THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 166

RECORD NO. 2016/109

FINLAY GEOGHEGAN J.
PEART J.
STEWART J.

BETWEEN/

ACC BANK PLC.

PLAINTIFF / RESPONDENT

- AND–

MICHAEL WALSH AND MARY WALSH

DEFENDANTS / APPELLANTS

JUDGMENT OF MR. JUSTICE MICHAEL PEART DELIVERED ON THE 23RD DAY OF MAY 2017

Introduction

1. While the notice of appeal filed in this case names both defendants as the appellants, only Mary Walsh appeared at the hearing of the appeal. In truth she is the only appellant. I will therefore refer to her as "the appellant".

2. By order made on the 12th February 2016 on foot of the respondent bank's motion for summary judgment the High Court (McDermott J.) granted judgment against Michael Walsh and the appellant jointly and severally in the sum of €938,957.37, and gave the bank liberty to re-enter the matter in respect of the balance of the claim for interest.

3. In the High Court, both defendants appeared in person, but for the most part it was Michael Walsh who spoke for himself and the appellant. She had wished to resist the motion for summary judgment and to have the matter adjourned to a plenary hearing, as she considers that she has a *bona fide* defence to the bank's claim for judgment against her. In pursuit of that aim she had filed a number of affidavits which were sworn jointly with Michael Walsh.

4. Michael Walsh and Mary Walsh are married but the Court has been informed by the appellant that they are no longer living together as husband and wife, and in her submissions he is referred to by her as her estranged husband. According to a note on one of the emails before the Court they separated in November 2006.

5. She had sought to defend the claim against her for summary judgment essentially on the basis that she never made any application to the bank for the loan on foot of which the bank seek to recover judgment, that her signature to some of the bank documents is not her signature, that she did not benefit in any way from the proceeds of the loan which were used solely in connection with her estranged husband's business in which she had no interest, beneficial or otherwise, and that in so far as she did actually sign any loan documentation such as an acceptance of the loan facility offered in 2004 or any documents in relation to it, she did so under the undue influence or duress of her husband. She maintains that the bank failed to advise her to seek, or otherwise ensure that she received independent legal advice. Her evidence is that at no stage did she ever visit the bank and that no member of the bank's staff ever even spoke to her. It appears to be the case also that the loan in question was used at least in part to pay off a previous loan made to her husband alone for the purchase of a property in his sole name. That is the essence of what she sought to put forward by way of a *bona fide* defence to the bank's claim against her. It is worth noting at least that none of the deponents of affidavits filed on behalf of the bank were the bank staff who dealt with Mr Walsh at the relevant times.

6. As I have mentioned already, it was Michael Walsh who made submissions on their joint behalf in the High Court, and the appellant considers that she was prevented therefore from making her case properly and fully to Mr Justice McDermott.

7. The motion was heard in the High Court on Monday 8th February 2016. An ex tempore judgment was given by McDermott J. on Friday 12th February 2016, and this Court has been provided with a transcript of both days.

Some factual background

8. Before summarising the reasons given by McDermott J. for refusing to adjourn the proceedings to a plenary hearing I will give a brief factual summary of relevant facts and events. I do so from the affidavits filed by the bank and by Mr and Mrs Walsh.

9. Mr Walsh owned a business engaged in the manufacture and supply of fitted windows. In 2003 he on his own (not jointly with Mrs Walsh) had applied for and was granted a loan from ACC Bank in the sum of €676,000 for the purpose of refinancing an existing IPBS loan with which he had purchased some property in his sole name, and in order to provide funding for the purchase a factory premises at Kerlogue Industrial Estate, Wexford. The security for that loan was stated to be a first charge over 2 factory units at that location. It appears that additional security was provided in the form of an undertaking given by Michael Walsh to assign the benefit of a pension policy to the bank. The loan was an interest only loan, and the expectation was that upon the expiry of the loan the proceeds of the policy would be sufficient to discharge the principal owing at that time. This however is not the loan facility on foot of which the present proceedings have been brought.

