Neutral Citation: [2013] IEHC 427

THE HIGH COURT

COMMERCIAL

[2011 No. 2131 S.]

[2012 No. 1 COM]

BETWEEN

ACC BANK PLC

PLAINTIFF

AND

SAM DEACON AND BEN DEACON

DEFENDANTS

JUDGMENT of Mr. Justice Ryan dated the 28th June 2013

Introduction
In this case the plaintiff bank seeks judgment in a total amount of €3.495 million due and owing on foot of six loans that were advanced between the 19th April, 2007 and the 11th August, 2008, five in the name of the first defendant and one made jointly and severally to both defendants. The case is that both defendants defaulted on loan 1 and that the first defendant, Sam Deacon, defaulted on all of the others, following which the bank served demand notices in March 2011 and then brought proceedings.

The claim is in respect of loans 1 to 6 as set out in the following table:

Facility	Date	Borrower/s	Amount
Loan 1	19th April 2007	Ben & Sam Deacon	€185,000
Loan 2	19th April 2007	Sam Deacon	€210,000
Loan 3	13th Aug 2007	Sam Deacon	€500,000
Loan 4	1st April 2008	Sam Deacon	€1.3 million
Loan 5	11 Aug 2008	Sam Deacon	€500,000
Loan 6	11th Aug 2008	Sam Deacon	€800,000

The plaintiff's case in summary is that for each loan the bank sent out a facility letter, with its general terms and conditions attached, to the defendant and also at his request to his solicitors Ensor O'Connor of Enniscorthy. For each of the six loans plus two earlier pension backed loans that were replaced by loans 5 and 6, Ensor O'Connor sent back facility letters signed by Mr. Deacon. The defendant implicitly acknowledges that he did actually get the money but does not formally admit that he entered into the 6 transactions that are in question here. He disputes that he entered into loans 5 and 6, which paid down and replaced the two pension backed loans. The defendant used the money to buy land and the loans were secured by mortgages executed by Mr. Deacon in favour of the bank.

The second defendant Ben Deacon is concerned only with loan No. 1. He did not give evidence or participate individually in the case and references in this judgment to the defendant are to Mr. Sam Deacon. If the bank proves its case in respect of this facility, there must be judgment against the second defendant.

The defendant sets up a large number of defences. He alleges that the bank is unable to prove its case. Its documents and records are in a mess and cannot be relied on. A handwriting expert discovered instances where the signature of Mr. Sam Deacon is not genuine and other irregularities in the documents supplied by the bank to the defendant, according to his evidence. The bank it is said was indifferent to its obligations under the Central Bank and statutory consumer codes. The bank officials mis-sold the pension backed loans to Mr. Sam Deacon and lied about his accountant's attitude to those loans. The bank should be denied a contractual remedy and left to an equitable claim for restitution.

The defence traverses the statement of claim so as to put the plaintiff to proof of its case and pleads that the bank's general terms and conditions are unenforceable against the defendants, that the plaintiff acted unlawfully as a financial adviser to the defendant, that the plaintiff is in breach of the consumer protection code and the Central Bank code for lending to small and medium enterprises. The defence denies that loans 5 and 6 replaced the pension backed loans and pleads, at paragraph 6, that if such transactions occurred they were carried out by fraudulent means. Finally, at paragraph 18, it alleges that the plaintiff "has attempted to confuse the defendant by forging his signature and attempting to show that he entered into and approved various transactions". Particulars are given of six documents, each relating to one of the loans that are in issue, that are not genuine or are irregular.

By order of this court of the 11th December, 2012 paragraphs 6 and 18 of the Defence were struck out for failure to comply with an order of the court to furnish further and better particulars.

Issues
The questions to be decided are:

(1) Has the bank proved its case in regard to the six loans?

(2) If so, is there anything in the points made by Mr. Giblin S.C. on behalf of Mr. Sam Deacon that undermines or disproves or displaces the case as made by the bank; i.e.: (a) have any of the factual allegations been made out? and (b) if and insofar as they have been made out, do they have any material bearing on the claim?

Evidence for the Plaintiff
The plaintiff called five witnesses to prove its case. Three were present or former employees and the others were the solicitors who acted for Mr. Deacon in his dealings with the bank in regard to the series of loans.

The evidence established the following. The eight transactions between ACC and Mr. Sam Deacon had all the essential features in common. The bank sent Mr. Deacon a facility letter to be signed and returned. This was a statement of the terms of the loan that the bank was offering him. The amount of the loan, the duration, the interest rate and other relevant details were stated. The letter had the bank's general terms and conditions attached. There was provision for mortgage of the lands Mr. Deacon was intending to buy with the money. This was the form of the loan offer to Mr. Deacon.

The bank also sent a loan pack including a copy of the bank's facility letter to Mr. Deacon's nominated solicitors, Messrs Ensor O'Connor of Enniscorthy. It may be more correct to say that the pack contained another similar facility letter rather than a copy. The reason for this quibble is that the document sent to the solicitors might not be subsidiary to the one sent to Mr. Deacon. The letter to the solicitors contained a list of things to be done before the loan would be completed.

The first essential was for Mr. Deacon to accept the loan. He did that by signing the loan acceptance. The solicitors returned the documents to the bank, having complied with the list of requirements. Referring to the loan acceptances in their letters to the bank in respect of each loan, the solicitors said that they enclosed the loan acceptance "duly completed" by their client. By this means, Mr. Deacon accepted the loan in the terms of the facility letter.

