THE COURT OF APPEAL

Record No: 914/2014

[Article 64 Transfer]

Peart J.
Irvine J.
Hogan J.

BETWEEN:

GOVERNOR AND COMPANY OF THE BANK OF IRELAND

PLAINTIFF/RESPONDENT

- AND -

KATHLEEN QUINN

DEFENDANT/APPELLANT

JUDGMENT OF MR JUSTICE PEART GIVEN THE 10th DAY OF FEBRUARY 2016:

1. The defendant is appealing against an order made by Mr Justice Hedigan on the 15th July 2013 giving judgment to the plaintiff bank in the sum of €1,859,734.31. Before doing so he had concluded that none of the bases on which the defendant sought to resist the motion for judgment amounted to a bona fide defence to the claim, as that expression is to be understood. It is not contended on this appeal that the trial judge applied the wrong test.

2. As is well established by now, a defendant seeking to have a summary summons proceeding for a liquidated claim adjourned to a full plenary hearing on oral evidence must satisfy the court on affidavit that he/she has a bona fide defence. What exactly that means has been the subject of a number of judgments, perhaps the best-known being *Aer Rianta v. Ryanair* [2001] 4 I.R. 506 in which Hardman J. put it most clearly and pithily when he stated that the court must ask itself if it is very clear that the defendant has no defence to the claim.

3. As I have said, Hedigan J. was so satisfied and gave judgment to the plaintiff bank on the motion for judgment.

4. It is that order which the defendant appeals against. In order to do so successfully she must satisfy this Court that the trial judge fell into error in concluding that what was being urged by her as an arguable defence to the claim did not pass the Aer Rianta test.

Background facts
5. The grounding affidavit to the bank's motion sets out that the claim arises on foot of a loan agreement entered into between the bank and Mrs Quinn and her husband on the 7th September 2010 in the sum of €1,749,497. This was a short term loan to be repaid in one sum within 6 months, or such period as may thereafter be agreed between the parties, with interest being paid monthly during that period at the rate of €2,000 per month.

6. This loan offer was accepted by the borrowers 10 days later on the 17th September 2010, and the exhibited copy of the facility agreement shows that the acceptance was signed by each borrower on that date.

7. According to the loan agreement the purpose of the loan facility was to restructure some existing loan facilities which the bank had made available to the defendant and her husband over the preceding few years.

8. The loan was repayable on demand, and until such demand was made, interest was to be discharged at the rate of €2,000 per month commencing one month after drawdown.

9. It is averred that the loan was drawn down by the borrowers on the 1st October 2010 in the sense that it was debited to the loan account and credited against the existing balance due on the previous facility. That drawdown is not in dispute, except that it is contended that since no funds were actually received by the borrowers, because it was restructuring the previous loan,, there is an absence of consideration. In my view, this submission is unstateable. The previous loan had become payable, and the new restructuring facility was in ease of the borrowers. That forbearance by the bank is a clear consideration.

10. It is averred also that the borrowers defaulted on the required repayments leading to the bank issuing a letter of demand ultimately on the 25th April 2012 in the amount then due including interest of €1,836,122.63. As of the date of swearing of the grounding affidavit the amount due was €1,859,734.31.

Non-Compliance with s. 30 of the Consumer Credit Act, 1995 ("the Act)
11. In her first replying affidavit sworn by Mrs Quinn on 4th February 2013 she disputes for the first time that she has any liability to repay the amount borrowed by her and her husband. Essential to her claim that the bank is not entitled to recover the monies lent to her and her husband is her averment that at all times she was a consumer within the meaning of the Act, and within the meaning of the Consumer Protection Codes 2006 ("the Code") from the date on which it was implemented. The bank accepts that she was a consumer. It is also necessary for the defendant as a consumer to satisfy the court that the loan the subject of the within proceedings, and indeed the loans which preceded it and which were restructured by the loan agreement dated 7th September 2010 are not within the definition of a "housing loan" under the Act, because if indeed the loan is a housing loan then none of the requirements and obligations upon a lender under s. 30 of the Act which the defendant says have been breached by the bank thereby rendering the loan irrecoverable by the bank, are obligations with which the bank was required to comply.

12. According to the agreed note of his judgment the trial judge was satisfied that the loan was a housing loan and that therefore the requirements of the Act which are relied upon by the defendant were not applicable, because housing loans are exempted from the

requirements of that Act.

13. The defendant describes how in June 2006 she and her husband had discussions with the bank about the possibility of borrowing a sum of €1,600,000 for the purpose of down-sizing from their then principal residence at 66 Bushy Park Road by releasing equity in that house in order to buy a smaller house adjacent thereto at 66A, Bushy Park Road then owned by a family member, and to provide a pension for her and her husband with the balance of the funds borrowed, since her husband had made no other pension provisions. Those discussions appear to have led to what the defendant now describes as an alleged contract dated 13th June 2006, which on its face is a loan agreement in that sum which was signed by the defendant and her husband, though not by the bank.