10. The appellant has sworn that she had no knowledge that her husband at the time had sought this loan with a view to buying the factory premises. She says that she was not consulted by him nor by the financial consultant, Mr Barden, whom her husband had approached in connection with the loan. She says that she never visited the offices of ACC Bank, nor spoke to anybody from the bank.

11. By letter of loan sanction dated 5th July 2004, this time issued to both Michael Walsh and Mary Walsh, a term loan in the sum of

€926,000 was offered. The term of the loan was 15 years from drawdown. It was an interest only loan like the previous loan, and was backed by the assignment of the same pension policy. Its stated purpose was to refinance the 2003 borrowings and to provide finance in order to renovate the factory unit at Kerlogue Industrial Estate.

12. Again, the appellant has sworn on affidavit that she was not aware that her husband was seeking to top-up the 2003 loan. She says that she never made any application for a top-up loan, never spoke to her husband's accountant about the loan, and neither did she ever visit the bank, or speak to anybody from the bank.

13. The 2004 loan was accepted. On the acceptance page there is a signature by Michael Walsh, and what at least purports to be the signature of Mary Walsh. But she says that she did not sign the document. She has remained adamant that she did not sign an acceptance of this loan, and has sworn to this effect, e.g. at para. 2 of her joint affidavit sworn on the 19th March 2015.

14. The appellant stated on affidavit also that she did not get an opportunity to put forward her case to the High Court. Her husband did the talking. She says that it was her husband who exclusively dealt with ACC Bank. She was not consulted at all either by him or the bank, and she herself had no capacity to discharge the interest on the loan or make repayments on the pension policy referred to.

15. She sought a plenary hearing so that she could make the case that she should not be held liable to the bank for these borrowings and that she was manipulated and coerced by her husband so that he could obtain the finance that he sought.

16. Mr Colm Ryan of ACC Bank swore the affidavit which grounded the bank's motion for judgment. He referred to the 2004 facility letter on which the bank was relying. He described its purpose, and the security to be provided. He referred also to the mortgage which was signed as part of the bank's security, as well as to the pension policy being provided as additional security, and to the fact that there was default in the payment of the premiums required under that policy. It was in such circumstances that the bank was entitled to demand repayment of the loan, which it did by letters of demand to both borrowers dated 23rd January 2014.

17. In a further affidavit by the bank in reply to the defendants' first joint affidavit, Michael Kiernan of the bank, apart from dealing with some matters not relevant to the main issue in this appeal, went on to refer to the appellant's statements that she had no knowledge of the 2004 loan. He referred to the fact that she signed the loan agreement thereby indicating her acceptance of it. He referred also to the fact that the proceeds of the 2004 loan were drawn down into an account in their joint names. He states also that both loans (presumably the 2003 loan and the 2004 loans) were applied for by both defendants, though I note that the loan application forms themselves have not been exhibited. He states that throughout the currency of the loan both defendants were sent bank statements, and states that *"any suggestion to the effect that the second named defendant was somehow unaware of the fact or substance of her dealings with the plaintiff is simply not credible"*.

18. Generally speaking the bank's view as expressed in its affidavits is that the averments by the appellant as to her lack of knowledge about and awareness of the 2004 loan are unsubstantiated, lack credibility and are so vague and nebulous as to be meaningless.

The judgment appealed against

19. There is no doubt that on a motion for judgment where a defendant seeks a plenary hearing on the basis of a bona fide defence which is put forward on affidavit, the court does not have to be satisfied that the defence offered is a good defence in the sense of being a defence that will as a matter of probability succeed. The case law in this regard is so well-known that it hardly needs to be repeated once more. I will simply refer to the well known judgments in *Harrisrange Limited v. Duncan* [2003] 4 IR.1, and in *Aer Rianta cpt v. Ryanair Ltd* [2001] 4 IR. 607. Put very simply, the court must be satisfied that the defence is arguable. There must be some evidence adduced on affidavit by the defendant that provides some factual basis for the defence, and that goes beyond mere assertion. To grant summary judgment it must be "very clear" that the defendant has no defence.

