

Banking

Consumer Loans

When is a loan a consumer loan?

Before taking recovery action in relation to a loan a lender should consider at the outset whether the loan is properly characterised as a consumer or non-consumer loan. If a non-consumer loan is mischaracterised as a consumer loan a lender may risk being deprived of the right to bring judgment proceedings before the Commercial Court.

Increasingly lenders have been treating non-consumer borrowers as consumers when, on a detailed review of the facts, it would appear that a loan was advanced for the promotion of business and not for an individual's private consumption.

In some recent cases in 2014 the Courts have had occasion to revisit the principles which should be applied in considering the status of a borrower under the Consumer Credit Act 1995 (the "Act"). These principles were developed by Kelly J in the leading case of *AIB v Higgins and Ors* [2010] IEHC 219.

In the Higgins case, AIB loaned over six million euro to the defendants' partnership for the purpose of acquiring and developing lands in County Meath. When summary proceedings were commenced against the defendants over the loan, they argued that they made these borrowings from AIB as "consumers" within the meaning of the Act.

Section 2(1) of the Act provides that a "consumer" is:-

- (a) a natural person acting outside the person's business, or
- (b) any person, or person of a class, declared to be a consumer in an order made under subsection (9).

If correct, then Section 30 of the Act was applicable to the lending but its requirements were not complied with by AIB. That omission would have rendered the loan unenforceable (Section 38 of the Act).

Of particular relevance was Kelly J's reliance on the ECJ case of *Benincasa v Dentalkit* (Case C-249/95).

Kelly J referred to the judgment in this ECJ case regarding whether a particular contract is a consumer contract:

- "...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..."
- "...the self-same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others..."
- "...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..."

The Court also considered the concept of the borrower "acting outside of his business, trade and profession" and concluded that this is not confined to one such business trade or profession but rather the promotion of any business with a view to profit. The Court found that the defendants had no arguable defense as they did not borrow as consumers.

By way of comparison, in the recent case of *UBIL v Healy* [2014] IEHC 96, where summary proceedings were brought by UBIL to recover over six hundred thousand euro from Mr. Healy. The defendant argued that he was a consumer for the purposes of the Act. He argued that the loan was advanced to him to fund the purchase of a number of investment properties for the purposes of a “pension type investment”. Barrett J focused on the fact that Mr. Healy had engaged in such personal investment for his own private consumption. He found, based on this, that it was arguable that the defendant was a consumer and granted him leave to defend the summary proceedings at plenary hearing.

The Court considered the principles set down by Kelly J in the Higgins case. Barrett J noted that the borrowings and the venture in which the defendants in the Higgins case were engaged was quantitatively and appeared qualitatively different from the level and form in the Healy case.

On the basis of the above cases and specifically on the issue of private consumption, lenders should consider all facts carefully, noting Kelly J’s decision, in deciding whether a borrower is a consumer or not. Failure to do so may preclude a lender from proceeding to the Commercial Court in relation to the recovery of debt.

For further information on this topic please contact Aisling Doran, Solicitor, Banking Department, E: adoran@efc.ie