation to this matter.*

Yours sincerely,

Margaret Murphy".

5. The second Defendant, Margaret Murphy, seeks leave to defend these proceedings and for that purpose to have them remitted to plenary hearing, on the basis that she entered the loan agreement as a consumer, for the purposes of the Consumer Credit Act 1995 (as amended) and that since AIB have not acted in compliance with that Act, the loan agreement is unenforceable against her. AIB deny that she is a consumer for the purposes of the Act.

Consumer Credit Act

6. The Consumer Credit Act 1995 transposed Directive 87/102 as amended by Directive No. 90/88/EEC into Irish Law. One of the purposes of the Act is to protect people dealing with financial institutions, otherwise than in the course of business.

7. S. 2(1), of the Consumer Credit Act 1995, is the definition section. It defines a consumer as: -

"(a) A natural person acting outside the person's business"

Business in the same section is defined as: -

"business" includes trade and profession.

Credit agreement is defined as:

"credit agreement" means 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;

8. S. 3 of the Act provides that the Act applies to "all credit agreements" save for those specifically excluded by s. 3(2). That subsection lists ten excepted credit agreements, none of which is relevant to the loan at issue in this case. The second Defendant contends that a credit agreement which is commercial in nature can be a consumer credit agreement, if it is entered, otherwise than in the course of a natural person's business.

9. S. 30 of the Act provides for statutorily required contents of a credit agreement. S. 30(1) provides: -

A credit agreement and any contract of guarantee relating thereto shall be made in writing and signed by the consumer and by or on behalf of all other parties to the agreement, and-

(a) a copy of the agreement shall be sent to the consumer by the creditor within 10 days of the making of the agreement….

S. 30(2) provides:-

A credit agreement shall contain a statement in respect of the cooling off period that the consumer-

(a) has a right to withdraw from the agreement without penalty if the consumer gives written notice to this effect to the creditor within a period of 10 days of the date of receipt by the consumer of a copy of the agreement, or

(b) may indicate that he does not wish to exercise this right by signing a statement to this effect, this signature to be separate from, and additional to, the consumer's signature in relation to any of the terms of the agreement.

S. 38 of the Act provides in effect, that a failure to comply with the requirements of section 30, will render the agreement unenforceable.

Threshold for remittal to plenary hearing

10. The parties acknowledge that the test as to whether an application for summary judgment should be remitted to plenary hearing, is clear and well established, arising from the Supreme Court decision in *Aer Rianta c.p.t. v. Ryanair Ltd. (No. 1)* [2001] 4 IR 607 and thereafter expanded upon by McKechnie J. in the High Court in *Harrisrange v. Duncan* [2003] 4 IR 1. If there exists a fair and reasonable probability of a Defendant having a real or *bona fide* defence then the matter should be remitted to plenary hearing. A Court will not grant summary judgment against a Defendant upon the sworn evidence placed before it, unless it is very clear from such evidence that a Defendant has no case. It is also acknowledged by the parties that the threshold as to proof of the existence of a *bona fide*, arguable defence, which must be established by the Defendant, is a low one and it is not necessary for a Defendant to make out a defence which has the probability of success at full oral hearing.

Defendant's submissions

11. The issue for the Court is whether or not the Second Named Defendant has an arguable *bona fide* defence that she entered this loan agreement as a consumer and accordingly is entitled to the protections for consumers under the Consumer Credit Act, 1995 as amended. It for the Defendant to satisfy the Court that she has an arguable *bona fide* defence. The fact of the loan is admitted. The fact of the default on repayments is admitted. The fact of the demand is admitted and the first named Defendant, the second Defendant's husband, has consented to judgment in the sum claimed together with costs. In these circumstances the only possible defence available to the second Defendant is her asserted status as a consumer to whom the protections of s. 30 of the Consumer Credit Act, 1995 were not afforded and as a consequence against whom the loan agreement is unenforceable. The Directive and the Act are based on the premise that persons acting outside the course of their business, trade or profession are in a weaker more vulnerable position when negotiating with financial institutions and the Act is designed to bring balance to their respective negotiating positions by affording certain protections to persons who are consumers within the meaning of the Consumer Protection Act and the relevant Directive.

12. S. 2(1) of the Consumer Credit Act 1995 as inserted by Part 12 of Schedule 3 of the Central Bank (Financial Services Authority of Ireland) Act 2004, ("the Act") provides that a consumer is: -

"(a) a natural person acting outside the person's business"

And "business" is defined as: -

"includes trade and profession".

The second Defendant's business, trade or profession is that of a maternity nurse employed in Limerick University Maternity Hospital. She has averred that she is not involved in nor has she derived any remuneration or benefit from her husband's business as a builder.

13. S. 3 of the Act provides: -

" . . . this Act shall apply to all credit agreements . . . to which a consumer is a party".

The Plaintiff submits that this provision covers commercial loans where one party to the loan is a consumer. S. 3(2) specifically excludes ten types of credit agreements from the ambit of the Act, but none is relevant to this claim.

14. S. 30 specifies the requirements relating to the contents of credit agreements. The agreement must be signed by the consumer; a copy must be sent to the consumer by the creditor within ten days of the making of the agreement. The agreement shall contain a statement in respect of the cooling off period that the consumer: -

"(a) has a right to withdraw from the agreement without penalty if the consumer gives written notice to this effect to the creditor within a period of 10 days of the date of receipt by the consumer of a copy of the agreement, or

(b) may indicate that he does not wish to exercise this right by signing a statement to this effect, this signature to be separate from, and additional to, the consumer's signature in relation to any of the terms of the agreement".

15. Failure to comply with the requirements of s. 30 in effect renders the agreement unenforceable pursuant to s. 38 of the Act. The second Defendant submits that the Act is clear in its terms. If at the time of entering the loan agreement the second Defendant was acting outside her business trade or profession then she entered the loan as a consumer regardless of the nature of the loan. The Defendant submits that in order for the second Defendant to be deprived of the defence that she was acting as a consumer, it is necessary that the Court be satisfied that at the time of entering the loan agreement, the second Defendant, Margaret Murphy, was engaged in the building trade with her husband and that she became party to that loan in order to pursue that business. Counsel for the second name Defendant, Mr. O'Flaherty, submitted that much of the jurisprudence in this

jurisdiction derives from the *Benincasa v Dental Kit Srl* (Case C – 269/96) [1997] ECR1-3767. In that case, Mr. Benincasa had a franchising contract to set up a dentist's shop in Munich offering dental kits goods, and using their trademark. A dispute arose about the contract under which he bought the equipment to set himself up. He argued that he made a contract contemplating a trade or business, not a contract in the course of or for the purposes of a trade or business. He sought to argue that he was entitled to protection as a consumer. In the course of its judgment, at paras. 16 to 18, the European Court of Justice stated: -

"16. 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.

17. 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.

18. Accordingly, it is consistent with the wording, the spirit and the aim of the provisions concerned to consider that the specific protective rules enshrined in them apply only to contracts concluded outside and independently of any trade or professional activity or purpose, whether present or future".