20. In his ex tempore judgment McDermott J. explained the principles which guided him on the motion for judgment in the following way:

> *"Essentially, the test to be applied is whether the defendants have satisfied the Court that they have a reasonable probability of having a real or bona fide defence. It's sometimes put in this way: is what the defendant says credible? Which is not meant simply in terms of believable, but is it an arguable defence? The defendants do not have to prove that the defence will probably succeed or that success is not improbable. It is sufficient that there is an arguable defence. Leave to defend should be granted unless it is very clear there is no defence. Leave to defend should not be refused only because the Court has reason to doubt the bona fides of the defendant, or has reason to doubt whether he has a genuine cause of action. I have no difficulty in accepting the bona fides of the defendants in this case, so that is not an issue. Leave should not be granted where the only relevant averment in the totality of the evidence is a mere assertion. That is to say, there must be … some sort of cogent basis upon which the defence is advanced. Then the overriding determination that the Court has to consider, is whether there is an infringement, essentially, of the constitutional right of access to the Courts and an infringement of the fair hearing of the matter if summary judgement were to be granted in the circumstances. It is those principles that are the basis upon which the Court must determine the case."*

21. This passage reflects sufficiently, in the context of an ex tempore judgment, the principles stated in *Harrisrange Limited v. Duncan*, and in *Aer Rianta cpt v. Ryanair Ltd*. I am satisfied that the trial judge identified the appropriate test for his consideration of the defences put forward by the defendants in order to seek to have the proceedings adjourned to a plenary hearing. It is the application of that test to just one of the defences put forward by the appellant that requires assessment on this appeal, and that is her contention that she acted under the undue influence of her husband, that she neither received independent advice nor was advised by the bank that she ought to seek such advice before entering into the loan, that she derived no benefit from the 2004 loan, had no real involvement in relation to the application for it, and that in respect of at least one or more documents purporting to have been signed by her, the signature is not hers. She contends that in all the circumstances it is arguable that given what it knew of her lack of real involvement in the loan and the absence of any real benefit from the loan accruing to her, the bank was on inquiry such that it was obliged to ensure that she received independent legal advice before entering into the loan with the bank. The other matters raised by the defendants in their joint affidavits were in my view correctly rejected by the trial judge as failing to satisfy the test for a plenary hearing.

22. The trial judge referred to undue influence as one of the issues raised by the defendants. In that regard, when listing the issues that had been raised by way of possible defence, he stated:-

"Five, a claim that they were misled into signing any documents. This seems to relate more particularly to Mrs Walsh. There is a suggestion in one of the affidavits that an "x" beside her signature on the deed of mortgage or charge indicates a degree of duress in the signing -- not duress, undue influence. I'm not satisfied that the elements set out in the affidavit justify a determination that that assertion provides cogent enough evidence to form the basis of a defence". [emphasis added]

Discussion and Conclusion

23. There is no doubt that in the affidavits that were filed by the defendants a claim of undue influence by Mrs Walsh is not very clearly stated. These were joint affidavits by her husband and herself. They were not prepared by a lawyer. She was given liberty to file a further affidavit in this Court. She did so on 7th July 2016 in which, inter alia, she stated that she *"was forced under duress to sign these affidavits"*, referring to those which were filed in the High Court. She again makes the point that she made no application to the bank for the loans, and never met anybody from the bank. She says that it was her husband who entered the appearance to the summary summons on her behalf, and that he almost alone addressed the High Court. That is clearly apparent from the transcript. She states that she did not get a chance to make her arguments.