Two solicitors in the firm of Ensor O'Connor dealt with Mr. Deacon in these transactions, namely, Ms. Ethel Deacon (a relation of Mr. Sam Deacon) and Ms. Suzanne Carthy. They either witnessed Mr. Deacon signing the loan acceptance or he brought in his copy of the facility letter and presented it signed to the solicitor.

The solicitors gave undertakings as required and completed the mortgage documents and took all the other steps that were required in order to complete the transaction in accordance with the terms of the facility letter. When all of that was done, the solicitors sent a request for the funds and the bank transferred the money electronically to the solicitors' client account, from which it went to Mr. Deacon and he then bought the land.

The solicitors' file contains copies of all the relevant documents including loan offer acceptances signed by Mr. Deacon in respect of all the loans. There are actually no originals on the file because Mr. Deacon has the solicitors file which they copied before handing it over to him.

In respect of each loan, there is accordingly a document trail including a facility letter with details of the loan, signed acceptance furnished by the defendant's solicitors, mortgage executed by him and associated correspondence. In order to draw down the money, the solicitor completed a funds requisition form with the details of the Ensor O'Connor client account on it, and the money was transferred electronically by the bank to the solicitors' client account and was then available for Mr. Deacon in respect of his land purchases. All of the money was drawn down in order to complete land sales. In each case the solicitor gave the bank an undertaking in respect of the execution of the mortgage and in each case Mr. Sam Deacon executed the deed of mortgage.

Mr. Deacon proceeded to comply with the terms of his various loans for a number of years. He stopped paying in 2010 and that constituted default. The bank sent letters of demand in March 2011 before issuing its proceedings.

None of this is disputed.

Evidence of the Defendant
By way of background, Mr. Deacon was in a substantial way of business in 2006 when the series of transactions with ACC began. He had a sand and gravel business employing almost 100 people. It was very successful and he was perceived by ACC as an attractive customer and they set out to recruit him. The first transaction was a purchase of 65 acres for which Mr. Deacon needed €800,000. The bank's employee Mr. John Dwan recommended a pension mortgage. He brought in Mr. Jeff Deering who was the bank's expert in that area. He was persuaded by the bank to enter into those transactions and did so against the wishes of his accountant, Mr. Robert Stamp. His counsel, Mr. Giblin SC, led him through evidence about his leaving school before he was 14 years old and not understanding pension mortgages and seemed for a time to be suggesting some kind of undue influence but that was never actually proposed and is not pleaded and it does not arise in the case.

Mr. Deacon did admit that he received monies from ACC for land purchase and said that he intended to pay it back but he confined himself to agreement in general terms that he got money and did not agree that he had taken out any particular loan or on any specific terms. He was careful to avoid making any concession that could be seized upon by the bank as an admission that he owed money on foot of any of the accounts in loans 1 to 6 on which the bank is basing its claim.

Mr. Deacon said that when the downturn happened in 2009, business was tougher and good firms were in trouble and there were some bad debts. He discovered that his pension fund was losing a lot of money and he stopped paying the premiums in 2009.

Mr. Deacon did not deny default in repayment of money borrowed from the bank but sought to explain how it was the plaintiff’s fault that it came about. He ascribed a disastrous downturn in his business in the United Kingdom in and after 2009 to the aftermath of an unjustified and wrongful attempted repossession of machinery by the finance company that he regarded as the ACC asset finance arm. An altercation gave rise to a firearms charge against Mr. Deacon in the District Court which was dismissed but the resulting publicity and the availability of information about it on the internet had the most adverse repercussions on his reputation. He blamed the bank for the actions of its subsidiary or associate company.

He met the ACC in 2011. The IFA became involved on his behalf in presentations to the bank and in that connection he made a payment of €35,000, in June 2011 he paid €50,000 to ACC and another €50,000 in August. These were done in association with the IFA submissions on his behalf. He committed himself to paying another €100,000 in October 2011 and a further €10,000 in December.

He said he did not know about the SME Code, which is a reference to the Central Bank recommended code for dealing with small and medium enterprises and he never got an annual review of his accounts, which is in reference to the SME Code.

He complained that documents he received from the bank on foot of an FOI request were not in sequence and were redacted and he had to wait eight months for the first lot and documents relating to the affairs of other persons named Deacon were included in the material that he was given.

Mr. Deacon complained about the performance of the investments in the pension backed loans. He came to realise that these were a very bad financial product. He said that his accountant, Mr. Stamp was against them all the time and Mr. Stamp indeed confirmed that.

He had other miscellaneous complaints.

Mr. Redmond S.C. cross-examined Mr. Deacon by reference to the various loan acceptances and the evidence of the solicitors about his signatures. Mr. Deacon said that he had no dispute with their evidence.

He was, however, somewhat elusive and guarded. His attitude was that he just went in to his solicitor and signed. "I haven't a clue what I signed, but I got money, that's all I know".

Graphologist
The main plank of the defendant's case was the evidence of Mr. Denis Sexton, who was put forward as an expert witness on handwriting. Mr. Sexton is a retired school Inspector, having previously been a secondary school teacher.

Mr. Deacon procured his documents from the plaintiff and brought them to Mr. Sexton. The latter's brief was to examine and report, but without any assistance from Mr. Deacon as to which documents he accepted as genuine and which he was questioning. Neither did Mr. Sexton have information as to how there might be different versions of the same document.

Mr. Sexton reported and testified that in a number of documents supplied by the defendant he had discovered irregularities, uncertainties and queries. He also concluded that certain of the purported signatures appearing in the documents held by the bank or exhibited in the bank officials' affidavits are not those of Mr. Deacon.