The Benincasa decision cited by Kelly J. in *AIB v. Higgins* [2010] IEHC 219, gave rise to a number of cases in which the Courts objectively considered the purpose of any particular loan in order to determine the issue of whether or not the contract was a consumer contract. In those cases, weight was certainly given to the Benincasa test of whether or not the contract was concluded *"for the purpose of satisfying an individual's own needs in terms of private consumption".*

16. The Plaintiff contends that the result of those cases has been that a narrow definition of a consumer has developed. The Defendant contends that this narrow definition is not suitable to all situations and does not conform to the actual provisions of the Act. The Defendant submits that in determining whether someone is a consumer within the meaning of the Act, the Court needs to look at the unique circumstances of each case from an objective perspective in respect of both the purpose of the loan and the status of the borrower in taking out the loan. The second Defendant submits that the circumstances of this case are unique in that the Defendant did not obtain any benefit

from the loan and simply became jointly liable for the debt of her husband under the restructuring of the loan agreement. It is submitted on behalf of the Defendant that the case law which focuses on the purpose of the loan, and whether it is for "personal consumption" may well be appropriate in many circumstances, but is not a suitable definition for all circumstances. In his submissions, counsel for the Defendant traces the evolution of Irish jurisprudence from the 2010 decision in *AIB v. Higgins*, through the 2014 decision of Barrett J. *Ulster Bank Ltd. v. Healy,* and the decisions of Baker J. in *Danske Bank v. Miley* [2016] IEHC 105 and Noonan J. in *AIB. v. Gormley* [2018] IEHC 744, upon which the Plaintiff had placed particular reliance in oral argument before the Court. In the *Miley* case, Mrs. Miley was defending an application for summary judgment in respect of a loan facility entered into in 2012. That facility was a restructuring of a 2006 loan facility that was in the joint names of Mrs. Miley and her late husband. While the 2006 facility was used to invest in property both at home and abroad, it in turn was a refinancing of an existing loan that was in the joint names of Mr. and Mrs. Miley and which had been made in respect of a licenced premises that was jointly owned by Mrs. Miley and her husband and of which Mrs. Miley was the manager and operator. In addition, Mrs. Miley was involved in negotiating the restructuring of the 2012 loan following the death of her husband, and the pub which they had jointly owned remained as security for the loan. In those circumstances, Baker J. was satisfied that the loan was a commercial loan, and that Mrs. Miley was acting in the course of her business in her dealings with the bank when she obtained the original loan for the purchase of the pub and when the loan was restructured in 2006 and renegotiated again in 2012. Further, though Mrs. Miley may not have been directly involved in the investment decisions that were made by her husband, there was no doubt that she would also have stood to benefit from those investments.

17. The *Gormley* case involves borrowings made in 2005 when the Defendants (a son and father) borrowed money for the purposes of purchasing property for development and for working capital. At the time of entering the loan the Defendants were a building contractor and bricklayer respectively. The Defendants defaulted on the loans which were subsequently restructured. One of the defences raised by the son was that he was a consumer in respect of the restructured borrowings, because his personal circumstances had changed since the original loan was advanced. The Defendant did not explain or elucidate the asserted change in his personal circumstances upon which he was relying, and Noonan J. was satisfied that as the Defendants had entered the initial loan for the purpose of their business, and that that commercial loan was refinanced by the Defendants, they were not consumers within the meaning of the Act. The Defendant submits that the circumstances of the instant case are distinguishable from both Miley and Gormley in that: -

    (a) The Defendant Margaret Murphy had no involvement in the original borrowings which were in her husband's sole name and which were incurred by him in the course of operating his business as a builder;

(b) Both Mrs. Miley and the Gormleys were personally involved in the business that was to benefit from the borrowings. Margaret Murphy has averred in her affidavit that she was not involved in the building business of her husband for which the loan was advanced.

18. The Defendant submits that the position of the Defendant Margaret Murphy, is closer to that of Charlotte Lavelle in the case of Friends First Finance Ltd. v. Lavelle [2013] IEHC 201 and that of Gerald Browne in the case of ACC Loan Management Ltd. v. Sean Browne and Gerald Browne [2015] IEHC 722.

19. In the *Lavelle* case, Charlotte Lavelle was sued by the Plaintiff bank for €1.75 million in respect of monies it claimed to have loaned her. In the peculiar circumstances of that case the Court upheld her plea of *non est factum*, in circumstances where the Court was satisfied on oral evidence that Charlotte Lavelle had had no direct dealings with the bank and had entered no loan contract with them. In that case, Ms. Lavelle had claimed as an alternative defence, protection under the Consumer Credit Act. On the application of the Consumer credit Act 1995 to the facts of the case, Mr Justice Charlton observed;

> *"It is clear to me that Charlotte Lavelle was not dealing with the Plaintiff financial institution at all and in any event she has already established the defence of non est factum. However, even had she failed to establish that defence and the Court was required to consider the issue under this Consumer Credit Act point, it is clear that she was not dealing with the Plaintiff in the context of a business, which would constitute a circumstance wherein s.38 would not operate. She does not have the financial wherewithal or interest in financial business to deal with a bank as a business investor for the purpose of engaging in volatile markets as a property speculator. That was left to her husband."*

20. The second Defendant relies on the *Lavelle* case both as giving expression to the fact that the purpose of the Consumer Credit Act is to protect the weaker party in their dealings with financial institutions and secondly as demonstrating the importance placed by Charlton J. on the oral evidence of the Defendant in reaching his decision. In the instant case counsel contends that oral evidence is necessary so that the Court can determine whether the second Defendant was acting in the course of her business or whether she was simply added to the loan because she was the wife of the person who had the debts with the bank.

21. The Defendant relies on a line of authority from Ms Justice Baker which questions whether the definition of a consumer should be on the basis of a strict application of the definition provided for in the Act (*'A person acting outside their business '*) or on the basis of the criteria established in such judgments as *Higgins* and some of the ECJ judgments.

22. In the case of *ACC Loan Management Ltd v Sean Browne and Gerald Browne* [2015] IEHC 722, Ms Justice Baker was dealing with an application for summary judgment in respect of borrowings that had been made to two brothers. In this case the first Defendant worked for a taxi company and the second Defendant was a retired member of the Irish Defence

Forces. The loan facility which gave rise to the proceedings was provided on the 9th of April 2008 for an amount of €100,000. The loan was made to the two Defendants jointly and the purpose of the loan was to refinance an existing facility. The background to the existing facilities is that the two Defendants had borrowed €40,000 in 1999 for the purpose of purchasing lands in Co. Donegal. That facility was repaid in full. Separately the first named Defendant borrowed in his own name an amount of €30,000 from the Bank in 2006 for the purposes of a deposit on a premises. The Second Named Defendant had provided a guarantee in respect of the 2006 facility for his brother.

23. The 2008 loan was not used or intended to be used to further any private purpose of the second Defendant and Ms Justice Baker considered whether that of itself makes it a business or professional loan. At paragraph 51 of her Judgment Ms Justice Baker states:

> *"The Second Defendant, Gerard Browne, asserts that he had agreed with his brother, the First Defendant, that Sean Browne would be wholly responsible for paying the 2008 facility. This agreement was made between the two Borrowers themselves and does not bind the Bank. However, it is equally clear that the loan, whatever its purpose, was from the point of view of the Second Defendant not one obtained by him for any purpose relating to his business. The Second Defendant is retired from the Irish Army and the 2008 facility did not and could not have been said to have furthered any business of the Second Defendant, he not being engaged in any trade or profession in respect of which he required or sought loan finance ... While it could be said that the 2008 facility did not satisfy any needs "in terms of private consumption " of the Second Defendant, to use the terminology of Kelly J. in Allied Irish Bank plc v Higgins, following Benincasa v Dentalkit, the needs of the Second Defendant, insofar as they related to this loan, were allied to the needs of the First Defendant, and the Second Defendant was a Borrower primarily if not entirely because he was the co-owner of the property in Donegal which was to be the security for the 2008 loan. While it would have been possible to provide the security even were Gerard Browne not to be a borrower, the Bank may have considered it more efficient to identify both Browne brothers as borrowers and mortgagors. "*

24. The Defendant submits that like the Second Named Defendant in the above proceedings, Margaret Murphy entered into this loan for no personal benefit. One of the conditions of the loan was to provide security over land of which she was a joint owner. This the Defendant contends is a matter to be teased out in plenary hearing to determine whether the reason that the Bank sought to have Margaret Murphy as a joint borrower with her husband was because she was providing security over a parcel of land. It is an issue in the case that Margaret Murphy was under the impression that the Plaintiff already held security over her home, and that that was a reason she agreed to be a party to the loan. This the Defendant contends is relevant to determining whether Margaret Murphy was a party to the loan in pursuance of her business of whether she was a party to the loan for other reasons.