14. It is described as an alleged contract presumably because the defendant now seeks to argue that because it does not comply with the requirements of s. 30 of the Act because it was not executed by the bank, and therefore, it is contended, it is unenforceable by virtue of section 38 of the Act.

15. The same complaint is made in relation to a number of later loan restructuring agreements dated 11th October 2011, 14th August 2008, 22nd December 2008, and 8th April 2009.

16. In addition to that alleged defect it is stated that there was no cooling-off period specified in the loan agreement as required under the Act, and neither was there a consent by her or her husband to dispensing with that cooling-off period either in an alleged agreement dated 22nd May 2008 or that dated 14th August 2008, and since that is a breach of s. 30 (2) of the Act those agreements are rendered unenforceable.

17. Those agreements in which defects are alleged to exist thereby rendering them unenforceable by virtue of s. 38 of the Act are not of course the agreements on foot of which the bank seeks to recover the amount claimed in these proceedings. However, the defendant is now urging upon this Court, as she did in the court below, that the defects in the previous loan agreements cannot be cured by virtue of the agreement dated 7th September 2010 now sued upon, even though the latter does not contain the defects apparent in the previous loan agreements. It is submitted that in reality all of the restructuring agreements are simply variations of the first allegedly defective agreement dated 13th June 2006.

18. As I have said, the question as to whether these issues are sufficient to demonstrate the existence of a bona fide entitling the defendant to have the matter adjourned to a plenary hearing turns principally on whether or not the loan on foot of which the bank seeks to recover judgment is or is not properly to be considered a 'housing loan' as defined in s. 20 of the Act of 1995. The bank says that it is such a loan. The defendant disagrees.

19. Section 29 of the Act provides that Part III thereof shall apply to all credit agreements other than housing loans. A 'housing loan' is defined in s. 20 of the Act (as amended by the Central Bank and Financial Services Authority of Ireland Act, 2004) as follows:

> *"(a) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land*
>
> > *(1) for the purpose of enabling the person to have a house constructed on the land as the principal residence of that person or that person's dependents, or*
> >
> > *(2) for the purpose of enabling the person to improve the house that is already used as the principal residence of that person or that person's dependents, or*
> >
> > *(3) for the purpose of enabling the person to buy a house that is already constructed on the land for use as the principal residence of that person or that person's dependents,*
>
> *or*
>
> *(b) an agreement for refinancing credit provided to a person for a purpose specified in paragraph (a) (i), (ii), or (iii), or*
>
> *(c) an agreement for the provision of credit to a person <u>on the security of a mortgage</u> of a freehold or leasehold estate or interest in land on which a house is constructed where the house is to be used, or to continue to be used, as the principal residence of the person or the person's dependents, or*
>
> *(d) an agreement for the provision of credit to a person <u>on the security of a mortgage</u> of a freehold or leasehold estate or interest in land on which a house is, or is to be, constructed where the person to whom the credit is provided is a consumer."[emphasis added]"*

20. It is clear from the affidavit evidence and particularly the loan agreement dated 13th June 2006 that the purpose of the original loan facility was to enable the defendant and her husband to purchase the house at 66A, Bushy Park Road, Terenure, Dublin 6, which adjoined their existing house at 66, Bushy Park Road, and that the intention, and indeed a condition of the loan, was that the latter would be sold within 6 months of the date of drawdown, and the proceeds applied to pay off that facility. This was the mechanism by which the defendant and her husband downsized as it has been described. However, 60 Bushy Park Road was not sold within that period, which accounts for the fact that the facility was renewed from time to time by the issue of new facility letters which have been referred to.

21. I note also that the 13th June 2006 facility letter records that no security was held by the bank at that date in 2006, but that the security required to be put in place was a "Solicitor's letter of undertaking, acceptable to the bank, to hold title deeds to property at 66 Bushy Park Road, Terenure, Dublin 6 in trust for the bank pending sale and thereafter to forward sale proceeds to the bank". It appears that the borrowers in due course provided security to the bank by way of executing a first legal charge over the property at 66 Bushy Park Road. That fact is recited in the loan agreement dated 7th September 2010 under the heading 'Security Held'.