24. It must be borne in mind that the defendants were representing themselves in the High Court, and therefore will not have been in a position to articulate their arguments as cogently and as fully as would be the case if they had legal representation. In particular, I bear in mind that not only was Mrs Walsh not legally represented, but it was her husband who made virtually all the submissions to the High Court, and indeed, as the transcript shows, spent little time doing so. It is worth quoting from the transcript the only two paragraphs which record what Mrs Walsh herself said to the trial judge. The following passage appears immediately following a statement by Mr Walsh that it was he who applied for the loan, and that Mrs Walsh never applied for the loan:

"Mrs Walsh: Sorry, if I had been in the dealings in the beginning of the whole – – I would have had an opportunity of ensuring that we had an ability to pay it, right. There was never, ever accounts sent until 2009 when the loan went bad and that's when I took responsibility at that stage because I saw my name was on it. But it was actually – – I had no control over checking and ability to repay the loan. It was out of my hands. I was put under undue pressure at the time to sign the last loan because we were employing 50 Wexford people – – Michael was. They were working from the property and I wouldn't have been able to stay in Wexford if they didn't have a premises to work from. I would have had to leave because I would have put fifty something people and 50 families out of work, and I had no control whatsoever. I had small children. I was trying to rear them and look after them and trying to work myself in a different capacity, and I had no ability.

Judge: so, there is some suggestion you were funding the repayments then from your own resources, was it?

Mrs Walsh: from 2009 I ended up spending my savings. My children's education money to put them through college. I ended up having to use it because I took responsibility at that stage, because I could see no way out of it and then when I sat down and spoke to somebody, a financial adviser, it dawned on me that I have never, ever, spoken – – been in an office of ACC, spoken to anybody from ACC, and it seems to me that because they saw I had put some investments together and that I had savings they were trying to encompass, by putting my name on it, encompass my investments which are pretty much gone now anyway." [emphasis added]

25. That is the sum total of Mrs Walsh's contribution to the hearing that took place before that the trial judge, apart from one or two comments thereafter but nothing a relevance.

26. The trial judge did not have the benefit of legal submissions by reference to cases such as *Royal Bank of* Scotland plc v. Etridge (No.2) [2001] 2 AC 773, and Ulster Bank Limited v. Roche and Buttimer [2012] IEHC 166. There cases are relevant to a situation where a spouse/partner can establish that they gave a guarantee in respect of a loan from which they stood to gain no benefit because of exertion of the undue influence of the other spouse/partner – in other words where there was some non-commercial element to the guarantee. In such a case an issue then arises as to whether such a guarantor may also rely on that undue influence defence against the bank on the basis that it, being aware of the personal circumstances of the borrower and guarantor, is deemed to have constructive notice of the facts giving rise to the claim of undue influence; or, as it is sometimes put, is on inquiry such that if it has not taken steps to ensure that the guarantor understands fully the proposed guarantee, and that he/she is freely entering into same, such as by ensuring that the guarantor receives independent legal advice before executing the guarantee, he/she will be permitted to rely upon the undue influence of the principal borrower as a defence to a claim on the guarantor by the bank.

27. In *Etridge*, and in *Ulster Bank Limited v. Roche and Buttimer* what was at issue was the enforceability by the bank of a guarantee said to have been given under the undue influence of the primary borrower, and not a bank's claim against a joint primary borrower who claims to have entered into the joint loan under the undue influence of the other borrower spouse/partner. That important distinction must be acknowledged. I will return to that distinction in due course.

28. An important consideration in the present case is whether the appellant has established a sufficient factual basis for her assertion that she acted under the undue influence of her husband, Michael Walsh, so that the bank can arguably be said to have had constructive notice of that situation of undue influence such that it was on inquiry, and required to take reasonable steps to ensure that she fully understood what she was doing, and entered into the joint loan freely such as by ensuring that she received independent legal advice.

29. A mere assertion by the appellant of undue influence will not suffice for this purpose. There must be other facts to which she can point which, if proved at trial, would likely support her assertion of undue influence. In considering the facts relied upon the court may consider all the surrounding circumstances. In the present case, on the motion for judgment, one of the questions for the trial judge was whether the appellant has gone beyond mere assertion, and raised this potential defence to a sufficient level, having regard to all the surrounding circumstances so as to be allowed a full plenary hearing. The words "undue influence" themselves do not appear more than two or three times in the transcript. But all the circumstances surrounding the loan in question must be considered.

