

BETWEEN**THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND****PLAINTIFF****AND****DAVID MELLON AND ELIZABETH MELLON****DEFENDANTS****JUDGMENT of Mr. Justice Eagar delivered on the 28th day of July, 2017**

1. This is a judgment on the application for summary judgment against the second named defendant Elizabeth Mellon. This is in circumstances where proceedings against David Mellon, the first named defendant were compromised.

2. The motion was grounded on the affidavit of Paul Traynor who describes himself as a business manager of Bank of Ireland, 2 College Green, Dublin 2. In his affidavit he said that the plaintiff Bank had loaned and advanced the sum of €2,950,000.00 to the defendants pursuant to a loan agreement between the plaintiff and the defendants which was dated the 18th of June, 2007 upon the terms and conditions of the said loan agreement.

3. The purpose of the loan facility was to assist with the purchase of 72 Roebuck Road, Clonskeagh, Dublin 14 and he exhibited the loan agreement. The loan was to be repaid in full within thirty-six months of the drawdown and any surplus sale proceeds from the development of 68 and 70 Roebuck Road, Clonskeagh, Dublin 14 were to be lodged in reduction of the said facility.

4. In relation to security held there was no security held by the Bank, although there was a note that additional security was required, which included:-

(1) First legal mortgage/charge over the property at 72 Roebuck Road, Clonskeagh, Dublin 14 registered in the name of David Mellon and Elizabeth Mellon;

(2) First legal mortgage/charge over the property at Churchtown Park House, Churchtown Road, Dublin 14 registered in the name of David Mellon and Elizabeth Mellon;

(3) First legal mortgage/charge over the property at 68 and 70 Roebuck Road, Clonskeagh, Dublin 14 registered in the name of David Mellon; and

(4) Assignment to the Bank of a level term life policy on the life of Mr. David Mellon for the amount of €7 million.

The loan offer was signed by Jane McGrath described as a senior business manager, and the form of acceptance was signed by both David Mellon and Elizabeth Mellon on the 26th of June, 2007.

5. Mr. Traynor said that the relevant account number with the plaintiff for the loan facility was an Account No. 75544731. The defendants drew down the loan on the 28th of July, 2007 and this is clearly documented in the loan account statement relating to Account No. 75544731.

6. Mr. Traynor then states that the plaintiff agreed to loan to the defendants the sum of €2,935,875.00 by way of an existing loan pursuant to a loan agreement between the plaintiff and the defendants dated the 20th of August, 2008. The purpose of the loan facility was to restructure the existing facility for Account No. 75544731 on an interest only basis for a period of six months. The loan was to be repaid in full six months from the drawdown date. He exhibited the loan offer. This was addressed to David Mellon and Elizabeth Mellon dated the 20th of August, 2008 and signed by Jane McGrath, senior business manager. The form of acceptance of this loan was signed by David Mellon and Elizabeth Mellon on the 2nd of September, 2008 and the form of acceptance read:-

"I have read and agreed to be bound by and fully accept all the terms and conditions contained in this offer letter and in the appendix to this offer letter".

It set out the terms and conditions of the letter of offer.

7. Mr. Traynor then recites that the plaintiff agreed to lend to the defendants the sum of €3,083,000.00 by a loan agreement between the parties dated the 1st of October, 2008 upon the terms and conditions of the said loan agreement. The loan was provided by way of an existing loan for the purpose of the continuation of the said existing loan facility for Account No. 75544731 and the plaintiff agreed to provide additional funds in the sum of €133,103.60 in relation to a six month interest rollup including capitalisation of two months arrears. The letter of offer was dated the 1st of October, 2008 and signed by Emer Deegan, described as business manager. The form of acceptance was duly signed by David Mellon and Elizabeth Mellon on the 2nd of October, 2008.

8. The form of acceptance read:-

"I have read and agreed to be bound by and fully accept all of the terms and conditions contained in this offer letter and in the appendix to this offer letter. On acceptance of this offer letter we are required under the consumer and protection code to notify all existing guarantors that there is a material change in the circumstances of the borrowing."