Mr. Abrahamson, junior counsel for the bank, questioned Mr. Sexton's qualifications. It transpires that Mr. Sexton does not have any form of qualification in the area of expertise that he professes. He has done a course by correspondence/over the internet and he claims to have examined a large number of documents in the course of his work. This however, is the first time that he has ever given evidence although he has been in court on previous occasions without actually been called because the matter was otherwise disposed or his evidence became unnecessary. It was established in evidence that the bank had engaged its own handwriting expert but no such witness was called. It does not follow that Mr. Sexton is to be considered an expert simply because the bank had their own expert and did not call him. But it is relevant, I think, to the evidence of Mr. Sexton that no alternative expert view was actually put to him.

Loan 1 - 19th April 2007 -Ben & Sam Deacon - €185,000
On this facility letter the witness said that the signatures of Sam Deacon and Ben Deacon "seem ok, no questions". In regard to the date: he said that the 20 in 20/4/07 where it appears opposite each of the signatures was possibly entered by a different person, with different pressure and very likely a different time. Another point Mr. Sexton makes is that one of the number 4s in the dates could have originally been 11 and altered to make it into a 4. But there is no reason to think that there is anything sinister, irregular or improper in this.

In summary, Mr. Sexton, did not question the signatures; he had a query about the day number in the date as to when it was inserted and a lesser inquiry about whether the month number might have been changed in one of the dates. He proposed that exhibits in the affidavits of Mr. O'Sullivan and Mr. Dwan were photocopies of somewhat different originals, although he agreed that the copy in Mr. Dwan's affidavit at exhibit 3 was indeed a replica of the original facility letter as retained in the bank's files and produced in court. There is however no evidence of improper conduct on the part of the bank or of any possible gain that might accrue by altering a documents and indeed there is no evidence that a document was in fact altered.

Loan 2- € 210,000 date 19th April 2007
Mr. Sexton said that the signature on this acceptance is not Mr. Deacon's "usual, customary signature" and in his opinion, on the balance of probabilities, "it was not written by Sam Deacon". My observation is that this signature on loan no. 2 acceptance also 20/04/07 is certainly different from the signature on loan no. 1 of the same date but that is far from saying that they were written by different people. In the documents there are signatures written by Mr. Deacon that are fuller expositions of the name Sam Deacon and others that are little more than the letters S and D in the form of a more or less straight line and something of a squiggle. He signed things in both ways. Mr. Deacon may not be a fluent or a habitual writer and that may account for some of the squiggly writing that he uses on some occasions but it also happens that anybody's signature can vary substantially from one document to the next and the fact that one is written on the same day or soon after another does not exclude the possibility of substantial difference. It is in my view illegitimate and unscientific to look at these two varieties of signatures and to deduce that they were written by different people when it is perfectly obvious that they are actually quite different but that is only the beginning and not the end of the enquiry. The same issue of the date arises here.

In cross-examination, Mr. Sexton agreed that some of Mr. Deacon's signatures could be put into the category of executive scrawl -an expression he used in one of his reports:- "if he scrawled them very quickly, they could be that, you know symbolic one. It has to do with the speed. A scrawl is just short, whereas a symbolic is using symbols rather than lettering".

Mr. Sexton was pressed by counsel for the bank, Mr. Abrahamson, as to the steps he took to ascertain whether there might be some explanation for a departure from the usual and customary signature. The witness in his reports had identified elements that he would have considered such as illness or hurry, or being on a train or sneezing or something of that kind. Concerning a questioned signature, counsel suggested that he would have been expected to ask his client about those matters and to have recorded the fact and the client's response and then taken it into account or not. Only then would he reach a conclusion. When he was asked about these matters by counsel, he was extremely vague and even somewhat evasive before finally agreeing that he did not remember asking Mr.

Deacon if any of the explanatory factors applied: "I don't remember. I didn't make a note of it and I don't know". These questions arose out of Mr. Sexton's evidence that facility no. 2 did not carry Mr. Sam Deacon's usual and customary signature and he thought it was in the circumstances not authentic.

Loan 3 - €500,000 13th August 2007
Mr. Sexton agreed that the two different versions of Mr. Deacon's signature in respect of this facility were genuine. His evidence was that there were two different copies of pages 4 and 5. The alternative pages, i.e., those that did not accord with the bank's document obviously came from another edition of the acceptance. Ms. Ethel Deacon said that her client signed the acceptance in her presence but there was another text that gave rise to the second copy of pages 4 & 5.

I should say something about the facility letters. The practice was for the bank to send a facility letter to Mr. Deacon personally with the bank's logo and footer. Pages 2 and 3 contain the various terms and conditions and on page 3 the letter is signed on behalf of the bank. In this case the signatories were Deirdre O'Keeffe and John Dwan. Pages 4 and 5 are the section of the document that is signed by the borrower and his acceptance of the facility that is offered in the letter. In respect of this facility there is a signature of Sam Deacon, the date is 14/08/07 and the signature is witnessed by Ethel Deacon, Enniscorthy, solicitor and below that again where the solicitors acting in the matter are to be stated appears Ethel Deacon, Ensor O'Connor, 4 Court Street, Enniscorthy, County Wexford and the telephone numbers are given. All that is written in handwritten capitals and that is according to the evidence Ms. Ethel Deacon's signature and it is her document and she witnessed Mr. Sam Deacon signing it. On the bank's file there also appears a further two pages 4 and 5, namely the acceptance of borrower document. This acceptance of borrower came from another document which also contains the signature of Mr. Deacon.