25. In the later Judgment of *Stapleford Finance Ltd v Lavelle* [2016] IEHC 385, Ms Justice Baker was dealing with a case where a venture fund was seeking judgment against the Defendant in respect of a number of facilities. The Defendant had been employed as a trader in the City of London for 11 years and had successfully accumulated considerable wealth during that period. The Defendant returned to live in Ireland and developed a relationship with Anglo Irish Bank. Over the following years the Defendant was provided with significant facilities which he claimed were to be used in pension type investments to secure his family's future. The Defendant argued that he was a consumer within the meaning of the Consumer Credit Act, 1995 and the European Communities (Unfair Terms in Consumer Contracts) Regulations.

26. Ms Justice Baker undertook a review of the case law and addressed the circumstances of the *AIB v Higgins* decision as well as the decision of Ms Justice O'Malley in *Allied Irish Banks v Fahy* [2014] IEHC 244 and the ECJ decision of *Benincasa v Dentalkit* and the case of *Gruber v Bay WAAG* (Case C-464/01). Ms Justice Baker stated from paragraph 85 onwards of her judgment:

> *"From the authorities in which a difference of approach is apparent, it is in my view at least arguable that the Defendant is correct that he was acting as a consumer and the case law relied on by the Plaintifff is not authority for the broad proposition that a person who borrows money to make a personal investment cannot be a consumer for the purposes of the legislation. I consider for that reason that the question may not readily be determined in a summary hearing. This is more evident. when one looks at two decisions of the CJEU on which reliance is placed and to the proposition advanced by the Plaintiff that the test of whether a person is a consumer must be strictly construed. I turn to consider this proposition. "*

27. Ms Justice Baker then briefly addresses the *Benincasa v Dentalkit* case and the *Gruber v Bay WAAG* cases and states at paragraph 88 of her judgment:

> *"A difficulty is immediately apparent in relying on either Benincasa v Dentalkit or the Judgment of the Court in Gruber v Bay WAAG, in that in both cases the Court was considering a provision which was a derogation from a general rule of jurisdiction. It is not readily apparent that the provisions of the Directive (Council Directive 87/102/EEC of 22nd December, 1986 as amended by Council Directive 90/88/EEC of 22" February, 1990) or the Irish Consumer Credit legislation ought to be construed as a derogation from any general rule. Rather, they are an attempt by community and domestic law to offer special protection to a person who might have a deficit of bargaining power. There is nothing in my mind which suggests a strict construction of the concept of "consumer" for the purposes of the consumer protection legislation that is warranted by the European case law. While Kelly J. in Allied Irish Banks plc v Higgins & Ors quoted with approval from the Judgment of the European Court of Justice in Benincasa v Dentalkit, he did so for the purposes of the conclusion that he reached that the self-same person can be a consumer in relation to certain transactions and an economic operator in others, and only some*

contracts concluded by an individual person may be properly characterised as consumer contracts. He nowhere in that Judgment stated a view that the concept was to be interpreted restrictively.

89. In ACC Loan Management v Browne I observed at the stage of an application for summary judgment that I would not consider whether Counsel for the Defendants was correct that an overly restrictive interpretation of the notice off consumer is not intended by the Directive, or by the Act of 1995. The point remains to be decided by an Irish Court or by the CJEU. However, the argument that a less restrictive construction is warranted is one that adds weight to the submissions of the Defendant that the legal issues in the present case are less than clear.....

91. I accept that there is sufficient evidence before me that Mr Lavelle did not engage in the business of the underlying investments. He was not engaged in the activity of investing in commercial property or other commercial investments with his money. He was rather placing his money in the hands of somebody who would do that on his behalf, and he did so in the hope that his money would in turn generate further monies, or at least be secure in terms of the capital.

92. *As a result of the conclusions come to by the English High Court in Standard Bank London Ltd v Apostol AKIS (No. 1), a judgment that was referred to with approval by O'Malley J. in Allied Irish Banks plc v Fahy and because of the decision at Barrett (sic) and Ulster Bank Ireland Ltd v Healy and because there is no decided Irish case or Judgment of the CJEU which deals with the matters I have outlined, I have come to the conclusion that the question of whether the Defendant was a consumer is one that cannot readily be answered on the authorities. The factual matters identified by the Defendant with regard to compliance with the requirements of the legislation are in my view more than mere assertions, unsupported by evidence, and do raise what Clarke J. identified in IBRC v McCaughey as "a realistic suggestion that evidence might be available to support the argument put forward by a Defendant."* [Emphasis added in all instances by the Defendant]

28. In the case of *Standard Bank London Ltd v Apostol AKIS & Anor*, Mr Justice Longmore was dealing with circumstances in which a married couple who were resident in Greece were involved in forward purchases of ECUs in exchange for Drachmas. The Defendants were a civil engineer and a lawyer. The Defendants made margin deposits amounting to US$1.1 million. In March 1998 the Drachma was devalued and the bank unilaterally closed out the Defendants open position and fortified their margin deposits. One of the issues to be determined was whether the Defendants acted as consumers for the purposes of Article 13 of the Brussels Convention and the Unfair Terms in Consumer Contract Regulations 1994/1999. The Court held that the contracts were consumer contracts within Article 13 of the Convention and the 1994/1999 Regulations

29. The Court found that the definition of a consumer was substantially the same in the Convention and the Regulations. A consumer was someone acting outside his trade, business or profession. In this case the foreign exchange agreement and the individual

trading agreements made under it were entered into by the Defendants outside their trade, business or profession. The Defendants were not engaged in the trade of foreign exchange contracts as such, despite the size of the contracts. They were wealthy people disposing of income which they had available in the hope of making a profit.

30. In the course of his Judgment Mr Justice Longmore addressed the decision of the European Court of Justice in Benincasa v Dentalkit and said of the remarks of the ECJ:

> *"It can be seen at once that those remarks were made in a factual context which is very different from the present and of course those words fit that context. But the context of this case is entirely different end I do not think that the European Court of Justice can have intended the words "for the purpose of satisfying an individual's own need in terms of private consumption" as a substitute for the words of the relevant EC Directive or of the Brussels Convention. "*

31. The Defendant submits that the reasoning of Mr Justice Longmore is sound and is consistent with the concerns expressed by Ms Justice Baker.

32. The Defendant further submits that it is evident that in the course of various judgments the ECJ has failed to provide a uniform definition of a consumer. In *Hoatiu Ovidiu Costea v SC Volksbank Romania SA* the CJEU held that a lawyer could be considered as a consumer for the purposes of a credit agreement where that agreement was not linked to the exercise of that lawyer's profession. The circumstances of the case were that the lawyer had obtained a loan in his own personal name which was secured by a mortgage taken out by him in his capacity as a representative of his law firm on a building belonging to that firm.

33. The Court was satisfied that it was the status of the person who concluded the primary agreement and not the status of the person under the guarantee that was determinative. The opinion of the Advocate General Cruz Villalfin delivered on the 23rd of April 2015 says the following in respect of the definition of a consumer:

> *"The concept of consumer appears across many fields of EU law, beyond the specific instruments on the approximation of laws on consumer protection; examples are the fields of competition law, judicial cooperation in civil matters, the Common Agricultural and Fisheries Policies, and other fields where measures to approximate laws exist. In that regard, the many instruments of secondary law aimed at consumer protection do not provide an unambiguous conception of the term 'consumer' either. It is, therefore, a notion which is present in many areas of the European Union's legislative activity but one which has not been specifically defined in primary law, and its application as a category for identifying certain persons is not monolithic but is altered by each of the relevant instruments of secondary law. Thus, the notion of consumer is not defined uniformly in all instruments, which belong to different spheres and have different objectives: it is a working, dynamic notion, which is defined by reference to the subject-matter of the legislative act concerned."*

34. The notion that there is no uniform definition of consumer is evident from the different language adopted by the ECJ in various judgments relating to consumer law matters. In the case of *Pinto'* the ECJ found that one is not acting for private purposes when the act is a *'managerial act performed for the purpose of satisfying requirements other than the family or personal requirements of the trader*.' That quote suggests that if a person is acting for *family* purposes the person could be construed as a consumer.