The terms and conditions of this offer letter was attached to the loan agreement. He said that the defendants had made certain repayments in relation to the loan facility but the loan has not been repaid in full and a balance of €2,064,883.00 is now due and owing by the defendants to the plaintiff. He says that he believes that the defendants have no defence to the plaintiff's claim.

9. The next affidavit is that of David Mellon and although the proceedings have been compromised between the plaintiff and Mr. Mellon, his affidavit is relevant to the issues which have been argued before the court on behalf of the second named defendant. He made this affidavit on the 12th of January, 2016 and in response to the grounding affidavit of Paul Traynor sworn on the 8th of

October, 2015.

10. He stated that the Bank of Ireland borrowings were received against the properties known as 68 and 70 Roebuck Road, Clonskeagh, Dublin 14, "Cherry Trees" at 72 Roebuck Road, Clonskeagh, Dublin 14 and Churchtown Park House, Churchtown Road Upper, Dublin 14. He stated that the value of the security introduced known as Churchtown Park House at the time was €3,100,000.00. He states that his wife Elizabeth Mellon was a joint owner of a residential investment property which was requested by the Bank of Ireland as security for his borrowings (this Courts emphasis). He said that he dealt exclusively with the Bank of Ireland at all times and that his wife Elizabeth was not party to or asked to participate in any meetings relating to the project that took place with the Bank of Ireland. It was clearly understood by all parties at all times that his wife's sole involvement in any and all of the borrowings with the Bank of Ireland was for the purpose of capturing her interest in certain assets that were to be placed as security against borrowings with the Bank of Ireland.

11. He said that when the economic downturn began, Bank of Ireland insisted that all secured assets were to be sold into what was a stagnant and depressed property market. He said that he was against this strategy at the time, as his properties were well located and likely to benefit at any stage from any market recovery. He said that he (this Court emphasis) made various commercially viable submissions to the Bank of Ireland with alternative options which amounted to a "fire sale" policy. These submissions were declined by the Bank of Ireland and he states that the Bank of Ireland would not listen to reason at all, and forced him to sell the assets.

12. He says however, in exchange for his cooperation in the "fire sale" of the secured properties, he was assured by Bank of Ireland that he would be fairly treated in dealing with the shortfall on the loan account balances following the sale. He relied upon these assurances and consented to the property disposals. The properties were ultimately sold at a fraction of what they are now worth thereby drastically increasing his personal losses which could have been avoided. He says that the Bank of Ireland created these losses unnecessarily by forcing him to sell assets at greatly reduced prices.

13. The next affidavit was that of Elizabeth Mellon, the second named defendant in these proceedings and she made this affidavit on the 13th of January, 2016 and in response to the grounding affidavit of Paul Traynor.

14. She states that the Bank of Ireland borrowings were received against properties known as 68 and 70 Roebuck Road, Clonskeagh, Dublin 14, "Cherry Trees" at 72 Roebuck Road, Clonskeagh, Dublin 14 and Churchtown Park House, Churchtown Road Upper, Dublin 14. She stated that it was clearly understood at all times that her exposure to the Bank of Ireland would be restricted to her interests in the residential property known as Churchtown Park House and the security of the property purchased with Bank of Ireland funding.

15. She stated that the value of the property known as Churchtown Park House was at the time approximately €3,100,000.00. She was asked to participate in the transaction in order for the Bank of Ireland to capture her interest in Churchtown Park House.

16. She stated that the Bank of Ireland did not meet at any time with herself to discuss the borrowings being proposed and the nature of the project and the facilities being granted. She was not advised to receive independent legal advice in relation to the initial Bank of Ireland facilities and she said that the plaintiff had not furnished in their affidavit of pleadings a certified true copy of the guarantee and the basis thereof. She stated that the Bank of Ireland reviewed all facilities and issued new facilities in August 2008 including their final facility funding to David Mellon in the amount of €855,000.00 over and above previous facilities granted.