Mr. Sexton raised a query as to the provenance of the alternative pages 4 and 5. It seems likely that Mr. Deacon returned another copy of the document to the bank, in addition to that sent by his solicitors, but whether that is correct or not, it is established beyond any doubt that the defendant signed the acceptance, it was witnessed by his solicitor and neither signature is queried by Mr. Sexton.

Loan 4 - 1st April 2008, €1.3M.
The entry in Mr. Sexton's report is as follows:

> "Signature Sam Deacon.
>
> "This is not the usual and customary signature of Sam Deacon opinion: In my professional opinion and on the balance of probabilities this signature was not authored by Sam Deacon. While it may be genuine, I am unaware of any explanation to why it deviates so far from the norm".

Mr. Sexton said that he did not ask his client whether there might be any factors that would account for this apparent departure even though he had acknowledged that the signature might indeed be genuine. To say the least of it this approach is unprofessional and does rather undermine Mr. Sexton's reliability.

For my part, looking at this it seems remarkably similar to other examples of Mr. Deacon's signature where he uses the particular form that I mentioned earlier consisting of a form of S and D. It depends on what is called his usual and customary signature. Mr. Sexton says that he was not aware of any reasonable explanation so therefore he concluded that it was more likely that it was not his signature. I am not sure that this is a scientific way to go about analysing a person's writing or signature. Since it is clear that Mr. Deacon does use this form on some occasions, I do not think that the witness could reasonably reach a conclusion based on absence of explanation when he did not look for one.

Loan 5 - 11th August, 2003, €500,000,
Mr. Sexton did not quarrel with the signature and appeared to accept that it was that of Mr. Deacon.

The purpose of this facility was to repay ACC bank loan facility 10041429 which is the second pension backed loan.

Mr. Sexton said that the first page of the document demonstrated some irregularities of printing and that there was some misalignment and then he deduced that the page might be a composite in that there was something wiped out but there is no reason to suppose that that is the case in my view. The misalignment appears to me to more or less consistent from close to the top of the page if not from the very top and there is of course the solicitor's evidence about this. Then he pointed to the date that appeared to have been changed.

Loan 6 - 11th August 2008, €800,000
As to the signature on loan facility 6, Mr. Sexton said "there is no difficulty there". This facility was to repay the first pension backed loan- ale 10040174. The first thing Mr. Sexton said is that page 1 was similarly afflicted in respect of the inconsistency of ink or other reproduction as a previous page 1 was, document no. 5. He drew attention to the way the loan facility account no. is written where the last three digits- 174- appear in bold. He made a great deal of this but I am not sure that he is correct. The fact the last three digits appear in bold which is the really significant part does not demonstrate anything sinister or improper. Mr. Sexton says that the last three digits are irregular. This document is the same date as the previous facility and that strikes me as being suggestive of innocent error. However, this emphasises how difficult it is say that any such changes in the dates are of any significance or indicate misconduct on the part of some person unknown. The mere fact that Mr. Sexton is able to point to a date which appears to have been altered from 4/11/08 to 4/9/08 does not seem to me make any difference to anything that we are dealing with here.

Mr. Dixon invited Mr. Sexton to say how improbable it was that one would find precisely identical signatures or writing on different documents. Underlying this was the assumption that there was a signature page on a facility letter acceptance page in facility 5 that was precisely the same as the same page in facility 6. However, the original documents are not precisely the same in respect of page 5 and the signatures. This conclusion therefore is incorrect.

Loan 7 - 19th December 2006 - PBL 1 - €800,000
Mr. Sexton accepted that there were two original documents for this loan. In respect of the one dated 5/01/07 he said that the signatures "seem to be reasonably good. I wouldn't find fault with those".

As to the form of acceptance for 3/1/07 he said that the third signature at the bottom of page appeared doubtful and similarly there was a doubt about the second one: "but those two are dubious. I don't know what my report says. Whatever it says is what I would go along with". The report said that the signatures on the credit reference page appeared to be genuine. The form of acceptance page has three Sam Deacon signatures and Mr. Sexton reported that "on the balance of probabilities" two were not authentic and the

authenticity of the other was inconclusive, because they were not usual and customary. The signature as witnessed by Ms. Ethel Deacon appeared to be genuine.

The other original document is in the almost all respect similar but there is more to it. There is an undertaking by Mr. Deacon to pay the money received out of the pension policy and that is addressed to ACC Bank and it is "signed, sealed and delivered" and by Mr. Deacon and witnessed by Ethel Deacon, Enniscorthy, Solicitor. This transaction has a letter from ACC Bank varying the existing facility letter to provide for additional security and it was accepted by Mr. Deacon by signature of 5-01-07.

Loan 8 - 19th April 2007 - €500,000 – PBL 2
The form of acceptance of this loan has four separate signatures of Sam Deacon. Mr. Sexton says- Q. 139, page 80- that "they are wildly different from Sam Deacon. No way do the look anything like his, and it is amazing that if any bank official or anybody who was half familiar with his signature would look at that and say 'my God, that cannot be his signature'. No they are way off'. He also raised another date issue.

Mr. Sexton was a good deal more restrained in his report. In regard to the credit reference page, he said that it was not the usual and customary signature and on the balance of probabilities neither of the two signatures was authentic. The four signatures on the acceptance page were not authentic because they were not usual and customary but in regard to the instruction and authority he said that the signature appeared to be genuine.