30. The appellant denied on affidavit that she made any application to the bank for the loan on foot of which the bank now seeks judgment. She has denied that the signature on the acceptance of the loan which purports to be hers is in fact her signature, though that is a bare denial. However, there does not appear to be a denial by the bank in their affidavits of her contention that she did not make an application for a loan jointly with her husband. Nether is it contradicted that the earlier loan of €676,000 was a loan to her husband alone. In this regard it can be noted that among the exhibits in this case is a copy letter dated 9th May 2003 from the bank to a solicitor which refers to Mr Walsh as the borrower, and to a letter of loan sanction of that date to the borrower(s). In addition there is exhibited an internal bank memo which refers to "a letter of loan sanction to Mr Michael Walsh". Furthermore, the 2004 loan

sanction refers to the fact that its purpose is to refinance the earlier loan to Mr Walsh alone and to provide finance to renovate the factory premises. In fact the greater part of the 2004 loan was used to pay off the 2003 loan. The appellant has also averred that at no stage did she ever meet anybody from the bank in connection with the 2004 loan, and that has not been disputed by the bank. She has stated also that she derived no benefit whatsoever from the loan. It is worth noting also that the affidavits sworn by the bank to ground the motion for judgment are sworn by bank personnel who were not involved with this loan application to Mr and Mrs Walsh in 2004.

31. I am satisfied that the appellant established on affidavit by her own assertions and by reference to the surrounding facts to which I have referred, at least an arguable case that she acted in relation to this joint loan under the undue influence of her husband. I emphasise the words "at least an arguable case". I refrain from expressing any concluded view which will be a matter for the trial judge at any plenary hearing that will take place. That is an issue which ultimately must be decided on the oral evidence adduced at hearing which will be subjected to cross-examination in the normal way.

32. The second issue that arises is whether the appellant can rely upon the arguability of that assertion of undue influence by her husband for the arguability of her defence to the bank's claim for judgment against her, on the basis that given its knowledge of relevant facts it is fixed with knowledge of that undue influence, and was therefore on inquiry in relation to the matter such that it was obliged to take steps to ensure that the appellant fully understood the implications for her of the joint loan, and was entering into it freely. If she can so rely, then she was entitled to have the proceedings determined at a plenary hearing, and the trail judge fell into error in granting summary judgment against her.

33. In view of my conclusion that the appellant sufficiently established an arguable case of undue influence by her husband, the second issue involves a consideration of, *inter alia*, whether what I will refer to as *the Etridge* principles, and the consideration of them by Clarke J. in *Ulster Bank Limited v. Roche and Buttimer*, can be extended in their application beyond a guarantee of a primary loan, and to a case where one joint borrower has acted under the undue influence of the other. As I have already mentioned, these cases were not opened to and therefore not considered by McDermott J. in the High Court, as they undoubtedly would have been if the appellant and her husband had been legally represented before him.

34. A brief summary of the facts in *Ulster Bank Limited v. Roche and Buttimer* include the following. Mr Roche ran a motor business. Ms. Buttimer was his partner (in the personal sense, not the business sense). She had no role whatever in his business apart from being a nominal director. She was a hairdresser on a modest salary. At some point Mr Roche decided to move his banking business to Ulster Bank and had discussions with them, which resulted in the business moving to Ulster Bank, but it was a condition of so doing that a personal guarantee would be signed by both directors of the motor company. Ms. Buttimer signed such a guarantee. In due course the company defaulted and the guarantees were called in by the bank. Summary judgment was obtained against Mr Roche, but the claim against Ms. Buttimer on foot of her guarantee was adjourned to a plenary hearing.

35. While Ms. Buttimer acknowledged that she had signed the guarantee, she denied that she had done so in the presence of the bank official whose signature appeared as a witness to her signature. In fact she stated that she had never attended at the bank branch in question and had never met the person who signed as a witness. The witness when called to give evidence stated that she did not recall meeting Ms. Buttimer but that it was her universal practice not to sign such documents as a witness unless she was present when it was being signed.