17. In the Bank of Ireland letter, Ms. Emer Deegan advised for the first time that the second named defendant seek independent legal advice in response to the request for the signing of the required guarantee. She sought as requested independent legal advice and her solicitor Mark Ronayne spoke with Emer Deegan and subsequently corresponded as requested with Ms. Deegan.

18. She stated that her guarantee to the Bank of Ireland was clearly limited to her interest in the properties held by the Bank of Ireland as security. She states that before the granting of the loan facilities she was a full-time mother raising four children. She states that at the time of the agreement she was under fifty years of age and the Bank of Ireland did not raise the issue of life assurance cover with her and did not advise her in relation to same.

19. She said that at the time she was in receipt of disability benefits from the Department of Social Welfare of approximately €160.00 per week and had no capacity whatsoever to borrow money. She states that she has no liability to the Bank of Ireland whatsoever.

20. The next affidavit is that of Paul Traynor and he says that he makes this affidavit supplemental to this affidavit of the 8th of October, 2015 and the supplemental affidavit sworn on the 26th of April, 2016 and in this supplemental affidavit he states that the wrong demand letters were exhibited in his initial letter and he exhibits the correct letters of demand.

21. The next affidavit is that of David Mellon sworn on the 27th of April, 2016. He said that as apparent difficulties emerged in the market place he proactively and continuously engaged with the Bank. He proposed various restructuring options based upon income generation to continue servicing interest of obligations and that a sustainable restructuring agreement within normal banking parameters was feasible. However, the Bank refused all options put to them and the Bank confirmed that it was only interested in immediate capital reduction of his debt, despite market conditions.

22. He understood that if he consented to the fire sale of his assets, he would be treated honourably and fairly in respect of the residual balance. He relied upon these assurances to his ultimate detriment when it became apparent that the Bank was resiling from its commitment. He said that the purpose of his business as agreed with the Bank of Ireland was to build and sell three houses at Roebuck Road, Clonskeagh. He said that the Bank of Ireland failed to honour its commitment as originally agreed when approached for funding at the outset of the project. The result of the lack of funding lead to an incomplete and unfinished development akin to a small "ghost estate". This lead to a considerable amount of speculation and conjuncture as to the status of both the development itself and himself as a developer.

23. The next affidavit is that of Elizabeth Mellon dated the 27th of April, 2016. She states that her husband David Mellon was a businessman and a property developer and he entered into discussions with the Bank of Ireland in June 2007 in order to secure funding for properties on Roebuck Road, Clonskeagh, Dublin 14.

24. She said she was never involved in any discussions with the Bank of Ireland nor with her husband in relation to this or any other proposed transaction. At the time of these discussions she was not working. Five years earlier in 2002 she underwent major surgery and since that time had been unable to work. She had no capacity to borrow monies as her only income was disability benefit in the amount of €160.00 per week.

25. He husband informed her that the Bank of Ireland sought additional security to support the proposed borrowings. To this end Bank

of Ireland had asked that the property known as Churchtown Park House be transferred over to them as security. She confirmed that she had jointly owned Churchtown Park House with her husband. She said she was not asked to attend any meetings with Bank of Ireland in relation to her husband's dealings and as such did not see herself as a borrower. She was never asked for any financial information verifying income for her tax position at that stage during her dealings with the Bank of Ireland.

26. She said she could not be regarded as a borrower without full appraisal of her financial circumstances and an assessment of her ability to repay any proposed borrowings.

27. She was fully aware that no bank would lend her money due to her being on disability benefit. She had no repayment capacity as her income was insufficient to allow her to borrow even modest sums let alone millions of euro in commercial debt. She held and operated her own bank accounts at AIB bank for a period of over twenty years and had no connection to Bank of Ireland. It is her clear understanding that she was imported into the transaction purely to capture her interest in Churchtown Park House which is a very valuable property. In agreeing with the proposed dealings with Bank of Ireland she was allowing by her husband to use her interest in this particular property to support his business interests.