Concerning the witness's examination of documents generally, Mr. Abrahamson elicited that Mr. Sexton had not seen any of the documents with signatures by Mr. Deacon that were contained in the solicitors' file. It will be recalled that Mr. Deacon got his file from his former solicitor, Ensor O'Connor from Enniscorthy. Ms. Deacon and Ms. Carthy of that firm gave evidence based on the copy documents on file which had been made before the whole file was handed over to Mr. Deacon. Therefore, Mr. Deacon had these documents in his possession. A question arose during Mr. Sexton's evidence in chief as to a signature on a document which was on a yellow sheet that had been produced by one of the solicitor witnesses and counsel Mr. Dixon was inviting Mr. Sexton to comment on the signature and any comparison with some other document which was being discussed at the time and on which he had reported. Mr. Sexton had not reported on that document. Not only that, he had not seen it until a few days previously to his giving evidence and he had never examined it. I was not satisfied that an expert witness should be making a comparison and an analysis of the document that he had not examined in any detail before but had merely glanced at and I made a ruling that he should not do so. However, I left it open to counsel for Mr. Deacon to apply to have Mr. Sexton recalled after he had an opportunity of considering the document and any comparisons that he wanted to make but no such application was made.

Mr. Sexton's evidence is that he thought some of the facility letter acceptance signatures were not genuine. Others he believed were genuine. He did not seek explanations from Mr. Deacon as to why there might be discrepancies or differences. From my part, I find it difficult to understand why Mr. Sexton condemns some signatures as not being authentic and accepts others that seem to me to very similar. I think that Mr. Sexton lacks expertise and professionalism and experience. His methods of reporting and of testifying do not lend themselves to a process of evaluation.

There is also the substantial difficulty that the actual agreements that were sent out by the bank were returned by Mr. Deacon's solicitors with express declarations that he had completed them.

Other Defence Witnesses
Mr. Robert Stamp was the defendant's accountant. He was adamant that he preferred capital and interest loans over pension backed loans. The bank employees, Mr. Dwan and Mr. Deering, thought that they had persuaded Mr. Stamp but he maintained that the ACC was in no doubt about his views on the matter and he did not come around to their point of view. He was sceptical about pension mortgages, as he was about endowment mortgages, which would similarly depend on the capacity of investments to accumulate enough funds to pay off the debt. He advised Mr. Deacon against it. Although he was not in favour of such schemes that depended on the growth of investments, Mr. Stamp recognised that this was what the bank was going to give Mr. Deacon and he accepted that it was going to happen. The loan was going to be a pension backed loan and Mr. Deacon wanted the loan and was going to engage in the transaction.

Ms Margaret Watkins (nee Deacon) is the daughter of the late Samuel Deacon, who died in 1996 and whose address was Barnahask, Bunclody, Co. Wexford. She is the sister of another Samuel Deacon who has suffered from motor neurone disease for some ten years and who as a result is incapable of signing documents. She looked at documents and identified addresses and references in them to her later father and her brother. These were among the papers that the bank furnished to the defendant in the mistaken belief that they concerned him.

Mr. Samuel Frederick Deacon of Knockmore, Cairn, Enniscorthy, identified documents that referred to him. These other Deacons dealt with ACC and obviously their papers and records should not have been furnished to the defendant, Mr. Sam Deacon and it was clearly erroneous and a serious interference with the privacy of these other customers or former customers of the bank. Having said that, the persons who had most to complain about were the persons whose documents were mishandled in this fashion. As for the defendant Mr. Deacon, it is of course a nuisance and somewhat embarrassing for him to be given documents that relate to these other persons, but it is no more than that. He suggests that it goes further in demonstrating that the bank's files are entirely in a mess and that it would therefore be unsatisfactory for the court to rely on any documents that the bank produces. I think that is the essence of the claimed relevance of this evidence.

Submissions
The defendant's original written submissions may be summarised as follows.

> (a) The defendant(s) did not accept funds on the terms claimed; the documentation produced by the bank is defective and is not evidence of an agreement between the bank and the defendants.
>
> (b) Mr. Deacon was not told in respect of the pension backed loans about the manner in which the funds were managed, the commissions payable to intermediaries and charges in the funds.
>
> (c) Loan facilities 5 and 6 were not approved or even known about by Mr. Deacon and were contrary to his express wishes.
>
> (d) The documents relied on by the bank are not true copies of any documents signed by Sam Deacon.
>
> (e) If the doctrine of part performance applies to any of these loans then equitable rules as to restitutionary remedies

apply to those loans.

(f) Statutory Codes promulgated by the Central Bank must be incorporated into any contract between the bank and Mr. Deacon.

(g) If the bank fails to prove the alleged contracts then it is accepted that restitution arises, but this is a discretionary remedy and the conduct of the parties is taken into account and in this case the conduct of the bank is such that "it cannot in conscience claim repayment of monies advanced to the defendants" because

1. The bank approached Mr. Deacon with various propositions to buy land using money lent by the bank.

2. Mr. Deacon was subject to a marketing campaign which involved him being entertained at sporting events.

3. He was given advice by the bank which supposedly demonstrated the advantage of one product over another.

4. He was not told that there would be commissions and charges.

5. He was not told that if he sought changes they would be made in a manner that maximised the charges and commissions.

6. Documents purporting to bear his signature do not in fact do so.

7. "As a result of the activities of the bank the business and professional life of the defendant has been severely disrupted".

(h) If the bank made a claim in restitution, Mr. Deacon would be able to adduce facts and circumstances to mitigate or even eliminate the amount of any claim.

(i) The most that can be said is that there was some agreement, but no more than that and the specific terms cannot be established.

(j) Agreements were procured by way of misrepresentations and are voidable at the option of Mr. Deacon.

(k) The bank gave financial advice without having the competency requirements required as a minimum under the Central Bank Act 1989, as amended.

(l) Mr. Deacon was a consumer within the meaning of the Consumer Credit Act 1995 and the Consumer Protection Act 2007.

