

Fairness of Terms in Consumer Contracts Examined Again

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The High Court recently delivered another important judgment highlighting the need for clarity in loan agreements and the importance of the court's role in evaluating the fairness of terms in consumer contracts, even in the absence of a challenge by a consumer.

Background

The proceedings concerned a particular type of loan agreement commonly referred to as a "lifetime loan" or a "reverse mortgage". The defining feature for these loans is that no repayments are due on the loan until the death of the borrower. Upon the death of the borrower and a subsequent demand, the entirety of the loan (together with interest) becomes repayable. The plaintiff sought an order for possession of a residential property in Sligo on foot of a mortgage dated 22 March 2007.

Two issues arose during the plaintiff's application. Both issues were raised by the court rather than by the defendant.

The first related to the way the lender had calculated interest on the loan. The lender continued to apply interest on the loan following the death of the deceased borrower, up until the date of the hearing. This raised concerns regarding unfair terms in consumer contracts within the meaning of Directive 93/13/EEC.

Unfair Contract Terms

The mortgage terms as stated in the loan offer was a "Lifetime Mortgage" with a fixed interest rate of 6.95% APR. Within the "repayment" section of the loan offer it provided that, upon the deceased's death, the sum lent together with all interest accrued thereon and all costs, fees and expenses would become immediately payable on demand.

The court raised concerns regarding the fairness of the contractual terms due to a possible tension between the provisions regarding interest, which suggested that interest would continue to accrue until the loan was repaid in full, and the provision regarding the period of the loan agreement which was the date of death of the borrower.

Applying the rationale in *Pepper Finance Corporate (Ireland) DAC v Cannon* [2020] IESC 2, a court is obliged to consider the fairness of terms in a consumer contract, regardless of whether their fairness is put in issue by the consumer. The court found that it was particularly appropriate for the court to examine this issue in circumstances where the consumer had unfortunately died at the time that the lender seeks to enforce the terms of the loan agreement.

However, the court went on to find that the amount repayable under the loan agreement does not fall to be assessed under the Directive so long as the terms regarding same are set out in "plain intelligible language". The court found that the language used in the letter of loan offer was plain intelligible language and as such, the terms of the loan relating to the applicable rate of interest were outside the scope of the Directive.

Incorrect Letters of Demand

The second issue related to the fact that the demand issued by the lender, which triggered the enforceability of the lender's power of repossession, was for a figure significantly more than the sum actually due. This was because of an error by the solicitor acting for the lender. He/She accidentally used a figure from a previous letter of demand which was unrelated to the present case. The court considered whether such a demand could be regarded as a valid demand sufficient to trigger the plaintiff's entitlement to seek possession.

It emerged during the hearing of the lender's application that the initial letters of demand (made first against the borrower's personal representatives and subsequently against the administrator ad litem) were for sums significantly more than the amounts actually then due and owing at the dates of the demands.

The solicitor for the lender took responsibility for the errors; the figures having been inadvertently carried over from previous precedent letters. There were further errors in the lender's pleadings; the incorrect loan amount was included in one section of a grounding affidavit and the incorrect date of the deceased's death referenced in another grounding affidavit.

The court considered whether those demands were valid and whether the plaintiff could rely on those demands for the purpose of triggering enforcement of the mortgage. Having comprehensively considered the applicable case law in Ireland (and outside of Ireland), the court found that an overstatement of a sum due in a demand does not render the demand invalid or ineffective save where the terms of the loan provide otherwise, or it is unclear what is to be done on foot of the demand.

Key Takeaways

While the court found that the lender had met the necessary proofs to establish that it was entitled to an order for possession, the case highlights the importance for lenders to ensure that:

- The language used in letters of loan offer should be clear, plain, unambiguous and intelligible. This will reduce any risk of a court dissecting the terms of the loan offer as they will be outside the scope of the Unfair Contract Terms Directive;
- Notwithstanding the use of plain language in loan offers, lenders should be aware of the court's obligation to consider the fairness of the terms in a consumer contract, irrespective of whether the fairness of the terms has been put in issue by the consumer;
- When issuing demands, care and precision should be used in the drafting of these. The court found that if it is unclear what is to be done on foot of the demand, the court may render the demand invalid.

For more information please contact [Aisling Duffy](#) or your usual contact in Beauchamps.