28. She said that she was very confused and very uncomfortable and sought clarification as to her exact and total exposure to Bank of Ireland following the proposed new loan agreements. She was only prepared to proceed if it was clear that she had no exposure to the Bank of Ireland other than what had been agreed in terms of Churchtown Park House. She felt that she needed independent legal advice and sought advice from her solicitor Mark Ronayne. She instructed Mark Ronayne to clarify her own position with Bank of Ireland. She wanted absolute clarity as to the totality of her obligations to Bank of Ireland given their request for the guarantee. She wanted to be sure that other than the agreed property pledges, she had no other liabilities to Bank of Ireland. She has an income of €160.00 and could not repay the debt.

29. She states that Emer Deegan of the Bank confirmed to her solicitor Mark Ronayne that her exposure was limited to the security held at "Cherry Trees" at 72 Roebuck Road and Churchtown Park House. These assets were subsequently sold without obstruction at the request of the Bank. She considered this to be the end of her involvement with the Bank. She further says that on a second occasion a senior manager of Bank of Ireland Jane McGrath also clarified the limit of her exposure, and she exhibits letters in this regard.

30. The first exhibit is a letter from Emer Deegan, Business Manager of Bank of Ireland and she wrote to Elizabeth Mellon, Washington House, Butterfield Avenue, Rathfarnham, Dublin 14 on the 2nd of October, 2008. The letter says:-

"Dear Elizabeth,

You have recently received offer letters renewing your joint loan facilities with Bank of Ireland.

As per my letter dated the 07 of August 2008 I am confirming that your guarantee in favour of David Mellon is limited to your interest in properties at 72 Roebuck Road, Clonskeagh, Dublin 14 and Churchtown Park House, Churchtown Road, Dublin 14.

If you have queries in this regard, please do not hesitate to contact me on 01-637 5291.

With Kind Regards,

Yours Sincerely

Emer Deegan

Business Manager"

31. She further exhibits a letter from Jane McGrath, Senior Business Manager wrote to her on the 14th of August, 2008.

"RE: Offer Letter for David Mellon,

Reference LS900754/1058029/0822448282

Dear Elizabeth,

I refer to the above mentioned offer letter addressed to David Mellon. In this regard recourse to your personal letter of guarantee in the amount of €4,600,000.00 in favour of David Mellon is limited to your interest in the properties at "Cherry Trees", 72 Roebuck Road, Clonskeagh, Dublin 14 and Churchtown Park House, Churchtown Road, Dublin 14.

Jane McGrath."

32. She said that she engaged a financial advisor, Mr. Des Walshe who clarified her position in detail with Bank of Ireland. At that time her husband was selling various assets and her signature was required to allow the sales to complete.

33. She said that from 2008 to this day throughout the entire six year period when her husband was renegotiating terms and disposing of assets, she had never spoken nor communicated with any person from Bank of Ireland. She said she was never a borrower or consumer with the Bank of Ireland. The Bank is fully aware that she has no liability and believes that they are continuing to pursue her to exert additional pressure on her husband. The conduct of the Bank of Ireland is causing her significant distress and upset.

34. She says that her solicitor Mark Ronayne who advised in relation to these matters has prepared a statement verifying the contents of his discussions with Emer Deegan and Bank of Ireland and she exhibits this letter. It is dated the 6th of April, 2016: Re: Elizabeth Mellon – Guarantee to Bank of Ireland independent legal advice furnished the 8th of August, 2008. He details his meeting with Elizabeth Mellon on the 8th of August, 2008 and her circumstances. He said that he rang Emer Deegan of the Bank of Ireland in relation to her letter of the 7th of August to confirm that he was independently providing legal advice to Elizabeth Mellon.