22. The facility dated 13th June 2006 was, as already stated, signed by the borrowers, but not by the bank. That is accepted by the bank. Nevertheless it clearly performed its obligations under the agreement by making the funds available to the borrowers, since it is clear that the loan was drawn down. The later facilities were in the nature of a restructuring of that earlier loan. The nature of the loan did not alter. The argument being advanced that the loan dated 7th September 2010 now sued upon is not a 'housing loan' is based on the strained argument that the first loan dated 13th June 2006 is outside the definition of a housing loan under s. 20 of the Act because it is not "on the security of a mortgage". The reason put forward for that proposition is that the facility letter refers to

"Security Held" as being "*Solicitors Letter of Undertaking, acceptable to the Bank to hold title deeds to property at 66 Bushy Park Road, Terenure, Dublin 6 in trust for the Bank pending sale and thereafter to forward sale proceeds to the Bank".* Counsel for the defendant has submitted that such an undertaking constitutes an equitable mortgage, and therefore it is not admissible in evidence in any court unless it has been stamped in accordance with the requirements of s. 12 (3) of the Stamp Duties Consolidation Act, 1999. In such circumstances, it is submitted that the plaintiff is not entitled to rely upon the letter of undertaking as proof that the loan is a loan "on the security for a mortgage", and therefore cannot rely on the exemption in respect of a housing loan from the rigours of the Act.

Non-stamping of the Solicitor's Letter of Undertaking
23. It is necessary to set out the entire of s. 12 of that Act in order to demonstrate that it does not provide for what is contended for by the defendant. It provides as follows:

> *"12(1) In this section "fee simple", "interest", "land" and "lease" have the same meanings, respectively, as in section 41 of the Finance (1909-10) Act, 1910 , and references to a "transferee" or a "lessee" include the personal representatives of any transferee or lessee.*
>
> *(2) It shall be the duty of the transferee or lessee, on the occasion of any transfer of the fee simple of any land or of any interest in land or on the grant of any lease of any land for a term exceeding 14 years (whether the transfer or lease is on sale or operates as a voluntary disposition inter vivos), to present to the Commissioners such particulars in relation to such class or category of transfer or lease as they may prescribe by regulations and, without prejudice to the generality of the foregoing, the regulations may make provision in relation to all or any of the following matters:*
>
> > *(a) the form in which the particulars are to be delivered;*
> >
> > *(b) the time limits within which the particulars are to be delivered;*
> >
> > *(c) the manner in which the land is to be described or classified;*
> >
> > *(d) the furnishing of tax reference numbers of the parties to the instrument.*
>
> *(3) Notwithstanding anything in section 20 or 127, any transfer or lease to which regulations made pursuant to subsection (2) apply shall not, other than in criminal proceedings or in civil proceedings by the Commissioners to recover stamp duty, be given in evidence, or be available for any purpose unless it is stamped with a stamp denoting that all particulars prescribed by the Commissioners have been delivered."*

24. Section 12 does not refer to the payment of stamp duty. It refers to what conveyancing practitioners refer to as "the P.D. stamp", being one which must be impressed on any conveyance or transfer of property for valuable consideration. It is a separate stamp to the stamp indicating that *ad valorem* duty has been paid on the deed, and, as provided in s. 12, it indicates that the particulars of the transaction have been provided to the Revenue Commissioners in accordance with the regulations made in that regard.

25. However, that is not an end to the issue raised since s. 127 of the same Act exists, and it is the section upon which reliance was probably intended to be placed. That section provides, as relevant:

> *"127(1) On the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the State, or before any arbitrator or referee, notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the stamp on the instrument, and if the instrument is one which may legally be stamped after execution, it may, on payment to the officer of the court whose duty it is to read the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, be received in evidence, saving all just exceptions on other grounds.*
>
> *(2) ……*
>
> *(3)*
>
> *(4) Except as provided for in this section, an instrument executed in any part of the State, or relating, wherever executed, to any property situated, or to any matter or thing done or to be done, in any part of the State, shall not, except in criminal proceedings or in civil proceedings by the Commissioners to recover stamp duty, be given in evidence, or be available for any purpose, unless it is not chargeable with duty or it is duly stamped in accordance with the law in force at the time when it was first executed". [emphasis added]"*

26. It follows therefore that *"any instrument chargeable with any duty"* may not be received in evidence in any civil proceedings unless it has been properly stamped. One must therefore see what is "an instrument" for these purposes, and then what instruments are so chargeable. Instruments which are chargeable with stamp duty are set forth in Schedule to the Act of 1999 under various headings, and as far as relevant to this case, appear under the heading of "Mortgages" and specifically under "Equitable Mortgages", as the defendant contends that the letter of undertaking referred to in the loan facility dated 13th June 2006 constitutes an equitable mortgage and therefore is chargeable with stamp duty.

27. Under s. 1 of the Act of 1999 "instrument" means *"every written document".* As such clearly a letter of undertaking comes within that definition. If that letter of undertaking creates an equitable mortgage, then it is chargeable with stamp duty as provided for in Schedule 1 to that Act. In s. 1 of the Act an equitable mortgage is defined as *being "an agreement or memorandum, under hand only, relating to the deposit of any title deeds or instruments constituting or being evidence of the title to any property (other than stock or marketable security), or creating a charge on such property"* [emphasis added].