(m) The fact that the bank exhibited documents- this is a reference to one document- with Mr. Sam Deacon's signature waiving his right to a cooling off period means that the bank is accepting and cannot deny that he was dealing as a consumer because it is only a person who dealing as a consumer who is entitled to the cooling off period.

(n) A lender who breaches his statutory responsibilities "may well find that the contract or loan of guarantee is unenforceable" (see Laffoy J. in *Stepstone Mortgage v. Fitzell* and Donnelly on *Credit and Security*, paras 9-79 and 20 - 47).

Further submissions after the hearing were produced by Mr. Deacon's advisers. They are concerned with the proof of documents. They may be summarised as follows:-

(1) The original documents retained by the bank have not been proved in evidence.

(2) There was no evidence that Mr. Eoin O'Sullivan was the officer of the bank into whose custody the original was placed and "who could give evidence as to its safe keeping as required by the rules of the evidence". Phipson on *Evidence* (10th Ed.) para. 41.05 is relied on.

(3) Secondary evidence of completion of documents by solicitors acting for the defendant is insufficient for this purpose.

(4) As to proof of original documents- primary evidence may be given by production of the original etc. references are made to various passages from Phipson.

(5) Instead of attempting to prove the original contract documents as they should have done, the bank attempted to prove them "by the back door method of calling former solicitors for the defendants for this purpose".

(6) The submission then comments on the evidence of Ms. Deacon and Ms. Carthy and endeavours to demonstrate that they were unsure or equivocal or conditional.

(7) The bank's attempt to undermine Mr. Sexton's expertise was unsuccessful.

(8) In any event, the problems highlighted by Mr. Sexton are obvious even to an untrained eye.

(9) No evidence was given to explain the existence of multiple copies.

(10) The signatures of other persons named Samuel Deacon "were obviously forged".

(11) The submission deals with specific documents which have been considered above in the evidence of the graphologist.

(12) It is alleged that there were falsehoods because of differences between the evidence of Mr. Sam Deacon and Mr. Robert Stamp on the one hand and Mr. Jeff Deering on the other. All that of course is predicated on the court accepting that Mr. Deering was not telling the truth and that the others are correct.

In his argument, Mr. Giblin SC for the defendant highlighted the following.

The bank has not proved its case. This means that the bank according to Mr. Giblin S.C. has not produced or been able to produce the actual contract document executed by Mr. Sam Deacon. Insofar as there is a document purporting to be his agreement to the loan facility in question, there is discernable in each document some flaw that undermines its credibility or demonstrates that it cannot be the precise document that Mr. Deacon signed or executed.

The bank's documents are generally are in a mess and this means that the records they produced cannot be relied upon. Evidence of this according to Mr. Giblin is to be found, first in the inclusion in documents that were furnished to his client, Mr. Sam Deacon, under the Freedom of Information Act request that included the copies of the bank documents relating to accounts held by three other persons named Sam or Samuel Deacon. These were all customers of the bank. Two of them are deceased and one of them is suffering from a debilitating neurological condition. Mr. Giblin argues that the bank was indifferent to these other people's documents. In response, Mr. Aidan Redmond S.C. for the bank urges that the officials in the bank were eager, even desperate to ensure that no document was overlooked and they did indeed find documents dealing with Sam or Samuel Deacon and they included some belonging to other people, which was an unfortunate mistake, but which has nothing to do with Mr. Sam Deacon or this Mr. Sam Deacon's liability on foot of these loans.

There are irregularities and alterations in the documents and Mr. Giblin says or implies that these are forgeries. The question of forgery is somewhat complicated, because the bank sought further and better particulars of who it was alleged had forged which documents and when the defendants Mr. Sam Deacon did not give the information, this Court (Cooke J.) struck out the plea of forgery in the defence. Nevertheless, I think Mr. Giblin went as far as he could and indeed suggested or implied that the bank had indeed forged documents. They did so allegedly by putting Sam Deacon's signature on some documents and changing the dates on others and in those respects they differ from the originals and from any documents allegedly or purportedly signed by Mr. Deacon.

Mr. Giblin argues that the bank did not comply with a Central Bank code in respect of SME's and a Consumer Credit Code.

Counsel also suggested that the pension backed loans were mis-sold by the bank to Mr. Deacon. He was induced to undertake them by being brought to rugby matches and other sporting occasions and treated as an important customer of the bank and that his host bank officials persuaded him to agree to the pension backed loans. The bank's officials deny this, although they do admit that he was indeed treated as an important customer of the bank and brought to some sporting occasions including the rugby world cup in Paris.

Mr. Giblin also makes the case that the bank acted as financial adviser to Mr. Sam Deacon, but did not do so independently or properly or in accordance with statutory requirements. Counsel submits that the summary summons sets out the bank's case and that, and only that, is what the plaintiff must prove. The bank maintains that it has done just that. Counsel argues that the bank did not prove the actual document that is the loan contract, that is, the original document signed by Mr. Deacon.

The plaintiff’s submissions referred to admissions made by Mr. Deacon in his replying affidavit on the motion for summary judgment, sworn on the 25th June, 2012. The case was referred to plenary hearing because of the disputed issues that carne to light. The plaintiff draws attention to what Mr. Deacon deposed about the lands that he bought and how they were financed.

Paragraph 25 of Mr. Deacon's affidavit refers to loans of€185,000 and €210,000 which are facility No. 1 and facility No. 2 respectively.