35. He said that he had acted for both David and Elizabeth previously but never in relation to the properties at 68A, 70 and 72 Roebuck Road. He also explained that Elizabeth Mellon would require confirmation that not only would the guarantee be limited to her

interest at 72 Roebuck Road and Churchtown Park House, but that the guarantee was not to have any recourse to any other assets owned by Elizabeth Mellon, and was not to related to any other sums lent by Bank of Ireland to David Mellon.

36. She explained this clearly to Emer Deegan and she indicated that this was agreeable to her. She said her solicitor then wrote to Emer Deegan immediately afterwards on the 8th of August, 2008 to confirm this. Her solicitor says that he is absolutely certain that Bank of Ireland knew clearly that the guarantee was limited to the interest of Elizabeth Mellon in the properties at 72 Roebuck Road and Churchtown Park House, and furthermore Bank of Ireland knew that it's guarantee would not have recourse to any other assets owned by her and would not relate to any other sums lent by Bank of Ireland to her husband David.

37. The next affidavit is that of Paul Traynor, sworn on the 2nd of June, 2016 supplemental to his previous affidavits and in respect to the affidavits of the defendants. He says that in relation to the affidavit of the second named defendant sworn on the 27th of April, 2016, para. 4 and 5 are contradictory as the second named defendant states at para. 4 she was never involved in any discussions with the plaintiff or her husband. It goes on to state at para. 5 that her husband informed her of the reason of her being involved in the transaction.

38. He says that in relation to the matters averred to in the second named defendant's affidavit of the 27th of April, it was clear that there were two sets of transactions which are the subject matter of separate proceedings in relation to the loan offer letters. He said that it is clear that the correspondence exhibited in the second named defendant's affidavit of the 27th of April, 2016 relates to the loan facility relating to the proceedings bearing Record No. 2014/127S in which the second named defendant was a guarantor and not a co-borrower.

39. He said that the proceedings relate to loans advanced to the first and second named defendants as joint borrowers. He said it is clear from the loan offer letters exhibited in his affidavit of the 8th of October, 2015 that both defendants were named as borrowers and both defendants signed the loan offer letters.

40. He further states that the Bank statements relating to the loan account 75544731 which are exhibited in his earlier affidavit were in the names of both the first and second named defendant.

41. The Court notes that the loan account statement is in the names of David and "Liz" Mellon (Roebuck) addressed to Eton House, 85-86 Terenure Road North, Terenure, Dublin 6W.

42. The next affidavit is that of Elizabeth Mellon sworn on the 20th of July, 2016. She makes this affidavit in response to the affidavits of Paul Traynor of the Bank of Ireland sworn on the 8th of October, 2015 and 2nd June, 2016. She states in response to Mr. Traynor's affidavit of the 2nd of June, 2016 that she never sought any credit facilities from Bank of Ireland, and she never met with any bank personnel seeking any facilities. Her husband was asked by Bank of Ireland to provide security for his borrowings in the form of a loan security over a jointly owned property – Churchtown Park House.

43. She refers to her affidavit of the 27th of April, 2016 and the exhibits furnished, which clearly confirm the limitation of her involvement. She states in response to Mr. Traynor's affidavit that she was not a borrower as she had no repayment capacity. Her income was not sufficient to qualify her for any borrowings whatsoever. She said she sought on the 12th of January last information from Bank of Ireland under the Data Protection Act 1998 and 2003 and the response refurnished to her on the 16th of February did not contain any supporting documentation whatsoever in respect of any application for finance on her part. This was because she had never sought funding from Bank of Ireland.

44. She states that her husband David Mellon wrote to Bank of Ireland requesting credit underwriting documents/credit papers for herself in relation to this matter and that Bank of Ireland through their solicitors Anderson and Gallagher responded confirming they had provided the defendants with all relevant documentation. This documentation did not include any application from herself for funding or any other paperwork supporting an application.