28. In my view, the solicitor's undertaking to hold the deeds in trust pending the sale of No. 66 cannot be construed as being an agreement relating to the deposit of the title deeds with the bank. The question remains whether it is an instrument which "[creates] a charge on such property". If it is then it attracts stamp duty. I can usefully refer *to Land Law in Ireland* (2nd ed.) by Andrew Lyall where at pp.782-784 he discusses equitable mortgages and the forms they may take. He deals firstly with Mortgages of an Equitable Interest, Agreements for a Legal Mortgage, and equitable mortgages created by a deposit of title deeds. Then finally he discusses an

"Equitable Charge" as a species of equitable mortgage but when doing so distinguishes it from an equitable mortgage as such. In that regard the author states:

> *"(4) Equitable Charge:*
>
> > *Equity allows an owner of property to create a charge over it and this differs from an equitable mortgage properly so-called in that it does not have the effect of transferring an estate, legal or equitable, in the property. It is an equitable lien rather than a mortgage. In Re Kum Tong restaurant (Dublin) Ltd a company borrowed money and agreed by letter to secure the loan by holding the purchase money from the sale of its land for the benefit of the lender. The letter was held to create an equitable charge over the purchase money." [emphasis added]"*

29. There is a lack of clarity as to what exactly the solicitor undertook to do. That uncertainty arises because there are three different sections on the Bank's standard form of undertaking, and it is not clear which was intended to cover the transaction in this case. Nevertheless the only workable and sensible interpretation, in the light of the facility letter, is that it is an undertaking that in consideration of the bank's agreement to make available a bridging loan of €1.6 million to the borrowers to enable them to purchase No. 66A Bushy Park Road, he would use the funds for that purpose, and that following the completion of the intended sale of No. 66 Bushy Park Road he would remit so much of the proceeds of sale as was required to discharge the bridging loan plus any interest accrued. In order to create an equitable mortgage, as opposed to an equitable charge, that letter of undertaking would have to read as an instrument which creates a charge over No. 66 Bushy Park Road pending repayment of the bridging loan. The loan in question fits most conveniently within the Section 3 undertaking on the standard form which relates to "Bridging Finance by Bank Against Sale Proceeds of Existing Property". Within that Section 3 undertaking there is no reference at all to holding any title deeds in trust for the bank, even if it was the bank's intention that pending the sale of No. 66 those title deeds would be held in trust. Any reference to holding deeds in trust is contained in Section 1 undertaking which relates to a "Bridging Finance Towards Purchase of New Property". That suggests that the transaction is the purchase of a new house, but not where the buyers already own a house that is to be sold, as in the present case. It is the undertaking at Section 3 of the Standard form of undertaking provided by the bank that covers that situation.

30. At issue in *In Re Kum Tong Restaurant Ltd.* [1978] I.R. referred to in the passage quoted from Lyall's Land Law in Ireland above, was the terms of an undertaking given by the company's solicitors to its bank. The company was in financial difficulties and had contracted to sell its premises. It went to its bank for a bridging loan to enable it to continue in business until such time as the sale of the business and the premises was completed. The bank agreed to advance the funds, and the company's solicitor's undertaking was given in the following terms:

> *"We now therefore undertake in consideration of your granting the company a bridging loan of £4000 on the strength of the contract for the sale of their premises in Grafton Street to hold such documents of title to the said premises as we may have in trust for the bank and to hand over sufficient monies out of the proceeds of sale to redeem this bridging finance as soon as the sale is closed. It is however to be strictly understood that this firm undertakes only to hand over out of the proceeds of sale and should there be any delay in closing the sale the firm cannot be held responsible for the money until the sale has been finalised."*

31. McWilliam J. concluded that this letter was sufficient to create an equitable mortgage in favour of the bank. However he stated that it still remained to be decided whether it was a charge on the property or only over the proceeds of sale. It is worth noting at this point that the undertaking involved not only the payment of the proceeds of sale to the bank after completion of the sale, but that the title deeds of the premises would be held in trust in the meantime. I mention that because the latter is absent in the undertaking to which the defendant in this case refers as requiring to be stamped. McWilliam J. concluded that on the facts of that case there was a charge only over the proceeds of sale. In so concluding he stated at p. 451:

> *"The [undertaking] dealt solely with the proceeds of sale; the title deeds were stated to be held solely to secure payment out of the proceeds of sale. Although not stated in so many words, the clear intention was to charge the proceeds of sale and no argument has been advanced to me to show that the proceeds of sale cannot be charged as such, and I can see no reason why they should not be so charged. Although the fact that the documents of title were to be held by the solicitors in trust which normally create a charge on the vendors's interest in the lands and, very possibly, would have done so in this case had it been registered, the purchase price would only be paid on handing over the deeds so that the holding of the deeds would be equally attributable to securing the proper application of the purchase price."*

