Neutral Citation: [2016] NICA 33 | *Ref:* **WEA9937**

Judgment: approved by the Court for handing down | *Delivered:* **05/05/2016**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

BANK OF IRELAND (UK) PLC

Plaintiff/Respondent;

-and-

DERMOT McLAUGHLIN

Defendant/Appellant.

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Morgan LCJ, Weatherup LJ and Weir LJ

WEATHERUP LJ (delivering the judgment of the Court)

[1] By these proceedings the Bank of Ireland (UK) plc ("the Bank") sought to recover £123,000 plus interest from Dermot McLaughlin ("the appellant") on foot of a contract of guarantee by which the appellant guaranteed the indebtedness of Magma Heat Limited ("the company"). On 14 September 2015 Horner J gave judgment for the Bank against the appellant for £123,000 plus interest. The appellant appeals against the decision of Horner J. Mr Rafferty appeared for the appellant and Mr Stevenson appeared for the Bank.

[2] By a facility letter dated 25 May 2006 the Bank agreed an overdraft facility of £10,000 and a loan facility of £133,000 for the company. The appellant was a

shareholder and director of the company and signed a contract of guarantee dated 2 February 2007 to guarantee the company's liabilities to the Bank up to £140,000.

[3] The company fell into arrears and was placed in a creditors' voluntary liquidation. The Bank called in the appellant's guarantee. The appellant did not discharge the company debt. The Bank commenced the proceedings on foot of the guarantee and Horner J gave judgment for the Bank.

[4] The appellant's Notice of Appeal raised a number of grounds of appeal but the appellant has now limited the appeal to ground (v) which reads –

> "The appellant's reliance on the unfair relationship clause of the Consumer Credit Act was rejected and not properly considered according to law".

[5] The appellant seeks leave to amend that sole ground of appeal. The Bank opposes leave to amend as the appellant's skeleton argument indicates that the appellant proposes to advance the amended ground by reliance on matters that were not raised in the Court below. The proposed amended ground of appeal reads -

> "The Judge erred in directing himself on the law of the Consumer Credit Act 1974 (as amended) and the Judge misunderstood or misused the facts, as found, reaching the incorrect conclusion that the appellant could not seek the protection of the legislation."

[6] Before Horner J the appellant sought to rely on the unfair relationship provisions of the Consumer Credit Act 1974 to avoid liability under the guarantee. The essential basis on which the appellant's arguments under the 1974 Act did not succeed before Horner J was that the advance made by the Bank to the company and guaranteed by the appellant was found to amount to business credit and not to consumer credit for the purposes of the 1974 Act.

[7] The unfair relationship provisions of the 1974 Act are set out in sections 140A, 140B and 140C. Under section 140A(1) the Court may make an unfair relationship order in connection with a 'credit agreement' if it determines that the relationship between the creditor and the debtor was unfair to the debtor in certain specified respects. Section 140C(1) provides that a 'credit agreement' means any agreement between an 'individual' (the debtor) and any other person (the creditor). In 2006, section 189(1) provided that an 'individual' included a partnership or other unincorporated body of persons not consisting entirely of bodies corporate. The facility between the Bank and the company was not an agreement involving an 'individual' as the debtor and was not a 'credit agreement' under the Act.

[8] Section 140A also concerns a credit agreement taken with a 'related agreement'. Section 140C(4) provides that a 'related agreement' refers to a linked transaction or a security provided, which could include a guarantee. However the guarantee (the related agreement) must be related to a 'credit agreement'. The

agreement between the Bank and the company was not a credit agreement and the guarantee could not amount to a 'related agreement' under the Act.

[9] Section 8(2), repealed on 6 April 2008, provided that a consumer credit agreement arose where credit did not exceed £25,000. The credit provided to the company did exceed £25,000. The facility provided by the Bank to the company was made in 2006 before section 8(2) was repealed. The facility was not a consumer credit agreement when it was made.