36. Ms. Buttimer also stated in evidence that on a number of occasions she had signed documents that Mr Roche asked her to sign, and without reading or considering them. She claimed that she was under the undue influence of Mr Roche. The question then arose as to whether, if that be so, it provided a defence to the bank's claim. Clarke J. stated in this regard:

> *"However, even if that evidence is accepted, there is a difficult legal issue as to the circumstances in which a finding of undue influence by Mr Roche gives Ms. Buttimer a defence to these proceedings. It is, of course, clearly the case that, where one contracting party induces the other to enter into the relevant contract by the exercise of undue influence, then the contract concerned can be set aside inter partes. However, the problem here is that the assertion of undue influence is not made against a contracting party, but rather against a person who, in the context of the guarantee, is a third party, albeit one who had an interest in the execution of the guarantee in question by Ms. Buttimer, as the guarantee was a necessary part of the banking arrangements which were put in place which favoured Roche Motors and through that company, Mr Roche himself. In that context, it does need to be noted that Ms. Buttimer was not a shareholder in Roche Motors even though she was a director."*

37. Clarke J. found on the facts that Ms. Buttimer was under the undue influence of Mr Roche. There was evidence provided that she was in an abusive relationship with him, and that contemporaneous with the guarantee she had attended a clinical psychologist for counselling, who was able to give evidence as to her mental state at the time. Clarke J. found as a fact that she had signed the guarantee while under the undue influence of Mr Roche. He was satisfied also that there was no evidence that the bank was in any way aware of the existence of that undue influence. He then went on to consider whether that fact provided her with a defence to the bank's claim on the guarantee.

38. Having referred to a decision of the late O'Donovan J. in *Ulster Bank Limited v. Fitzgerald*, unreported, High Court, 9th November 2001, and having stated that if he was required to follow same, Ms. Buttimer's case would have to fail since it is clear that the bank was unaware of the undue influence of Mr Roche, he considered in some detail the decision of the House of Lords in *Etridge* [supra]. Having considered that decision in some detail, Clarke J. stated that nothing he said should be taken as implying that the law in Ireland goes as far as the position taken in the United Kingdom in *Etridge* which in effect, per Lord Nicholls' speech, suggested that a bank was on inquiry in every case *"where the relationship between the surety and the debtor is non-commercial"*.

39. I repeat that both *Ulster Bank v. Roche and Buttimer*, and *Etridge* were cases involving a guarantee of a debt, and not of joint primary borrowings. Nevertheless, in my view there is arguably some equivalence between a spouse who is unduly influenced to join in a loan application being made by her husband and from which she is to derive no benefit, and one who is unduly influenced to provide a guarantee for her husband's primary loan and from which she is to derive no benefit. In each instance, the spouse is exposing herself to liability for the amount owing to the bank in the event of default. For that reason it is worth considering the conclusion reached by Clarke J. in *Ulster Bank Limited v. Roche and Buttimer* when considering whether in the present case it is clear that the appellant has no arguable defence to the bank's claim against her. He stated at paras. 5.13 and 5.14 of his judgment:

> *"5.13 However, and in any event, on the facts of this case it is not necessary to go that far. First, it is clear that Ms. Buttimer was not a shareholder in Roche Motors even though she was a director. That is a factor which suggests at least a significant possibility of a non-commercial aspect to the case. Second, the bank had some knowledge of the fact that Mr Roche and Ms. Buttimer were engaged in a personal relationship. Admittedly that knowledge was somewhat*