32. A similar issue arose in different circumstances in *Murray v. Wilken*, unreported, High Court (Finlay Geoghegan J.) 31st July 2003. In those proceedings, the question was whether the solicitor's undertaking created an equitable charge over the property in question. The undertaking was given in the following terms:

> *"Dear Sirs,*
>
> *We refer to the above matter and we confirm that we act on behalf of Jurgen and Mary Wilken who are in the net any teat process selling 9 Rockfield, Ardee, County Louth.*
>
> *We understand that you act on behalf of Mr John Murray.*
>
> *We hereby undertake on our client's instructions to discharge the sum of £65,000 owing to your client out of the proceeds of sale of the above property when same depart to hand.*
>
> *Please note that this undertaking is being given strictly on the basis that there is absolutely no contact between your client and our client's pending the completion of the sale of our client's property and discharge of the sum owing to them.*
>
> *We look forward to hearing from you in relation to this matter.*
>
> *Yours faithfully."*

33. The learned judge had no difficulty accepting as a matter of law that a solicitor's undertaking to hold title deeds for the benefit of another person could create an equitable charge over the property. But she went on to state:

"Regretfully, I have concluded that the undertaking given in this case cannot be considered to come within the above definition in so far as it is alleged to have created an equitable charge over the property at Rockfield. It is not possible, in my view, to construe it as even implicitly appropriating the property of the defendants referred to or as an agreement to make it answerable for the payment of the debt of IR£65,000 then due. At best, in so far as the property at Rockfield is concerned, it contains a representation made by the solicitors that their clients are in the process of selling such property.

The undertaking to pay the sum of £65,000 is expressly an undertaking to make this payment out of the proceeds of sale of the property when 'same are to hand'. As such, it may have created an equitable charge over a future asset of the defendants, namely the fund comprising the proceeds of sale of the property when received by their solicitor.

The undertaking cannot be construed as containing any implied agreement that the property, as distinct from the proceeds of sale of a potential future sale of the property, be made answerable for the payment of the debt due."

34. Finlay Geogehgan J. went on to distinguish the undertaking given in *In Re Kum Tong Restaurant Limited* since in that case the undertaking was given in circumstances where a contract for sale of the premises was already in existence when the undertaking was given.

35. The undertaking in the present case, as that form of undertaking is to be properly construed, does not undertake to hold the title deeds in trust for the bank. It undertakes to pay to the bank so much of the proceeds of sale of the existing property at No. 66 as will discharge the amount due on foot of the bridging loan.

36. I am satisfied that the undertaking in the present case is not one which the defendant can reasonably argue created an equitable charge over the property at No. 66 Bushy Park Road as no undertaking was given to hold the deeds to that property in trust for the bank. I am satisfied, as already indicated, that the form of undertaking at Section 1 of the bank's standard form cannot be applicable to the circumstances of this loan, even if the facility letter dated 13th June 2006 intended that the undertaking would include an undertaking to hold those deeds pending that sale being concluded. It follows that on its face therefore that it is not arguable that the undertaking is one which required to be stamped as being an instrument creating an equitable mortgage, and was therefore admissible in court in so far as it was needed to be relied upon for the purposes of establishing that the loan of 7th September 2010 was a housing loan.

37. However, while I have dealt with the question of whether the undertaking in this case created an equitable mortgage as a matter of law because it was a submission made by the defendant, there is another reason why the submission made in relation to the facility agreement dated 13th June 2006 cannot avail the defendant. It is not the agreement sued upon. What is sued upon is the final facility dated 7th September 2010 which is expressed to be for the purpose of restructuring existing facilities. If one looks carefully at the statutory definition of a housing loan which I have set forth already in full, one can readily see a difference between (a) and (b) of the definition section which for convenience I will set forth again:

"(a) an agreement for the provision of credit to a person on the security of a mortgage of a freehold or leasehold estate or interest in land

(1) for the purpose of enabling the person to have a house constructed on the land as the principal residence of that person or that person's dependents, or

(2) for the purpose of enabling the person to improve the house that is already used as the principal residence of that person or that person's dependents, or

(3) for the purpose of enabling the person to buy a house that is already constructed on the land for use as the principal residence of that person or that person's dependents,

or

(b) an agreement for refinancing credit provided to a person for a purpose specified in paragraph (a) (i), (ii), or (iii)."

38. It will be seen that whereas in (a) the agreement to provide credit for any of the three purposes set out in (a) is on the security of a mortgage, there is no provision in (b) requiring that the refinancing agreement for any of the same three purposes be on the security of a mortgage. It cannot be presumed that the absence of that requirement is mere oversight on the part of the Oireachtas, since it comes back in at (c) and again at (d) of the definition. The facility sued upon in these proceedings comes within (b), and therefore, despite my conclusions as to the absence of a requirement that the undertaking referred to in the June 2006 facility be stamped before being relied upon in these proceedings, I am satisfied that the facility sued upon comes within the very clear words at (b) above and is itself a housing loan as defined, without any reliance being necessary upon the 2006 facility.