35. In a recent decision of the ECJ in *Schrems v Facebook Ireland LU* the ECJ were dealing with a situation where Plaintiff sought to sue Facebook for a breach of privacy and wished to bring the proceedings in Austria. In order to bring the proceedings in Austria, the Plaintiff relied on the Brussels Convention and the derogation applicable for consumers. The first issue that the Court had to deal with was whether the activities of *"publishing books, lecturing, operating websites, fundraising and being assigned the claims of numerous consumers for the purpose of their enforcement*" could lead to the loss of a private Facebook account user's status as a "consumer."

36. In his opinion Advocate General Bobek addressed the definition of consumer and stated: *"The second element, 'trade or profession', relates in broad tcrms to one's economic activity. This does not meant that the contract at issue would have to be necessarily connected with immediate economic profit. Rather, it means that that contract was entered into in connection with an ongoing, structured economic activity*." [Emphasis added]". In its judgment the ECJ refer to the notion of that a 'consumer' is defined in contrast to an *'economic operator'.*

Application of the Facts to the Law

37. The Defendant submits that Margaret Murphy has set out a bona fide defence that she is a consumer for the purposes of the Act in circumstances where she became a party to the loan when she was acting outside her business. The Act provides for that test as the determinative factor in respect of whether someone is afforded the protection of the Act. This is a matter that should be explored further at plenary hearing and evidence will be adduced by both parties in respect of Margaret Murphy's contention. It is uncontroverted that the facility letter does not provide for a cooling off period. As such, if Margaret Murphy satisfies the Court that she is a consumer, the Plaintiff will be precluded from enforcing the loan agreement against her on foot of the facility, by virtue of s. 38 of the Consumer Credit Act, 1995 (as amended).

38. While the loan is a commercial loan that is not the determining factor as such loans are not excluded from the Act. The Court needs to look at the circumstances of the Defendant, from an objective perspective, and her status in entering the loan in order to determine whether she is a consumer. The Defendant accepts that a person may have more than one business, trade or profession but does not accept that she has a second business, trade or profession.

39. The Defendant's sole trade or profession at the time of entering the loan agreement was that or a nurse. The only evidence advanced by the Plaintiff to support its contention that Margaret Murphy was acting in the course of a trade or profession is that she was

previously a director of a company that had been set up by her husband in 2001. In contrast, the uncontroverted evidence of Margaret Murphy is that there was never any business transacted through that company and it was dissolved in 2004, five years before she entered the loan transaction the subject matter of these proceedings. In addition, there is the uncontroverted evidence of both Tim and Margaret Murphy that she was not involved in her husband's business, that she never received a salary or remuneration from the business and at all material times enjoyed independent income arising from her job as a nurse and prior to that from her role as a teacher. In those circumstances the Plaintiff meets the criteria applied by this Court in the Lavelle and Browne decisions.

40. The Defendant does not accept that it is essential to demonstrate that the purpose of the loan was for *personal consumption'* in order to avail of the protection of the Act. While it is appropriate to look at the purpose of the loan and ask whether the loan was used to *'satisfy an individual's own needs in terms of personal consumption* ' as part of the exercise in establishing whether the borrower was a consumer, it should not be the determinative factor. The definition of a consumer in terms of private consumption arising from reference to the *Benincasa* case is too limited and does not represent a full definition of a consumer applicable to all scenarios. The *Benincasa* case was after all based on the strict interpretation of s. 4 of the Brussels Convention, due to its derogation from the general principle worded in Article 2 of the Brussels Convention. Therefore, it is not entirely clear whether the interpretation in *Benincasa* should apply to the Consumer directives. This is something with which Ms Justice Baker and Mr Justice Longmore were concerned when they queried whether such a restrictive definition of consumer was correct.

41. The use of *'personal consumption'* to define a consumer does not sit easily with a situation where a person enters a credit agreement without deriving any benefit at all, as in the present case. That is because the corollary of personal consumption must be *for business consumption'* where the borrower is involved in that business.

42. By applying the language used in some of the ECJ decisions in defining the notion of a consumer, it is apparent that Margaret Murphy is a consumer within the meaning of the Act. The status of Margaret Murphy in entering the loan was that she was a nurse who was not involved in the building trade. Margaret Murphy was not involved in *'an ongoing structured economic activity*' connected with the loan and was not a *'economic operator'* in the context of the loan.

43. If the Court accepts that the question of whether the Defendant is a consumer should be determined using the limited definition of a consumer in terms that the loan was *for the purpose of satisfying an individual 's own need in terms of private consumption'* it can take the view that the Defendant entered the loan to assist her husband and that assistance represents the personal consumption element. This would also be consistent with the language used in the Pinto case where it is inferred that if the purpose of the loan is to satisfy family requirements, it can be regarded as a consumer loan.

Conclusion

44. Having regard to the criteria propounded respectively by Hardiman J. and McKechnie in *Aer Rianta v Ryanair Ltd* [2001] 4IR 607 and *Harrisgrange Ltd v Michael Duncan [*2003] 4 IR the Defendant has set out a bona fide defence to the claim on the grounds that she is a consumer under the provisions of the Consumer Credit Act 1995 as Amended. There is nothing to justify the strict definition of consumer as advanced by the Plaintiff and a universal definition of consumer within the meaning of the Act is a matter that remains to be decided by the Courts.

45. The Defendant should be given leave to advance her Defence at a Plenary hearing when the Court will have the benefit of hearing the oral evidence of both parties and where that evidence can be tested under cross examination. At the plenary hearing, if the Defendant satisfies the Court that she is a consumer, that will represent a full defence to the proceedings by virtue of s. 38 of the Act.

Plaintiff's submissions

46. The Plaintiff submits that given the incontrovertible position that the relevant loan was for the commercial purpose of restructuring business debts, the Second Named Defendant could not have been acting as a consumer when she entered into the loan together with the first named Defendant and thus, none of the provisions of the Consumer Credit Act 1995 are applicable to her borrowings under that loan.

47. The Plaintiff contends that s. 3 of the Act has been misinterpreted by the second Defendant and it is submitted that the protections of the Act are not applicable to loans which are for commercial purposes as these would not be credit agreements to which a consumer is a party. The Plaintiff submits that where there are two joint borrowers for a loan which is for a single purpose, the two borrowers cannot have been conterminously acting as a "consumer" and as a "non – consumer" for precisely the same monies borrowed. The Plaintiff points out that the onus is on the second Defendant to establish that she has an arguable bona fide defence and submits that she has adduced no evidence to ground such a defence. On the contrary, according to the Plaintiff, in her letter of the 9th October 2013 she gave as her reason for entering into the loan arrangement the ability to "access details should anything happen to him". The full sentence from which that detail has been extracted by the Plaintiff reads as follows: -

> *"The loan in question was in relation to his business and my name was added so as to be able to access details should anything happen to him".*

The Plaintiff contends that it is entirely incongruous for a purported consumer such as the Second Named Defendant, to have sought to ensure engagement with business loans, if she had no interest in, or connection to, the business of the first named Defendant. The Plaintiff suggests that a consumer who had her own independent source of income, and who claimed to have had no connection with the business of her husband the first Defendant, and to have been wholly divorced from and disinterested in the business dealings of the first named Defendant, would not have sought access to details of the loan had she truly had no engagement with the business, trade or profession. The Plaintiff relying on the *Benincasa* test suggests that there is not a scintilla of evidence as to the

personal consumption need of the Second Named Defendant which the loan was intended to meet.

48. The Plaintiff relies on a line of authority stemming from *Allied Irish Banks plc v. Higgins* [2010] IEHC 219 to argue that the law is well settled that a Court tasked with determining whether or not a borrower is a consumer is to look to the purpose of the loan and not the characterisation of it by either party in order to determine whether or not the borrower was acting as a consumer.