> "The 3.5 acres placed in the joints names of your deponent and Mr. Ben Deacon was funded by a capital and interest repayment loan of €185,000.00. These three transactions are at '6' in the booklet of exhibits. The sums were raised as follows:
>
> (i) €500,000 was allocated to my existing pension policy and discharged by way of increased primia.
>
> (ii) A new loan was created for the sum of €210,000.
>
> (iii) The facility of€185,000 was created in the name of your deponent and Mr. Ben Deacon secured on the 3.5 acres."

Paragraph 48 refers to facility No.3 and is headed "The security for the purchase of 35 acres at Rossard, Bunclody.

> "This was purchased on the 12th October, 2007. The title to this is leasehold and is carved as follows from a holding to 213 acres 1 rood and 29 perches. It is on registered lands. This cost €595,000 I paid down €95,000.00 and got a loan of €500,000."

Paragraph 50 refers to facility No. 4 under a heading identifying 130 acres at Ferns, Enniscorthy with sand and gravel deposits includes the following sentence:-

> "This land was purchased for 1.5 million with the benefit of a loan of €1.3 million from the plaintiff."

The plaintiff submits that these averments are clear acknowledgements that the plaintiff borrowed money from the bank for the purpose of purchasing these lands and the facility letters correspond precisely to those transactions and that the evidence establishes a chain of correspondence relevant to and in reference to the very transactions in question. The evidence of the plaintiffs' solicitors was adduced in reference to the same transactions.

In regard to facilities 5 and 6, the plaintiffs submits that there is also a body of correspondence, documents and transactions backed up by the evidence of the plaintiffs solicitors to establish the taking out of the pension backed loans in the first place and their replacement by these capital and interest loans. In respect of the pension backed loans, the plaintiff submits that these also are acknowledged and accepted by Mr. Deacon. Paragraph 20 of the affidavit refers to the first pension backed facility in the sum of €800,000:-

> "The first facility offered by the plaintiff to me was for the sum of €800,000 to purchase 65 acres at Kilcarrig, on the 19th December, 2006 which was the first of the bank's facilities for the purchase of land offered by them ..."
>
> Paragraph 24 refers to the second pension backed loan as follows:-
>
> "The 26.5 acres parcel of land must be funded by two separate types of facility.
>
> - €210,000 to be repaid capital and interest and

- €500,000 to be secured by the pension backed security."

The plaintiff argues that the defendant has acknowledged expressly in his replying affidavit the receipt of the money comprising loans 1 to 4 and the pension backed loans that preceded them. In the first place, therefore, the bank pleads that the defendant has admitted receiving these loans. Secondly, there is a complete set of documentary evidence in respect of each loan that is confirmed by the defendant's own solicitors. The same applies to loans 5 and 6 that were used to pay down the two pension backed loans, except that the defendant does not explicitly admit those transactions. Nevertheless, the evidence is otherwise quite the same in respect of these loans as it is for all the other transactions. The solicitors were involved and the loan facilities were signed and returned by them to the bank and there were ancillary transactions and correspondence that comprehensively and indeed exhaustively reference and evidence those loans in addition to all the others.

With particular reference to facilities 5 and 6, the plaintiff submits that the pension backed loans were discharged, as was demonstrated by the statements of account that were proved in the statement of evidence of Mr. Dwan and the exhibits attached. The defendant was aware of the restructuring and it occurred at his request, which is recorded in a memorandum of the 281h July, 2008, saying:-

> "Client has suspended his pensions due to their poor performance in the current market and is requesting that related pension backed mortgages be converted to term loan facilities with principal and interest payable over the remaining term of the facilities."- Document JD14 in the witness statement of Mr. Dwan.

The loans are also proved by the drawdown documents. Furthermore, the statements of account demonstrate that the defendant made periodic payments to the loan accounts for a number of months.

If there was any defect in loan documentation, which the plaintiff does not admit, it is submitted that once the loan was advanced to the defendant, then by necessary implication it was repayable, in the absence of some exceptional element that would arise in law to rebut the normal presumption and there is no such issue in this case, nor has any been proposed by the defendant. In the circumstances, any defects or absences of signatures do not provide a defence. The plaintiff relies on a number of cases for authority for this proposition. In *ACC Bank Ireland plc v. Fahey* [2010] IEHC 41, Kelly J. approved a statement in the 29 1h Ed. Of *Chitty on Contracts* at para. 38-229:-

> "If money is proved, or admitted, to have been paid by A to B, then in the absence of any circumstances suggesting a presumption of advancement, there is prima facie an obligation to repay the money; accordingly, if B claims that the money was intended as a gift, the onus is on him to prove this fact."

Thee submissions cite a recent decision of the Court of Appeal in England in *Chapman v Jaume* [2012] E.W.C.A, Civ. 476 in which Lord Justice Levison said that where there was some sort of agreement, but the details had not been proved, the implication was that the money was repayable within a reasonable time after demand.

Accordingly, the plaintiffs submission is that even if the court were to come to the conclusion that the facility letters were defective and could not be relied upon, the facts that are established to a high degree of certainty of proof are all quite clear and to the same convincing effect. Even if that were not the case, and one only had the defendants' admissions, even they would give rise to a necessary implication that the money was to be repaid within a reasonable time after demand.

The codes that are cited by the defendant do not erase or reduce his liability. The plaintiff does not admit any breach, but contends that even if some infraction of the codes were to be proven, that would not affect the bank's entitlement.

The submission draws attention to the order of Cooke J. dated the 11th December, 2012, striking out paras. 6 and 18 of the defence by reason of the defendants' failure to furnish particulars of the allegations of fraud and forgery. In the circumstances, "it is not now open to them to maintain the case that the bank is guilty of any wrongdoing in respect of the Facilities. There is, in any event, no evidence to support such contention".