39. I am therefore satisfied for these reasons that the trial judge was correct to conclude that the provisions of the Act do not apply to the loan facility sued upon, and for that reason the defences sought to be put forward for the purposes of having the claim adjourned to a plenary hearing do not pass the Aer Rianta threshold. I can see no basis on which it could be thought that the defendant's arguments could be advanced further at a plenary hearing than they could be advanced on the motion for judgment. The facts are not in dispute. The issues raised are legal issues, and can be and were determined on the motion that came before Hedigan J. In my view he determined these issues correctly.

Undue Influence/Duress/Misrepresentation

40. Separate to the matters just referred to, it is submitted also that there was no consideration for the agreement sued upon, namely that dated 7th September 2010, and that in so far as the bank would say that the consideration is the forbearance to sue on its part in respect of the previous agreements, the defendant's contention is that in circumstances where the previous agreements were defective and unenforceable, that amounts to no consideration.

41. In addition to these matters which are put forward in an effort to show that there is a bona fide defence which justifies having the bank's claim adjourned to a plenary hearing, the defendant avers also that the loan agreement dated 7th September 2007 is void for misrepresentation, that misrepresentation being that the bank held out by its conduct that it was entitled to enforce the previous agreements, and was aware or ought to have been aware that she and her husband operated on that belief, and therefore to their detriment.

42. In addition, the defendant alleges that undue influence was exercised by the bank over herself and her husband in respect of all the loan agreements between 2007 and 2010, and that they should all be set aside as being improvident transactions. The defendant avers in that regard that she and her husband were pensioners, and placed all their trust and confidence in the bank and were influenced to sign successive restructuring agreements in the belief that they had no alternative but to do so, and have suffered prejudice as a result.

43. I consider that the arguments made on the basis of misrepresentation, undue influence or any form of duress on the part of the bank must fail. I am satisfied that the trial judge made no error in this regard. In order to merit any consideration as a possible defence to the claim, there must be something more than the mere assertions contained in the replying affidavits. In this case there are simply the bald assertions of misrepresentation and undue influence, and it is entirely insufficient to form a basis of a defence on these grounds, and the trial judge was in my view entirely correct to reject them as a potential bona fide defence to the proceedings.

Non-compliance with Consumer Protection Code, 2006
44. The defendant submits that the bank failed to comply with the Code by failing to carry out any product suitability assessment when deciding to offer extensions and renewals of the loan facility provided originally in June 2006. It is contended that as a result of that omission the bank is not entitled to recover the amount owing on foot of the loan. The particular provision in the Code that is implicated by this submission is that at which provides:

> *SUITABILITY:*
>
> *(30) A regulated entity must ensure that, having regard to the facts disclosed by the consumer and other relevant facts about that consumer of which the regulated entity is aware:*
>
> > *(a) any product or service offered to a consumer is suitable to that consumer;*
> >
> > *(b) where it offers a selection of product options to the consumer, the product options contained in the selection represent the most suitable from the range available to the regulated entity; or*
> >
> > *(c) where it recommends a product to a consumer, the recommended product is the most suitable product for that consumer.*
> >
> > *This requirement does not apply where:*
> >
> > > *(i) the consumer has specified both the product and the provider and has not received any advice;*
> > >
> > > *(ii) the consumer is purchasing or selling foreign currency; or*
> > >
> > > *(iii) where, in the context of the provision of a basic banking product or service, the regulated entity has alerted the consumer to any restrictions on the account and/or the availability of a lower cost alternative.*
>
> *(31) Before providing a product or service to a consumer, a regulated entity must prepare a written statement setting out:*
>
> > *(a) the reasons why a product or service offered to a consumer is considered to be suitable to that consumer;*
> >
> > *(b) the reasons why each of a selection of product options offered to a consumer are considered to be suitable to that consumer; or*
> >
> > *(c) the reasons why a recommended product is considered to be the most suitable product for that consumer.*
>
> *The regulated entity must give a copy of this written statement to the consumer and retain a copy.*
>
> > *This requirement does not apply where:*
> >
> > *(i) the consumer has specified both the product and the provider and has not received any advice;*
> >
> > *(ii) the consumer is purchasing or selling foreign currency, or*
> >
> > *(iii) the consumer is seeking a basic banking product or service." [emphasis added]*

45. The defendant's complaint is that the bank failed to observe the requirement underlined above, namely to ensure that the loan facility sued upon and its predecessors presumably, or at least those which post-date 1st July 2007 being the date after which compliance with the Code was required. Counsel has submitted that given the clear inability of the borrowers to service the loan facility by the time the loan was restructured by means of the final facility now sued upon dated 7th September 2010, it is manifest that it was not suitable for the borrowers, and that the failure to carry out the required suitability test in that regard is a breach of the Code and that therefore the loan is unenforceable.