45. The next affidavit is described as the supplemental affidavit of Elizabeth Mellon and it is sworn on the 4th of July, 2017. She says that since giving up work in 1993 her husband has always been the sole breadwinner in the household. She considered returning to work at a later stage perhaps when the children got older. In 2002 she became seriously ill and underwent life threatening surgery. Her medical condition enabled her to a disability pension which has at all material times been her sole personal income. She said that following her surgery given her poor health and concerns as to her life expectancy, she made certain provisions financially.

46. She said she has always adopted a very prudent approach to monies and debt as her overreaching concern remains the future care of her children in the event that her health was to deteriorate again. She said that she co-owned a property known as Churchtown Park House and said that the property was always registered in the joint names of her husband and herself and she always considered Churchtown to be her pension. In a rainy day scenario, she always felt it could be sold to provide for her family and herself.

47. She said in the calendar year 2007 Churchtown House had become a valuable property worth approximately €3 million. Her interest is worth about €1.5 million.

48. She said that in 2007, her husband sought her assistance in relation to borrowings which he intended to make for his property development dealings. He explained to her that he had meet a gentleman called Sean Byrne who was the manager of the Bank of Ireland, Rathmines Branch. At the time, he said he had spoken with Mr. Byrne in relation to the proposed borrowings which he wished to make and "a scheme" had been agreed with Mr. Byrne of the Bank to submit additional security to be given to the Bank in respect of the borrowings which he, her husband was to make.

49. Specifically, her husband indicated to her that the Bank was not prepared to advance the funds to him, unless an additional security namely her 50% interest in the property was given to the Bank. She said she was very reluctant to agree to her husband's request on account of the fact that she had always considered this property to be her pension. In the circumstances, he said that he needed her help to secure his borrowings and in the circumstances she indicated in turn that she would agree to consent to half of the property being pledged as security but that she wanted confirmation to be given by the Bank that her involvement in the matter was limited to the extent of her giving over of her share of the Churchtown property to the Bank of Ireland as security for David's borrowings.

50. David explained to her that he had spoken further with Mr. Byrne of the Bank and reassurances had been given that her involvement with the matter was limited strictly to the giving of her share of the security of the Churchtown property to the Bank to secure his borrowings. She said she was assured by her husband who had spoken to Mr. Byrne. She said that some documents were

given to her by her husband for signing, and her husband explained to her that these were the documents which were required to secure her interest in the property of Churchtown and on that basis and on representations made she signed the documentation.

51. She said she never had any contact from the plaintiff Bank nor spoke to any official of the Bank in respect of same. There was absolutely zero contact with her from the Bank which is astounding in the light of the fact that she was a consumer at all material times. She said at all material times the plaintiff, its servants and/or agents knew or ought to have known that she was firstly not independently legally advised. She had no income apart from the disability benefit. No assessment of her income was ever carried out by the Bank.

52. She said that at all material times Sean Byrne the manager of the Bank of Ireland, Rathmines was fully aware of her position. She notes that Mr. Byrne had not put in an affidavit in the proceedings. She said that Mr. Byrne, based on the representations made by her husband to her, is the person within the Bank who knows what the true position is surrounding the borrowings of her husband and her limited involvement with same.

53. She then makes a claim that she was unduly influenced by her husband in respect of all matters and given that her husband was the Bank's agent, this contract was entered into away from the plaintiff's business premises, and therefore she said and believed and had been advised that the terms of S.I. No. 2244/1989 European Communities Act (Cancellation of Contracts negotiated away from Business Premises) Regulations 1989 applied to this transaction.

54. She said she was never given a cancellation notice and the contract does not contain information to the same effect. As such she believes in and is advised that without prejudice to any other arguments, the contract is unenforceable.

55. She also noted that from the statement exhibited in the matter she is listed on same as "Liz" Mellon. She said she never used the name Liz nor has ever been or at any time has anyone called her Liz or list her name as Liz. She always indicates that her name is Elizabeth and not Liz.