limited and indirect in that it seems that another official in the same bank who had a tangential involvement in the transaction (being the official who was required to verify compliance with the various formal requirements, as a second set of eyes, after they had initially been confirmed as being in order by Ms. O'Connell) also happened to know of the relationship between Mr Roche and Ms. Buttimer. Third, there is some evidence which suggests that Ulster Bank may have been aware that both Mr Roche and Ms. Buttimer operated from the same address. The address ultimately placed on the relevant banking documents for Ms. Buttimer was a different address to that of Mr Roche. However, the address initially placed on the document seems to have been tippexed and printed over in circumstances where the verifying documentation, for the purposes of the money-laundering legislation, seems to have given a different address to that initially tendered by Ms. Buttimer. In the circumstances I am satisfied that Ulster bank was, in fact, aware that Mr Roche and Ms. Buttimer were in a relationship. Furthermore it is clear that all of the discussions between Roche Motors and the bank were conducted by Mr Roche. That fact, of itself, would not, in my view, be sufficient. It is, as Mr Healy pointed out, frequently the case that one of a number of partners in business ventures (whether carried out as a partnership or through a corporate vehicle) will have primary responsibility for dealing with and Angela matters including relations with the venture's banks. That fact of itself should not necessarily place a bank on inquiry as to whether others involved in the venture, who are asked to put up security by way of guarantee, might not be subject to undue influence. However, in circumstances where a person who is required to offer security is not a shareholder and where there is no evidence to suggest that the bank was aware of any active involvement of that party in the business, then it seems to me that the personal relationship between the parties emerges as a much more significant factor. [emphasis added]

5.14. It seems to me that the academic criticism of Fitzgerald is well founded. A regime which places no obligation on a bank to take any steps to ascertain whether, in the presence of circumstances suggesting a non-commercial aspect to a guarantee, the party offering the guarantee may not be fully and freely entering into same, gives insufficient protection to potentially vulnerable sureties. While not necessarily accepting that the precise parameters, identified in Etridge, all those which give rise to an obligation on the bank to enquire, and thus represent the law in this jurisdiction, I am satisfied that the general principle, which underlies Etridge, is to the effect that a bank is placed on inquiry where it is aware of facts which suggest, or ought to suggest, that there may be a non-commercial element to a guarantee. That's general principle, at a minimum, goes far enough to cover the facts of this case where the bank was, for reasons set out, aware of the personal relationship between Ms. Buttimer and Mr Roche and was also aware that Ms. Buttimer had no direct interest in the company (other than being a director) and was, indeed, in those circumstances, in a less secure position than spouses or, in the modern context, a civil partner who has at least certain potential legal rights in the assets or income of the other spouses or partner. The potential for undue influence against a partner, such as Ms. Buttimer, who has very limited legal rights indeed and who has no interest in the company whose debts it is sought that she should guarantee, seems to me to be well on the side of whatever threshold might ultimately be fixed for determining the point at which a bank is placed on inquiry."

40. Having concluded that in the circumstances of that case the bank was on inquiry, Clarke J. went on to consider what a bank must do in those circumstances. In that regard he stated at para. 5.16:

"5.16 That leads to the second question which is as to what a bank must do when placed on inquiry. I have already cited the position in the United Kingdom as per Etridge. Again, under this heading, nothing which I say should be taken as necessarily implying that the full rigours of the regime which applies in the United Kingdom represents the law in Ireland. However, I am satisfied that a bank which is placed on inquiry is obliged to take at least some measures to seek to ensure that the proposed surety is openly and freely agreeing to provide the requested security. As Ulster bank, in this case, took no such steps it is, in my view, unnecessary to consider the precise level of steps which a bank must take."

41. Clearly there are factual differences in the present case to those pertaining in *Ulster Bank v. Roche and Buttimer*, as I have stated on few occasions already, not least that in the present case the appellant is a joint borrower and not a guarantor of another primary borrower. While the bank was aware that the appellant and Mr Walsh were husband and wife there is no evidence that it was aware that there were any difficulties in that relationship which led ultimately to their estrangement. On the other hand the bank can be taken to have known that the appellant had no direct involvement in her husband's business, albeit that she was a nominal director. It is also clear that in the present case it was Mr Walsh alone who applied for and obtained the 2003 loan, and that the original loan in Mr Walsh's name from IPBS, and which was paid off with part of the proceeds of the 2003 loan was to enable him to buy property in his sole name. It is also uncontroverted on any affidavit by the bank that the appellant never met or spoke to any person from the bank in relation to the 2004 loan.