46. The trial judge considered the arguments put forward in this regard and, according to the note of his judgment, he concluded (a) that the Code was not in force on the date on which the bank first agreed to advance monies to the defendant in June 2006, and (b) that the absence of a product suitability assessment was not fatal to the bank's claim in any event because the product was clearly suitable since the bank was providing finance to enable the defendant and her husband to move from a larger house to a smaller one. The defendant submits to this Court that the trial judge erred in reaching these conclusions.

47. This Code came into force on the 1st August 2006, a couple of months after the original loan agreement in June 2006 when the defendant and her husband were planning on downsizing from their then principal residence. However, as I have said already, compliance with the Code was not required until after 1st July 2007 which postdates that first facility.

48. While compliance with the Code was therefore required by the date of the facility granted on the 7th September 2010, the bank submits that the relevant product for the purpose of considering the applicability of the Code is that made in June 2006. In other words, by the date on which this Code became operative, the product had already been provided, namely the original loan in 2006 to enable the borrowers to downsize in the manner described – that loan being simply renewed or restructured by later loan facilities in ease of the borrowers given that they had been unable within the 6 months provided for, to sell No.66 Bushy Park Road as had been their intention, and the last being that the subject of these proceedings dated 7th September 2010. In these circumstances there was not, in the bank's submission, any new product made available to the defendant which required any assessment as to its suitability under the Consumer Protection Code, but in so far as that is found to be incorrect, the loan sued upon was clearly in ease of the borrowers in all the circumstances as it replaced other less palatable action which the bank would have been entitled to take to recover the amount then due.

49. The bank also submits that in any event, even if the 2010 facility was found to be covered by the Code, any breach of the Code could not render the loan unenforceable. The bank submits that the defendant has not produced any authority to the effect that the failure to carry out such a suitability assessment renders the loan unenforceable, and in turn refers to a number of authorities that go the other way. These include the judgment of Birmingham J. in *Zurich Bank v. McConnon* [2011] IEHC 75, which was followed by Ryan J. (as he then was) in *AIB Bank v. Smith* [2012] IEHC 381, the judgment of Herbert J. in *Friends First v. Cronin* [2013] IEHC 59, and that of Clarke J. in *Irish Life & Permanent v. Dunne* [2015] IESC 46. It is the latter to which I wish to refer in particular, albeit it is a case involving a consideration of a different Code, namely the Code of Conduct on Mortgage Arrears. However, I consider that the principles enunciated by Clarke J. in relation to that particular Code are equally applicable to the Consumer Protection Code and should be applied mutatis mutandis.

50. *Irish Life & Permanent v. Dunne* was an unusual case in one sense in that the judgment emanated from a Case Stated from the High Court (Hogan J.) to the Supreme Court. A question arise initially as to whether there was a jurisdiction for the High Court to state a case at all for the opinion of the Supreme Court. I need not dwell on that issue save to note that the Supreme Court considered such a jurisdiction to exist, and then went on to address the other issues arising on the Case Stated, one of which was whether in the absence of any statutory indication the Code of Conduct on Mortgage Arrears can, either generally or in certain specified circumstances, affect the legal entitlement of a lender to secure possession of mortgaged property in the event of default of payment. A further question was whether, in the event that the Code does so affect the mortgagees right to obtain possession, the Court must refuse an order for possession in the event of any breach of the Code or whether instead that entitlement depend on the nature and the circumstances of the breach. Setting the scene for the conclusion of relevance to the present case, Clarke J. at para. 5.1 of his judgment referred to the Code's provisions thus:

> *"5.1 The issue raised by the trial judge is one of very considerable importance. There is no doubt but that the Code forms part of the law. Under section 117 (1) of the 1989 Act, a regulated financial institution is obliged, as a matter of law, to obey the Code. The Code involves, however, a whole range of measures of greater and lesser importance which are expressed in more or less concrete terms. At one extreme lies the moratorium period under which a financial institution is precluded from commencing repossession proceedings until that period has elapsed. That provision is both clear and of very considerable importance. Also important, but much less precise, the obligations which are placed on financial institutions to engage with borrowers in difficulty. Just how, and to what extent and in what manner, such engagement is to take place is specified to some extent, but inevitably each case is likely to throw up its own individual circumstances. At the other end of the scale, the current version of the code, for example, contains detailed measures on matters such as the obligation to keep a record of all contact with a borrower."*