56. It further came to her attention that a current account was apparently opened in relation to these borrowings. She said she never signed anything in relation to the opening of the account nor ever completed any mandate in respect of same. She said she never signed any cheque in respect of same. She said she never received a statement in respect of the account nor did she ever make a lodgement to the said account. She views the account as part of the scheme agreed between her husband and Mr. Byrne of the Bank and she was not a party to it.

Case Law

57. Counsel for the plaintiff suggested that the involvement of Mr. Byrne was only alluded to in the most recent affidavit of the second named defendant on the 4th of July, 2017.

58. He cited the *Governor and Company of the Bank of Ireland v. Michael Curran and Maureen Curran* [2016] IECA 399, which was a judgment of Irvine J. delivered on the 24th day of May, 2016. In this case the Court of Appeal had to decide whether the trial judge had erred in law when he concluded that Mrs. Curran had not established a *bona fide* credible defence to the Bank's claim. Mrs. Curran set out three grounds upon which she might arguably and credibly defend the proceedings; the first being that the guarantee was unenforceable as it was executed under undue influence (by her husband), secondly, that the guarantee was unenforceable as an unconscionable bargain and, thirdly, a defence based on the doctrine on *non est factum* was put forward. The trial judge McGovern J. had concluded that Mrs. Curran had not established any arguable defence in the proceedings.

59. Clarke J. in *Ulster Bank (Ireland) Ltd. v Roche and Buttimer* [2012] 1 IR 765 heard psychological evidence in relation to the issue of undue influence.

60. Any plea of undue influence is not acceptable to this Court as a ground on which a defence is established.

61. In relation to non est factum, Kelly J. in *Allied Irish Banks plc. v. Higgins and Others* [2010] IEHC 219 stated:-

"The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisors without making any inquiry as to their purpose or effect. But the essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have had such a belief unless he had taken steps or been given information which gave him some grounds for his belief."

62. Counsel for the plaintiff also relies on the judgment of McGovern J. in the *Bank of Ireland v. Stafford and others* [2013] IEHC 546:-

"The facility of 21st December, 2005, set out the security for the loan but did not state that the personal liability of the borrowers was limited to that security. The position appears to have been that the parties intended entering into a further arrangement in the following year but such an arrangement was not put in place because it was realised that the car park was not performing as well as anticipated. There is nothing ambiguous about the terms of the facility letter, and while all the borrowers may have understood or believed that it was a limited recourse loan, the evidence establishes that this is not in fact the case."

No other principles appear from this judgment.

63. Counsel of the second named defendant referred to *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607 in which the Supreme Court held that the jurisdiction to grant summary judgment was one to be used with great care. The court must look to whether there was a fair or reasonable probability of a real or *bona fide* defence. The Supreme Court also held that the fair and reasonable probability of the defendant having a real or *bona fide* defence was not the same thing as a defence, which would probably succeed or even a defence whose success was not improbable. The fundamental question on an application such as this remained:-

"Was it very clear that the defendant had no case? Was there either no issue to be tried or only issues which were simple and easily determined? Did the defendant's affidavits fail to disclose even an arguable defence?"

64. Counsel also quoted from *Harrisrange Ltd. v. Michael Duncan* [2003] 4 I.R. 1 in which McKechnie J. set out the following principles:-

"(1) the power to grant summary judgment should be exercised with discernible caution;

(2) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;

(3) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;

(4) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(5) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, "is what the defendant says credible?"

Decision

65. The Court is satisfied that there is no evidence of undue influence on the second named defendant by the first named defendant.

66. However, the Court is satisfied that the letter from Jane McGrath dated the 14th of August, 2008 and the subsequent letter from Emer Deegan on the 2nd of October, 2008 raise issues which may indicate that there may be an arguable defence on the part of the second named defendant. This is compounded from the lack any affidavit evidence from Ms. Deegan, Ms. McGrath or Mr. Byrne.

67. In these circumstances, the Court will direct that this matter be heard by way of plenary proceedings.