Briefing

December 2017

Should the Courts consider whether mortgage terms are "unfair", even if not asked to do so?

As mentioned in Resolving the Mortgage Arrears Crisis Vol 1/2017, Barrett J in the High Court delivered his well-publicised judgment in AIB v Counihan on 21 December 2016. In that judgment, he observed that the Court has a general obligation to establish if any terms in a mortgage contract are unfair within the meaning of the Unfair Contract Terms Directive (as implemented in Ireland by the Unfair Contract Terms Regulations), even if the Court has not been specifically asked to look at the mortgage contract in that context.

AIB V COUNIHAN

In *AIB v Counihan*, Barrett J cited the decision of the European Court of Justice in Aziz, in which the ECJ ruled that a national court should assess (even if not asked to do so) whether any term of a contract that is within the scope of the Unfair Contract Terms Directive (*Directive 93/13/EEC*) is unfair.

If a contract term is found to be unfair, that term will not be binding on the consumer, although the contract will continue to exist if it is possible for it to do so without that term. No unfair term was identified by Barrett J in *AIB v Counihan*.

REACTION

The decision in *AIB v Counihan* received a considerable amount of attention. Minister of State Dara Murphy (on behalf of the Minister for Justice and in response to a question raised in the Dáil) told TDs a short time later that the ruling was being examined by the Department of Justice. The Master of the High Court expressed his concern that, in repossession cases, there may not be sufficient experience at county registrar level to enable EU-based legislation, such as the Unfair Contract Terms Regulations (*SI 27/1995 as amended*), to be applied correctly. The then Minister for Justice also stated in the Dáil that where such a defence is raised, it must be transferred by the county registrar to the judge's list at the first opportunity. The most recent update (in July 2017), indicated that the review by the Department of Justice and Equality in conjunction with the Attorney General was ongoing.

THREE RECENT CASES

The issue has again arisen in three recent High Court cases, details of which are set out in the table below.

In *Cronin v Dublin City Sheriff*, Ní Raifeartaigh J observed that Barrett J's comments in *AIB v Counihan* were *obiter* and that, in the case in front of her, she did not find it necessary to decide the scale of "*any obligation*" placed on the Irish courts in repossession cases in light of the Unfair Terms Directive and Regulations.

In *Bank of Ireland v McMahon*, Noonan J dismissed the borrower's argument that terms of their mortgage contract were unfair as the borrowers had not identified any particular term as being unfair, and he had not been able to identify such a term, but did not go into any detail regarding the scale of the review he had carried out

However, in *EBS v Kenehan*, Barrett J refused to let a Circuit Court order for possession stand because EBS had not placed all of the contractual documents before the Court to enable the Court to "*discharge its Aziz-Counihan obligations*".

"UNFAIR TERMS" LIKELY TO BE RAISED MORE OFTEN AS A DEFENCE

It is expected that the Unfair Terms Directive and Regulations will be raised with increasing frequency by borrowers by way of a defence to enforcement action.

In light of Barrett J's ruling in *EBS v Kenehan*, lenders should ensure that all documents that could be relevant to the Court's consideration of whether a term of the lender's contract with the borrower is unfair are placed before the Court.

FURTHER DETAILS ON RECENT CASES	
Cronin v Dublin City Sheriff	Mr Cronin brought proceedings against Tanager DAC (which had acquired his loan from Bank of Scotland) claiming that an order for possession granted by the Circuit Court and later affirmed by the High Court was unenforceable because the terms of his mortgage contract had not been assessed by the Court by reference to the Unfair Terms Directive or Regulations. He also sought an injunction restraining the Dublin City Sheriff from enforcing the order for possession. Ní Raifeartaigh J noted that Mr Cronin's aim was to obtain a court order declaring the High Court order which affirmed the Circuit Order to be unenforceable. She held that as the possession proceedings had been concluded, it would be an abuse of process to allow Mr Cronin to maintain this set of proceedings. Interestingly, she indicated in her judgment that: >> the comments of Barrett J in *AIB v Counihan* appeared to be *obiter*; and >> nothing in the *Aziz* case suggested that there is an exception from the finality principle for proceedings relating to family homes. Notably, Ní Raifeartaigh J commented that she did not consider it necessary to decide the scale of "*…any obligation placed upon the Irish courts in house repossession cases by virtue of the Directive (as interpreted by the ECJ) in cases which are still "live"*."
The Governor and Company of the Bank of Ireland v McMahon & Anor	The borrowers claimed that the terms of their contract with Bank of Ireland were unfair, had breached the Unfair Terms Directive and Regulations, and were unenforceable as a result. While the borrowers relied on Barrett J's judgment in *AIB v Counihan*, as the borrowers had not pointed to any particular term as being unfair, and as Noonan J had not been able to discern one, the borrowers' '*unfair terms*' argument was dismissed as a "*non-issue*".
EBS Limited v Kenehan & Anor	This was an appeal against an order for possession granted by the Circuit Court. Barrett J was sharply critical of the failure by EBS to place either the relevant offer letter or the "*EBS Rules*" (each referred to in the mortgage contract) before the Court, with the result that "*...the court cannot discharge its Aziz-Counihan obligations*". In light of that, Barrett J refused to let the possession order stand, as EBS had placed the court in a position whereby it could not discharge its "*Aziz-Counihan obligations*", a requirement which was "*…incumbent upon it as a matter of European Union law…*"

ORLA O’CONNOR
PARTNER, FINANCE
+353 1 920 1181
orla.oconnor@arthurcox.com

ROBERT CAIN
PARTNER, FINANCIAL REGULATION
+353 1 920 1050
robert.cain@arthurcox.com

MAEDHBH CLANCY
PSL, FINANCE
+353 1 920 1225
maedhbh.clancy@arthurcox.com

KIM O’DOWD
ASSOCIATE, FINANCIAL REGULATION
+353 1 920 1277
kim.odowd@arthurcox.com