42. The affidavits filed in the motion for judgment do not explain why the 2004 top up loan was in joint names even though it was the financial circumstances of Mr Walsh alone which the bank examined for the purpose of approving that loan. There is evidence from the appellant that she never at any stage met any bank official in relation to this loan, or even visited the bank. She has certainly suggested that at least one of the signatures on documents which have been produced is not her signature. That alone, if it were the only relevant fact, would probably not avail her, but it is part of the overall case that she wishes to make, and it may well be part of what she might rely upon in seeking to defend these proceedings on the basis of undue influence by her husband, though it must be said that in so far as she asserts that she did not sign the loan documentation, this would appear on its face to be inconsistent with a defence that she entered into the loan under the undue influence of her husband.

43. It seems to me that the appellant has put forward a sufficient case for this Court to conclude that, having established a prima facie case of undue influence by her husband, that as a matter of law and even though she is a joint borrower and not a guarantor as was the case in *Etridge* and in *Ulster Bank Limited v. Roche and Buttimer*, it is arguable firstly that the bank had constructive notice of that undue influence in all the circumstances of the case, and was therefore on inquiry such that it was required to ensure that the appellant entered into this loan transaction fully understanding the obligations she was undertaking, and freely doing so. One of the ways in which the bank could have discharged that onus upon it would be by ensuring that she received independent legal advice. There is no evidence that they did so, or indeed took any other any other step which might be considered reasonable in all the circumstances.

44. I am not to be taken for one moment as suggesting that the appellant's case is a strong one, or even likely to succeed. That is not the test on a motion for summary judgment as I have already stated. I make no judgment in that regard. That is a matter to be determined only in the light of all the evidence heard at a full plenary hearing, which will be confined to that particular issue. The threshold of arguability on a motion for judgment which a defendant must surpass has already been referred to above by reference to what the trial judge stated, reflecting the principles in *Harrisrange* and in *Aer Rianta v. Ryanair*.

45. But it is in my view at least arguable (and that is all that the appellant must establish at this stage) that in the circumstances and on the facts of this case established thus far on affidavit, the appellant could have a defence to the claim being made by the

bank in respect of the 2004 loan since it must be taken to have constructive notice of her husband's undue influence, and was on inquiry in that regard, requiring it to take some reasonable steps such as to ensure that the appellant received independent legal advice, and failed to do so. That is at least arguable by way of a defence to the bank's claim against her, notwithstanding that the cases to which I have referred addressed undue influence in the context of the enforcement of a spouse's guarantee, and not the primary debt.

46. I reiterate that the trial judge was at a disadvantage by reason of the appellant not having been legally represented on the motion for judgment before him, and because it was Mr Walsh who made most of the submissions. It is not for the Court to make a case for any party before it. But the appellant's affidavits did make some reference to the question of undue influence, and there is little doubt in my view that if she had been professionally represented the sort of issues which I have addressed above would have been the subject of legal submissions to the trial judge, who would then have had a proper opportunity to consider the issue more comprehensively.

47. Before concluding I should refer to the fact that since this appeal was heard there have been three other appeals determined by this Court in which similar issues arose, and the majority judgments applied the principles set forth in Ulster Bank v. Roche and Buttimer to which I have referred. In those circumstances it was unnecessary that the parties should be recalled in order to make submissions by reference to those cases. Those three cases are: *Bank of Ireland v. Curran & Anor* [2016] IECA 399; *Ulster Bank (Ireland) Ltd v. de Kretser & Anor* [2016] IECA 371; and *ACC Loan Management Limited v. Connolly & Anor* [2017] IECA 119.

48. For these reasons I believe that this appeal should be allowed, and that this Court should direct a plenary hearing and grant the appellant leave to defend the claim by the bank on the basis that she did not enter into an agreement for the loan and did not sign acceptance of the offer letter as contended or that if she did so it was by reason of the undue influence upon her by her husband, Michael Walsh, and direct the delivery of a defence on those grounds alone.

49. I will conclude by urging Mrs Walsh to try to engage a solicitor to assist her in her defence. The issues on which a plenary hearing will now occur are not at all straightforward, and I am sure that the presentation of her defence would benefit significantly from legal assistance.