51. He went on to state that the question a Court must ask itself in cases of an alleged breach of a Code such as that under consideration was *"whether, applying the principles identified in [Quinn & ors v. IBRC (in Special Liquidation) I.E.S.C. 29] a financial institution must be regarded as being legally debarred from seeking to exercise a right to possession, which it would otherwise enjoy, by reason of a breach of the Code".* In *Quinn,* the Supreme Court has set forth a detailed but inexhaustive list of criteria by which a Court should be guided in its assessment of whether the nature of a particular breach was sufficiently serious to affect rights adversely: That list is quoted in full in *ILP v. Dunne* [supra] and there is no need to do so again here. In the Mortgage Arrears Code an important provision was what has been referred to as the "moratorium" on seeking possession so as to provide an opportunity for the borrower to explore whether there are other possible solutions to the arrears problem being addressed. A clear breach by an institution of that moratorium provision was considered to be of such importance as to constitute "the carrying out of the very act which the Code is designed to prevent", and in such a case Clarke J. considered that *"for a court to entertain an application for possession which was brought in circumstances of clear breach of the moratorium would be for a court to act in aid of the actions of a financial institution which were clearly unlawful (by being in breach of the Code) and in circumstances where the very act of the financial institution concerned and seeking possession was contrary to the intention or purpose behind the Code itself".* Aside from the fundamental provision relating to the moratorium, Clarke J. considered that different considerations applied in relation to the other provisions of the Code, and in conclusion he stated the following:

> *"5.27 In conclusion on this issue I should say that in those circumstances I am satisfied that, in the limited cases of a breach of the moratorium, but in no other cases unless and until appropriate legislation is passed, the court should decline to make an order for possession.*
>
> *5.28 I would, therefore, answer questions (ii) and (iii) in the case stated in this case by indicating that, where the breach of the Code involves a failure by a lender to abide by the moratorium referred to in the Code, but in no other case, non-compliance with the Code affects, as a matter of law, a relevant lender's entitlement to obtain an order for possession. I would further clarify that it is a matter for the relevant lender to establish by appropriate evidence in any application before the Court that compliance with that aspect of the Code has occurred."*

52. It is important to bear in mind that there is no evidence whatsoever put forward in this case as to the unsuitability of either the loan actually sued upon, or indeed the first loan in June 2006. In applying the principles in the Dunne case referred to, I would accept that there may be some provisions in the Consumer Protection Code that are of more fundamental importance than some others. Even if I was to accept (and I am not to be taken as doing so in this case) that the provision requiring a bank offering a loan or a range of options regarding different types of loan, to engage in its assessment of which loan best suits the needs of the borrower, is of central importance in the way in which the moratorium in Dunne was so found to be, any claim that the bank are not entitled to recover the amount lent would have to be soundly based on clear evidence for such a draconian result to ensue upon such breach. In the present case we know that in 2006 the borrowers wanted to downsize by purchasing a smaller house on adjacent land, and selling their larger house at No. 66 within 6 months, and repaying what was a bridging loan being advanced for the purchase of 66A. We also know that at that stage the Code was not in existence. The subsequent loans, including that now sued upon, were simply by way of restructuring. No additional money was lent other than by way of rolled-up interest. Without any evidence, and in the face merely of counsel's submission that because the borrowers were unable to repay the loan sued upon, the restructuring loan was clearly

unsuitable, I cannot accept that by a continued forbearance on the bank's part by offering a further restructuring of the loan it is arguable that this loan was not suitable. It was clearly in ease of the borrowers in the light of the unfortunate position in which they found themselves by 2010. In order to invoke the alleged breach of the Code (even if I was to accept that the particular provision relied upon was fundamental in the sense described) there would have to be at least some prima facie evidence put forward by the defendant that the loan was not suitable. In so far as the defendant submits that she has done so by any evidence contained in her affidavits in this case, I reject that.

53. I consider that the trial judge did not err in his conclusion on this point. I do not consider it necessary to reach a definitive conclusion on the issue as to whether the Code was applicable to the facility upon which the bank now sues, given that the original loan made pre-dated the coming into force of the Code because I am satisfied in any event that even if it was applicable, there is no evidence that the loan was in any whatsoever unsuitable to the borrowers' needs at the time. Some evidence to the contrary would be needed, and there is none. So causation is not made out. This is not a clear case such as would be the case under the Mortgage Arrears Code under consideration in Dunne, where potentially a bank seeks to recover possession of premises in clear breach of the required moratorium period provided for. That is not a case where the sort of evidence to which I am referring would need to be given, bar of the fact that the borrowers have not been given the benefit of the moratorium required to be give.

No consideration
54. Given my conclusion that the Consumer Act 1995 does not apply to the loan under consideration or its predecessors, it is clear that the argument that there was no consideration by way of forbearance to sue on the part of the bank must also fail. That argument was dependent on the prior loans being unenforceable. Given my conclusions in that regard, I am satisfied that the trial judge was correct, and therefore this ground of appeal must also fail.

55. For all these reasons I would dismiss this appeal.