49. The Plaintiff submits that the Second Named Defendant has taken an overly literal approach to the interpretation of ss. 2 and 3 of the Consumer Credit Act 1995 as amended and contends that such an overly literalist approach which entirely ignores that the purpose of the loan itself, identified through its nature, is the key determinative factor in deciding whether or not a person entered into a loan as a consumer. The Plaintiff cited excerpts from *ACC Loan Management Ltd. v. Brown & Anor* [2015] IEHC 722 and *Stapleford Finance Ltd. v. Lavelle* [2016] IEHC 385 and *Ulster Bank (Ireland) Ltd. v. Healy* [2014] IEHC 96, *Emberton Finance Ltd. v. Cronin* [2018] IEHC 572 and *Allied Irish Banks plc. v. Fahy* [2014] IEHC 244, all of which he asserts, confirm that the question of whether a person is a consumer is a matter to be determined objectively and irrespective of the characterisation that the parties might have applied to the loan. In *AIB v. Fahy* at para. 65, O'Malley J. stated: -

> *"The primary issue for determination is the position of the Defendant in entering into the loan agreement, having regard to the nature and aims of that agreement."*

50. The Plaintiff submits that the approach advanced by the Second Named Defendant amounts to an overly-literal approach to the interpretation of ss. 2 and 3 of the Consumer Credit Act, 1995, as amended which would lead to a grave injustice upon the Plaintiff. Indeed, according to the Plaintiff such an overly-literalist approach entirely ignores that the purpose of the loan itself, identified through its nature, is the key determinative actor in deciding whether or not a person entered into a loan as a consumer. Evidence was required from the Second Named Defendant and according to the Plaintiff no evidence is forthcoming.

51. The Plaintiff submits that, as has been frequently determined and/or alluded to by the Courts, the determination of whether, or not, a party is a Consumer is one which must be determined by the Court itself, having regard to an objective analysis of the purpose of the loan in question. The mere labelling of such loans by the parties, or the treatment of one party by the other not being *ipso facto* determinative either of the borrower's current nature or whether the provisions of the Act apply to such loan.

52. The Plaintiff submits that the Court is being incorrectly urged by the Second Named Defendant to engage upon a superficial and incomplete exercise of merely considering the averment of the Second Named Defendant as to what her stated profession was entirely detached from any stated reason or purpose, or nature or aim of the loan in question, in

order to determine whether she came under the statutory definition of a "Consumer" contained in s. 2 of the Act of 1995, as amended.

53. According to the Plaintiff, the approach which has been consistently set out by the Courts (in examining the financial transaction in the first instance and not the party thereto) is wholly correct in law and is not in need of any alteration, as suggested by the Second Named Defendant. The Plaintiff submits that such approach is in fact, protective of weaker parties entering into credit agreements. Were the issue of whether or a borrower was a consumer or not under the definition contained in s. 2 of the Act of 1995, as amended left to the parties themselves to determine in the credit agreements, no doubt situations would arise whereby the weaker party would be exposed to the possibility of agreeing that they were not borrowing in such capacity as a Consumer, notwithstanding that the nature and aims of such credit agreements being self-evidently and indisputably for "consumer" purposes.

54. As was held by the Court in *ACC Loan Management Ltd v Browne & anr* [2015] IEHC 722 (at paragraph 20 and 21 of the Judgment of Ms. Justice Baker), notwithstanding that the Second Named Defendant seeks to rely upon the dictum of this case:

> *20. The approach of the Court in determining whether a particular loan was a consumer loan is to consider the purpose of the loan and whether that purpose was to satisfy an individual need of a private person for his or her private consumption and not for commercial benefit or gain, and not where he or she was acting as a commercial operator.*
>
> *21. That it is the contract which is classified and not the person can of course have the consequence that a person who has considerable experience in business matters, and who has from time to time entered into credit agreements for the purposes of his or her business, may still be a consumer for certain credit contracts provided that the purpose is private and not commercial.*

55. Indeed, in Browne (upon which the Second Named Defendant relies and which the Defendant submits is readily distinguishable from the case at hand) the loan in question had been provided to two brothers in 2008 on a joint and several basis, the stated multiple purposes of which loan were to release equity on lands in Co. Donegal, to finance renovations to the Defendants' primary dwelling house and to refinance an existing facility which had been given to one Defendant in 2006 and which loan crucially was considered to be, on a *prima facie* basis, a consumer loan.

56. Clearly, the facts of such multi-purposed borrowings in 2008 in Browne, including the financing of home renovations and the refinancing of an existing consumer loan, previously given to a co-borrower, wholly distinguishes the Second Named Defendant in the instant case from the ultimate determination reached by the Court in *Browne*, to the effect that the borrowing did not further any of his business interests.

57. Incidentally, though not unimportantly, according to the Plaintiff, the Court in *Browne* was also persuaded that such loan was a "consumer" loan in the circumstances where:

> *"the accommodation needs of the second Defendant in that case were solely to be met by the borrowings and the Plaintiff bank was so aware."*

58. Ms. Justice Baker also considered the concept of a "Consumer" in a re-financing arrangement in the decision of *Danske Bank A/S trading as Danske Bank v Miley* [2016] IEHC 105, which the Plaintiff submits is entirely analogous to the position of the Second Named Defendant in the instant case. Such case concerned an action for summary judgment against a Defendant arising from a loan entered into in 2012 for the re-financing of an earlier loan in 2006 which had been jointly entered into by the Defendant and her late husband in order to invest in property both in Ireland and in China. The Defendant argued that the monies borrowed in 2006 were "*not really*" for her own use but were for her late husband's business and that she had no commercial interest, nor direct interest or involvement in same.

59. As was specifically contended by the Defendant in *Miley*, her trade, business or profession in 2006 (when she entered into a loan with the bank jointly with her late husband and which loan was secured upon property held in their joint names, which was subsequently refinanced in 2012, and which proceedings arose out of the 2012 loan), was that of running a public house. According to the Plaintiff, like Mrs. Miley the Second Named Defendant has sworn as to her separate occupation as a Nurse, and that she always had an independent income stream from her husband.

60. According to the Plaintiff, wholly analogous to the contentions now made by the Second Named Defendant in these proceedings, Mrs. Miley in that action asserted that she was a Consumer within the meaning of the Act, as a natural person acting outside her business of running a licensed premises, in that when she entered into the two loans she was not an investor in property, and had no commercial interest, directly or indirectly, in the initial 2006 borrowings and that she merely joined the loan for the Plaintiff's security requirements.

61. Whereas the Second Named Defendant has sought to distinguish the decision of Miley (and indeed the decision in *Gormley* also relied upon by the Plaintiff) on the basis that the Defendants in both actions were personally involved in the business that was to receive borrowings, which could be contrasted to the Second Named Defendant's lack of involvement in her husband's business, in fact, the Defendant's evidence in *Miley* was to the effect that she had no commercial interest whatsoever in such borrowing obtained jointly with her sole-trader husband.

62. However, notwithstanding such asserted lack of involvement and background role adopted by the Defendant in *Miley*, the Court firmly held that this did not make the loan personal to the Defendant and considered that the distance from decisions as to how borrowed monies were to be spent did not characterise the purpose of the loan. This according to the Plaintiff remains the singular difficulty facing the Second Named

Defendant. Though the Plaintiff accepts that the Defendant in *Miley* did not say she received no benefit from the borrowings, unlike the Second Named Defendant in this case. The Plaintiff suggests that this difficulty for the Second Named Defendant is compounded by her own evidence, dating from 2013, to the effect that she entered into the loan agreement in order to be able to access business accounts maintained by her husband – hardly the actions of a disinterested, private party wholly separate from a business maintained by another party. In any event, the Plaintiff submits that whether or not a party obtained a financial benefit from a borrowing is not determinative of the purpose for which the borrowing was made.

63. Further, the Plaintiff contends, such asserted lack of involvement in the First Named Defendant's business (as though purporting to confer the status of a "consumer" upon the Second Named Defendant, in and of itself) must be viewed through the prism of her historical holding of a number of officer roles in a building company established by the First Named Defendant upon taking professional advice.