[10} The appellant sought to rely on the unfair relationship provisions in a further manner. By section 8(3) a consumer credit agreement is a regulated agreement if it is not an 'exempt agreement'. Exempt agreements are dealt with in sections 16, 16A, 16B and 16C. Section 16B deals with the exemption relating to business and provides that the Act does not regulate a consumer credit agreement by which the creditor provides the debtor with credit exceeding £25,000 wholly or predominantly for the purposes of business.

[11] The exempt agreements are subject to this qualification -

> "(6) Nothing in this section affects the application of sections 140A to 140C" (being the unfair relationship provisions). "

[12] Thus, argues the appellant, the qualification rescues all agreements and the unfair relationship provisions apply to all agreements and in particular to the appellant's agreement.

[13] The Court is satisfied that the effect of the qualifying sub-section is that, while a consumer credit agreement may be an exempt agreement, it would still be subject to the unfair relationship provisions in sections 140A to 140C. However one must start with a 'credit agreement'. This case involved a limited liability company and did not involve a credit agreement.

[14] In any event Horner J found that, had this facility amounted to a credit agreement for the purposes of the Act, there was no unfair relationship. The grounds relied on by the appellant to establish an unfair relationship were that the Bank sought to exclude the appellant from the protection of the consumer legislation, withheld information in the discovery process, failed to point out where the consumer legislation applied and produced documents that were not up to standard and should not have been accepted by the Court.

[15] Horner J found there was no unfair relationship arising from the terms of the agreement or any related agreement or the way in which the Bank exercised or enforced its rights or any other thing done or not done by the Bank. Had it been necessary to consider that finding, which it is not because this case does not involve a credit agreement, we are satisfied that there is no basis on which that finding of Horner J should be set aside.

[16] This Court is in agreement with Horner J on the application of the unfair relationship provisions of the 1974 Act. In essence the unfair relationship provisions do not apply to this facility because credit was extended to a company and did not amount to consumer credit. In any event it has not been established that there was an unfair relationship.

[17] The appellant contended that the Bank had not complied with the notice requirements under section 86E of the Act. Section 86E provides for notice to be given to a debtor where a 'default sum' becomes payable under a regulated agreement. Section 189 provides that a 'regulated agreement' is, for present purposes, a consumer credit agreement other than an exempt agreement. Again, the agreement between the Bank and the company was not a credit agreement. The notice provisions do not apply in the present case.

[18] In any event the present case does not involve a 'default sum' being payable. Under section 187A 'default sum' means a sum, other than a sum for interest, which is payable in connection with a breach of the agreement, other than a sum required to be paid earlier than would otherwise have to be paid. That is not the basis of the payment claimed in the present case.

[19] For the purposes of this appeal the appellant sought to advance a new argument. Prior to the facility being provided by the Bank, the appellant had a personal loan from American Express for less than £25,000. By a facility letter dated 15 July 2003 from the Bank to the Directors of Premier Underfloor Heating Limited, a predecessor company of Magma Heat Limited, the Bank offered £150,000 by way of loan to refinance existing borrowings. According to Counsel for the appellant the finances provided by the Bank were used by the appellant, at least in part, to discharge the debt to American Express.

[20] Thus, argues the appellant, there was a credit agreement with American Express, which was within the Act. This credit agreement was carried over into the business loan to the company so as to attract the protections of the Act to the facility obtained from the Bank. Why this should be so was not explained. How the appellant could use the business loan to the company to discharge the appellant's personal debts was not explained. How the facility provided to Premier Underfloor Heating Limited bears on the facility with which this dispute is concerned, namely the facility provided to Magma Heat limited, was not explained. No authority was made available to support the appellant's argument. No evidence on these matters had been before the trial Judge. It was not a ground of appeal. It was raised in the appellant's skeleton argument on the appeal.

[21] The appellant's argument on the American Express loan is without merit. It was not raised at the hearing before Horner J. As there is no reason for the point not having been raised earlier and as we find it is not a reasonably arguable point we refuse leave to the appellant to amend the grounds of appeal.

[22] We have considered the remaining ground of appeal as presently drafted and find no basis for upsetting the conclusions of Horner J.

[23] Mr Rafferty and Mr McLaughlin showed much ingenuity but all to no avail. The appeal is dismissed.