64. According to the Plaintiff it is of significant assistance to set out at length as to what the Court in *Miley* considered and held between paragraphs 11 and 16 of such judgment as follows:

> *"11. I consider that Mrs. Miley has not made out a prima facie case that she was a consumer for the purposes of the 2012 loan, because the purpose of the loan is quite clearly to refinance what was itself a commercial loan, and because of other factors to which I now turn.*
>
> *12. Certain elements of the 2012 facility, some of which were also in common with the 2006 facility, bear out the characterisation of the loan as not being a consumer facility*
>
> *…*
>
> *13. The Defendant argues that the circumstances of the borrowings are sufficiently similar to those identified in my judgment in ACC Loan Management Limited v. Browne [2015] IEHC 722 (Unreported, High Court, 11th July, 2014), and that her needs were 'allied to' the needs of her husband. The facts of ACC Loan Management Limited v. Browne find no echo in the facts of this case, as the accommodation needs of the second Defendant in that case were solely to be met by the borrowings, and the Plaintiff bank was so aware. Mrs. Miley has not made out a credible argument that her borrowings were not allied to those of her husband. Further, the 2006 loan was itself a refinancing of a joint loan over the licensed premise of which she was the operator and manager, and which was jointly owned, and the loan was thus directly of benefit to her.*
>
> *15. At its height, what the Defendant says is that her husband engaged in a business which was other than that from which she derived her livelihood, and she became a joint borrower for his business loans not because it was intended by her, or by the*

couple jointly, that she would actively involve herself in the purchase of investment property, but because the licensed premises and residence of the couple was to be offered as part of the security for the loan.

16. The case law establishes that it is the purpose of the loan that characterises it as one for either private or business use. The loan of 2006 was undoubtedly for business purposes, and the fact that Mrs. Miley had no involvement with the business does not make the loan to her a personal loan. The case law is clear in that the decision on whether a loan is for commercial or personal purposes must be assessed objectively, not having regard to the subjective intention of the borrower as to how the loan monies would be applied, or in the case of joint or several borrowers, by whom the decisions as to the employment of the moneys was to be made. The fact that Mrs Miley did not herself intend to remain at a distance from investment decisions or from decisions as to how the loan monies were to be spent does not characterise the object or purpose of the loan."

65. Likewise as was referred to the Court in *Allied Irish Banks plc & anr v McGouran & ors* [2016] IEHC 629 (at paragraph 17 et seq of the judgment of Ms. Justice Costello):

"17. In AIB v. Higgins [2010] IEHC 219, Kelly J., held that the subjective view of the Bank in relation to the facility, whether right or wrong, was of no relevance. Therefore the Defendants' argument based upon the attitude of the Bank to the term facilities is of no assistance to them in this case.

18. Mr Justice Kelly also held that it was for the Defendants to demonstrate that they borrowed as consumers in order to be beneficiaries of s. 30 of the Consumer Credit Act, 1995…

…

23. It seems to me clear that the Court of Justice envisages that each individual contract must be assessed to ascertain whether or not it was concluded for the purpose of satisfying the individual's own needs in terms of private consumption. The concept of a consumer is one which must be strictly construed. This does not admit the possibility of a dual purpose contract coming within the ambit of the protections afforded to consumers by the Directive. It would involve accepting that a person could at one and the same time and in one contract be entitled to the protection of the Directive as both satisfying their individual private needs and acting in their trade or profession. This is inconsistent with a strict construction of the concept of a consumer. If a person wishes to maximise the protection afforded to him by the Act and the Directive it is open to the person to separate his business or trade dealings from his purely personal dealings. The provisions do not in my opinion apply to dual purpose contracts as argued by counsel (even assuming for the purposes of the argument that the term facilities were dual purpose facilities). Such a construction is without authority. It is inconsistent with the reasoning of the judgment of the Court of Justice. It introduces uncertainty into the application of

the Act and the Directive and is not necessary to give effect to the protections to be afforded to consumers."

66. From the foregoing, the Plaintiff submits that the Second Named Defendant is obliged to, but yet has entirely failed to, set out to the Court, what the precise purpose of the loan was for her, in order to characterise the loan as being for her private use, as opposed to business use, much less any evidence of how such loan satisfied her own individual needs in terms of private consumption. Rather the Plaintiff submits that the Second Named Defendant appears to have determined to confine her evidence to the bare facts and contentions that her occupation at the time of swearing her Affidavit was that of a Nurse and that the loan was for her husband's business in terms of restructuring business debts.

67. The Plaintiff submits that, where, by her own evidence, the Second Named Defendant was engaged in a different occupation to her husband and had her own income stream, it simply could not have been the case that her needs were allied to that of her husband when they jointly entered into the loan agreement, precisely like the borrower in *Miley* and most unlike the co-borrower Second Named Defendant in *Browne*.

68. Thus, whilst the Defendants in the recent decision of the High Court in *AIB Mortgage Bank v Gunning & anr* [2018] IEHC 555, sought to rely upon the decision of *Browne* to support the contention that where it can be shown on a *prima facie* basis that a loan had been advanced for a dual purpose, it may be difficult to obtain Judgement on a summary basis, such a contention is readily distinguishable from the contentions of the Second Named Defendant in these proceedings.

69. The loan the subject matter of these proceedings had a singular purpose for both joint borrowers, namely the refinancing of the First Named Defendant's business. Unlike the Defendants in *Gunning*, unlike the Defendants in Browne and unlike the Defendant in the application for summary Judgment in the decision of *Stapleford Finance Ltd v Lavelle* [2016] IEHC 385 the Second Named Defendant has never stated what the purpose of the loan was for her. She did not give any evidence of the loan being for her "*individual need"* or "*private consumption*" or "*personal dealing".*

70. The Plaintiff submits that entirely consonant with the Court's findings in *Miley*, the fact that the Second Named Defendant asserts that she had no involvement with the First Named Defendant's business (notwithstanding the incontrovertible evidence that she was, at one stage, both a Director and Secretary of a company operated by the First Named Defendant in the course of his business operations) does not make the loan personal to her or confer some form of "private" nature upon same.

71. The First Named Defendant swore on Affidavit that the purpose of this loan the subject matter of these proceedings was to "restructure" existing debts which had built up from his business as a builder, namely a "business loan" of €70,000, an overdrawn balance on a current account of €21,000 and arrears on a "Finance and Leasing account" of €4,000 – all self-evidently business debts and akin to the restructured liability facing the Defendant in *Miley*.

72. The Plaintiff submits that, far from being considered "unique", the circumstances of the Second Named Defendant's liability to the Plaintiff under the loan agreement are wholly analogous to the Defendant's determined liability in *Miley* and her asserted non-participation in the First Named Defendant's building business (save her undisputed engagement as an officer of a building company operated by him) did not make the loan to her, a personal one.

73. The Plaintiff submits that despite the contention made on behalf of the Second Named Defendant to the effect that *"there is no additional evidence before the Court to support the Plaintiff's contention that Margaret Murphy was involved in her husband's [business] when she entered the loan*", evidence has already been placed before the Court that the purpose itself of the loan was to restructure existing business debts. More significantly according to the Plaintiff, the Second Named Defendant advised the Plaintiff in her letter of October 2013 was for the purpose of enabling her to access the First Named Defendant's business details rather than to satisfy any "individual need" or "private consumption" or "personal dealing".

74. It is submitted that such purpose wholly undermines the Second Named Defendant's contentions as to her status as a "consumer" at the time of entering into the loan, where, by her own reckoning, such purposes for entering into the loan could not (it is submitted) be considered to be the actions of a disinterested "consumer", entirely divorced from the business of a co-borrower.

75. Likewise, according to the Plaintiff contrary to the contentions of the Defendant, it is undoubtedly the case that the Second Named Defendant was indeed acting in the course of business or professional activities or an economic operation when she obtained credit to be used to restructure the business debts of a sole-trader builder, by the act of entering into the loan.

76. The Plaintiff submits that it is not sufficient for the Court to simply examine the Second Named Defendant's occupation at the time of entering into the loan, and to ask whether such loan was for the purposes of nursing. That, in the Plaintiff's submission is to engage in an incomplete analysis of the purpose of the loan. In the same vein the Court should not cease its examination of whether or not the Second Named Defendant was a "Consumer" at the point of enquiring whether or not the Second Named Defendant was engaged in the building trade with her husband when she became a party to the loan.

77. According to the Plaintiff it is not the case that the Second Named Defendant needed to be somehow engaged in building works with her husband in order to be considered to be engaged in the trade or profession of a builder, at the time of entering into the loan. As has been well-established since *AIB v Higgins,* a party can have more than one business, trade or profession and indeed, it appears that the Second Named Defendant has accepted this proposition (as to a party having multiple trades or professional activities).

78. Whereas he Second Named Defendant has suggested that the decision of the European Court of Justice in *Pinto* may be authority for the proposition that a person could be

construed as a "Consumer" if they were acting for "family purposes". The Second Named Defendant's submission that she entered into the loan agreement "*to assist her husband and that assistance represents the personal consumption element*", the Plaintiff suggests that this contention cannot survive the barest of scrutiny.

79. The Plaintiff submits that it is most instructive that the Second Named Defendant has not provided any sworn evidence as to the occurrence of this "*assistance*" on her part, despite having had opportunity to do so. Indeed, though not vigorously followed at hearing, the Second Named Defendant averred that she "*was pressed*" by the First Named Defendant to enter into the loan agreement. Such apparent exercise of dominion over her simply cannot be reflective of any "assistance" given on her part.

80. In any event, it is submitted that the yardstick of "family or personal requirements of the trader", as applied by the European Court of Justice in Pinto in construing a "Consumer" is, in reality, one and the same as the yardstick later applied by the same Court in *Benincasa v Dentalkit* [1997] ECR 337 as a:

> *"15. private final consumer, not engaged in trade or professional activities" and*
>
> *17. 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."*

81. The Plaintiff particularly brings to the Court's attention the ECJ's use of the plural for trade or professional activities and submits that the Second Named Defendant was indeed so engaged in trade or professional activities at the time of entering into the loan agreement, being simultaneously a nurse and the recipient of credit for the restructuring of the existing business debts incurred by a sole trader.

82. Using the language of Advocate General Bobek of the European Court of Justice in *Schrems v Facebook Ireland Ltd* in the context of the derogation applicable to consumers from EU Regulation 44/2001 (as opposed to the language of the Consumer Credit Act, 1995, as amended, or the language of Council Directive 87/102 EEC, as amended), the loan was clearly entered into by the Second Named Defendant, in connection with an ongoing, structured economic activity and was not necessarily connected with immediate economic profit for the Second Named Defendant.

83. It is particularly noteworthy that the Advocate General had also stated at paragraphs 29 – 30 of his Opinion that:

> *"29. Two elements are discernible under that provision: first, the consumer is not defined in general, abstract terms, but always with regard to 'a contract'. Second, that contract has to be concluded for a purpose falling outside the 'trade or profession' of a given person.*
>
> *30. The first element is important in the present case. It means that an assessment of the consumer status is always contract-specific: the specific contractual relationship*

at issue must be considered. It is not an abstract or a global assessment of the predominant personal status."

84. The Plaintiff submits that the contention made by the Second Named Defendant, to the effect that commercial loans are not excluded from the provisions of the Consumer Credit Act, 1995, is expressly and wholly refuted by the Plaintiff. The suggestion that the Court should *"look at the Defendant, from an objective perspective, and her status in entering into the loan"* is, in reality, a request that a determination be made using subjective criteria, which is plainly and unequivocally at odds with the body of case law of this Court on the point and not least the Opinion of Advocate General Bobek in Schrems upon which the Second Named Defendant has sought to rely.

85. The Plaintiff submits that whilst the Second Named Defendant cautions against an over-reliance upon the decision of *Benincasa*, on the basis that such case concerned the issue of a derogation from the general principle of the Brussels Convention (the same as *Schrems* upon which she intends to rely), it must be borne in mind that the observations of the European Court of Justice in that case fortified the view taken by Kelly J. in *AIB v Higgins* that a construction of the Consumer Credit Act, 1995, to the effect that a person could only have one business was unsustainable and indeed, such observations were expressly cited and relied upon by Costello J. in *AIB v McGouran* in the context of determining whether certain borrowers were "Consumers" under Consumer Credit Act, 1995, as amended.

86. Finally, in that regard, the Plaintiff relies upon the principle of judicial comity – as the High Court (Clarke J.) stated in *Re Worldport Limited (In Liquidation)* [2005] IEHC 189, it is well established that, as a matter of judicial comity, a first instance judge ought usually follow the decision of a judge of the same Court unless there are substantial reasons for believing the initial judgment was wrong, in particular where the other determination was a recent one following a review of relevant authorities.

87. The Court in *McGouran* advised that, if a person wished to maximise the protections afforded by both the Consumer Credit Act, 1995, as amended and the relevant Directive implemented by same, it was open to that person to separate his business or trade dealings from his "purely personal dealings". The Plaintiff submits that in the circumstances of the Second Named Defendant evidently failing to do so, despite having been told to obtain the benefit of independent legal advice in advance, it is abundantly clear that the Second Named Defendant was engaged in economic activity or operations or trade or business at the time she entered into the loan agreement with her husband, the purpose of which was to restructure his business debts.

Conclusion

88. For the reasons set out above it is submitted that the Consumer Credit Act, 1995, as amended, has no application to the within application for summary Judgement as against the Second Named Defendant, where she has failed to establish that she is possessed of a fair and reasonable probability of having a real or *bona fide* defence on the basis of being a "consumer" at the time of entering into the loan agreement (the purposes of which was

to refinance her husband's existing business debts) and was not afforded the benefits of s. 30 (2) of the Act within such loan agreement.

89. In such circumstances, it is very clear that the Second Named Defendant has no case and thus, the Plaintiff should also be entitled to Judgment against her in the amount of €111,704.48.

Decision

90. The Court prefers the analysis and reasoning of the second Defendant to that of the plaintiff. In this case, the evidence shows that the debts which were being restructured were entirely the husband's debts arising from his building contracting business. The plaintiff on her evidence, had no involvement in that business and therefore had no responsibility for the debts it had accrued. The nature of the debts and how they were accrued was a matter within the knowledge of the bank. The bank saw fit to advise the Second Named Defendant to get independent legal advice in relation to entering the loan contract. This might be inferred to have been an acknowledgment by the bank that these were not the Second Named Defendant's debts and that by entering the loan contract, she was taking on a liability for which she had no responsibility. The second Defendant on her evidence, was deriving no personal benefit from the restructured loan other than the private benefit of assisting her husband in his difficulties. Depending on how the evidence unfolds at a plenary hearing, it is possible that a court might hold on the facts of the case that notwithstanding the fact that this was a commercial loan, it was a loan solely for her husbands' benefit which the second Defendant entered for personal reasons.

Status of Joint Borrowers

91. A core part of the Plaintiff's submission is that two joint borrowers cannot have been conterminously acting as a "*consumer*" and as a "*non-consumer*" for precisely the same monies borrowed. The Court wonders why not? On a given set of facts, it seems to the Court to be entirely possible that one joint borrower could be "*a natural person acting outside his business, trade or profession*" while the other borrower might be the owner of the business in respect of which the loan was being advanced. In such a scenario, one borrower would be entitled to the protection of the Consumer Credit Act, while the other would not. The court cannot see any logical or legal reason why individual borrowers cannot have a different legal status when entering into a loan contract.

92. The Court considers that the Plaintiff's reliance on the decision of Costello J. in *Allied Irish Banks plc & another v McGouran & ors* [2016] IEHC 629, is misplaced. The Court in that case was dealing with a different set of facts to the facts of this case. In *McGouran* the contention was that each borrower entered the loan for a dual purpose, one being the private individual needs of the borrower and the other being for the purposes of the borrower's trade or profession. There is no doubt that in rejecting the argument that a person could, at the one time and in the one contract, be a consumer and a business borrower, Costello J. applied the strict construction test of the term 'consumer' referred to in Benincasa. However, it is worth noting that Costello J. went on to consider what the situation was in the event that she was incorrect in so finding. At paragraph 25 of her judgment she states:-

> *"If I am incorrect in my conclusion that the first and second defendants are not consumers within the meaning of the Act in respect of the term facilities, I am satisfied that, in fact, the Bank has complied with the requirements of S.30(1) and (2) of the Act of 1995. Therefore, the first and second defendants have no defence based upon S. 38 of the Act."*

93. In the particular circumstances of the *McGouran* case, one ventures to suggest that the finding of Costello J. that the term 'consumer' is to be strictly construed, is more tentative than definitive. In any event, on the facts of this case, there is no question of a dual purpose loan. The single purpose of this loan was the restructuring of Timothy Murphy's business debts, a fact which he has acknowledged by submitting to judgment in respect of the debt.

Statutory Interpretation

94. The Court rejects the submission of the Plaintiff that the Second Defendant is being overly literal in her interpretation of the Act. The Court does so, simply because that submission flies in the face of the established rules of statutory construction. The first and most fundamental rule of statutory interpretation is that a court in construing a statute should give effect to the ordinary and plain meaning of the words of the statute. The rationale for this approach is that the text of the statute is the best indicator of the intent of the legislature and the role of the courts is to give effect to that intent. The rule is summarised in the oft quoted extract from the decision of Brandon J. in *Powys v Powys* [1971] 3 WLR 154 , as follows:-

> *"The true principles to apply are in my view, these: that the first and most important consideration in construing a statute is the ordinary and natural meaning of the words used; that, if such meaning is plain, effect should be given to it; and that it is only if such meaning is not plain, but obscure or equivocal that resort should be had to presumptions or other means of explaining it"*

95. Dodd, in his text, Statutory Interpretation in Ireland (2008) at [5.12], divides the rule into two parts: the ordinary (or literal) meaning rule and the plain meaning rule. The ordinary meaning rule provides that words and phrases should be given their ordinary and natural meaning. The plain meaning rule provides that where the natural and ordinary meaning *"results in a provision being entirely plain and unambiguous, then the interpreter's job is at an end, and effect must be given to the plain meaning."*

96. The application of these rules of interpretation to the definition section of the Consumer Credit Act 1995, produces, in the court's view, a clear and unambiguous definition of 'consumer'. A consumer *"is a natural person acting outside the person's business*." Our legislature has chosen to specify a single criterion for determining whether a borrower is a consumer. If, in entering a relevant credit agreement, the borrower is acting outside his/her business, then he/she is a consumer regardless of the nature of the loan, and as such, is entitled to the protection of the Act. Our legislation does not require a borrower to establish that the loan was *"to satisfy an individual's own needs in terms of personal*

consumption" or any like condition, in order to invoke the protection of the Act. It is sufficient to show that the borrower was acting outside his/her business.

97. In this context, it is worth recalling that the Directive which our legislation transposes, allows Member States to adopt more stringent measures to protect consumers than those required under the Directive. The second last recital of the Directive states:

> "*Whereas, since this Directive provides for a certain degree of approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit and for a certain level of consumer protection, Member States should not be prevented from retaining or adopting more stringent measures to protect the consumer, with due regard for their obligations under the treaty."* [Emphasis added]

98. Ireland has chosen to afford consumer protection to all persons entering relevant credit agreements as long as the person is acting outside his/her business when entering that agreement.

Case Law

99. While, as we have seen, there has been much debate since the decision of Kelly J. in *AIB v O'Higgins* as to the scope and applicability of the *Benincasa* test, in particular whether the term '*consumer'* must be strictly construed and whether 'commercial' loans can be consumer loans, the fact is, that a consideration of the case law in the intervening period shows a consistency of approach in our courts. The definition of 'consumer' in the Consumer Credit Act has, in fact, been applied. In every case cited in which a borrower was held not to be entitled to the protection of the Act, there was a finding of fact that the borrower had taken out the loan for the use of his/her business. See *Allied Irish Banks v Fahy* [2014] IEHC 244, *KBC Bank Ireland P.L.C. v Osborne* [2015] IEHC 795, *Danske Bank v Miley* [2016] IEHC105 *Allied Irish Bank v Gormley* [2018] IEHC 744. On the other hand, in those cases where our courts have held that it is arguable that a borrower was entitled to the protection of the Consumer Credit Act, that conclusion was reached in each case on the basis that the loans, some of which were commercial in nature, were not taken out for the purpose of the borrower's business. See *Ulster Bank v Healy* [2014] IEHC 96, *ACC Loan Management Ltd v Browne and Browne* [2015] IEHC 722. *Stapleford Finance Ltd. v Lavelle* [2016] IEHC 385.

100. On a review of our jurisprudence it seems clear that 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. This construction chimes with the clear words of the Act and with the existing jurisprudence. As stated by O'Malley J. in *Allied Irish Bank v Fahy :-*

> *"The primary issue for determination is the position of the defendant in entering into the loan agreement, having regard to the nature and aims of that agreement."* [Emphasis added]

Position of the Second Defendant

101. What then was the position of the second Defendant in entering this particular loan agreement? She was married to a builder whose business had accumulated bank debts of €95,000 which was made up of an existing business loan of €70,000, an overdraft on his current account of €21,000 and arrears on a financing and leasing account of €4,000. These were his business debts. No one has suggested otherwise. She has averred that she has no involvement in her husband's building business and that she receives no remuneration or salary therefrom. She has her own separate, independent bank accounts through which she processes her earnings from her profession as a nurse. She entered the loan at the behest of her husband who in turn had been requested by the bank to restructure his business loans. On the basis of that evidence, the second Defendant has made out a *prima facie* case that in entering this loan agreement, she was '*acting outside her business'.*

Plaintiff's Rejoinder

102. The Plaintiff has pointed to two pieces of evidence as being in its view, capable of displacing the *prima facie* evidence that the second Defendant was acting outside her business when entering this loan. The first is the fact that in May 2001, the second Defendant was appointed as a director and company secretary of a company, BGM Construction Ltd, formed by her husband. In response the second Defendant has averred that the company was formed on foot of tax advice, received by her husband and that her nomination as a director and company secretary was simply to comply with the requirements of company law. It is further averred that the company never traded and that her husband continued to transact his business as a sole trader. Those averments are supported by affidavit evidence of Alexandra Moore, solicitor, who has exhibited a report on the company, showing its incorporation on 14th May 2001 and its dissolution on the 23rd January 2004. The same report shows that no annual returns were made by the company during its short existence.

103. In the absence of oral evidence the court cannot determine whether the fact of the second Defendant's nomination as a director and company secretary of a building company formed by her husband in 2001, signifies her participation in his business at the time of this loan in 2009, so as to make a loan to restructure the debts of that business, a loan to her business. The court does note however, that the loan in issue, was made more than 5 years after the company was dissolved. (emphasis added)

104. The second item of evidence upon which the Plaintiff relies to displace the *prima facie* case that this loan agreement was outside the second Defendant's business, is her letter of the 9th October 2013, four years after the loan facility was granted. The letter is set out in full at paragraph 4 of this judgment. When read as a whole, the letter is at best ambiguous from the point of view of the Plaintiff. The Plaintiff has chosen to home in on a single phrase in the letter namely, " *my name was added so as to be able to access details should anything happen to him*." as proof that the second Defendant was engaged with the first Defendant's business. It seems to the Court that it is debatable that this phrase carries such an implication. Significantly, in the Court's view, the Plaintiff has ignored other parts of the letter which depending on the oral evidence, might support the

second Defendant's position. Her letter appears to have been written in response to a letter of demand from the Bank. The first point she makes is that she has "*spoken to Ted and he tells me that he is dealing with the matter*."

105. Again, depending on the oral evidence, this could indicate that she was unaware of the default until she received the letter from the Bank and then spoke to her husband. She points out directly that the loan in question was in relation to his business and that she has always had her own account and independent work. She also seeks a copy of the paperwork relating to the loan for the purpose of getting advice as to her position. In the Court's view, this evidence does not displace the *prima facie* case that in entering this loan agreement, the second Defendant was *acting outside her business*. In fact, depending on the oral evidence, this letter may support her position.

Conclusion

106. For the reasons set out herein, the Court holds as a matter of law and fact that the second Defendant has established a fair and reasonable probability that she has a real and *bona fide* defence to the Plaintiff's claim. The Court will therefore remit this claim to plenary hearing.