In regard to the allegation that the bank acted as financial adviser, the plaintiff submits that this is not a defence in the proceedings. The bank admits that it provided limited advice to Mr. Deacon in relation to the pension backed loans. It says that the advice was limited to information concerning the relative merits of different forms of funding and it denies that its officials were unqualified to give that advice. The plaintiff submits that the ordinary relationship of customer and banker does not impose on the bank a duty to advise the customer about the wisdom of the transaction that he or she is going to enter into with money borrowed from the bank. In circumstances where the bank official takes on the function of advising about the wisdom of the transaction, a different situation can arise, giving rise to liability in tort in the event that the advice turns out to have been negligent. The submission says that there is no case made to the effect that the bank was actually negligent or that the defendant suffered loss as a result. And information or even advice cannot bring about the invalidity of the loan or create a circumstance in which the borrower is freed from his obligation to repay money advanced.

Concerning the codes of conduct that are relied upon by the plaintiff, the plaintiff submits that it is clear that the defendant did not engage with the bank in a capacity of consumer and cannot rely accordingly on the Consumer Protection Code. Even if a breach were to be established, which the plaintiff does not admit, that would be a regulatory matter and would not impinge on the defendants' obligation to repay the loans. As to whether a person is a consumer within this meaning, the submission cites the judgment of Kelly J. in *AIB v. Higgins* [2010] IEHC 219, where the learned judge said:-

> "The European Court of Justice clearly envisaged that the concept of the consumer was confined to a person acting in a private capacity and not engaged in trade or professional activities. The self same person can be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others. Only contracts concluded for the purpose of satisfying an individual's needs in terms of private consumption are protected by the Directive."

Kelly J. held that the defendants borrowed money to invest in property for the purpose of development for profit which was engaging in business and not borrowing as consumers.

The plaintiff relied on *Zurich Bank v. McConnon* [2011] IEHC 75, in which Birmingham J. held that the Central Bank Code that he was dealing with in that case could not exempt the borrower from liability to repay. The submission acknowledges that in more recent times, Laffoy J. and Hogan J. have extended the protection of the Code of Conduct on mortgage arrears in the case of family homes, but they have stopped short of holding that the Code forms part of the contract between the parties or that non compliance alters the lenders rights.

The submission argues that the defendants have failed to specify with any degree of precision the basis on which it is alleged that the bank acted in breach of these Codes. The submission concludes that the basis of the bank's claim for judgment is clear and is amply supported by the evidence. It is difficult, it says, to discover any meaningful defence from the complaints that are made by the defendant. It is impossible to ignore the admissions made by the defendants of the entirety of the sums that are in issue. None of the matters raised by the defendants constitutes a good or bona fide defence.

Discussion
The issues are first whether the bank has proved its case. If not, the claim must be dismissed. If the answer is yes, the second stage is to consider if any of the points raised by the defendant is correct as a matter of fact or law and whether it constitutes a defence. There is little serious dispute as to the basic facts of the bank's claim. It would be quite impossible for Mr. Deacon to deny that he got the money from the bank and he does not do so. Or does not do so directly, at any rate. He agrees that he got money but does not specifically admit that he got the money from these loans. As regards his signatures, Mr. Deacon admits that he signed documents in his solicitors' offices but he is careful to say he cannot remember any particular one of these transactions.

He used the funds to buy land and he executed mortgages over the various parcels. But he denies that he got the money on the terms of the facility letters that the bank says contain the terms of the loans. He does not suggest any different terms or conditions on which he might have been given the loans. He admits that he got the money on some terms, but they are not these terms. He acknowledges in submissions the absurdity of proposing that he should have almost €3.5 million without obligation, arguing that while the bank cannot succeed on this claim, it would notionally be able to recast its case on the basis of a restitutionary claim in equity. However, he is not even admitting the bank's entitlement to succeed on that footing; he contends that facts and circumstances would weigh in equity in his favour which would substantially reduce and might even eliminate any liability to repay.

(a) Has the bank proved its case?
The first defence is that the bank has not proven its case. It has not produced and proven the loan agreement in any of the transactions, which means, according to Mr. Deacon, that the claim must be dismissed. Before considering the first question, one has to be clear about what it means.

Central to the defence on this part of the case is an implicit theory that in regard to each loan, it is an essential proof that the actual contract document be produced by the bank and proved in some kind of solemn form of law. The defence approaches this documentary material as if it were a mandatory proof such as a certificate of an essential fact. The document itself is envisaged as having an independent existence from the transaction that it evidences. The comparison may be with a will or with the title documents of land, in which the document itself constitutes a thing. The document or documents of title may be considered to represent the building or land for the purpose of an equitable mortgage or a sale and obviously a will is a thing in itself that has its own existence and an elaborate set of rules surrounding it. Mr. Giblin S.C. refers to the loan document in this sense; not that it is evidence of a transaction, but that it is the actual transaction itself; not that it is evidence of a state of affairs or of what the terms of agreement were, but that it is the actual agreement. If he is able to cast any doubt on the formal validity of the particular piece of paper that is produced as the agreement, he has undermined the alleged agreement and no judgment can be given on it.

But that is not the situation here. There is nothing of special legal significance about the original documents here. They are not muniments of title or of similar free-standing status. In many contracts there is not any one embodiment of the contract in a document. Even where there is such a contract, it may be signed in a number of copies or versions and there may therefore be more than one original contract.

This case is about the proof of a series of loan agreements, not whether the bank has proved a particular, individual document. Documents are evidence of the agreements and their terms. But it is a misunderstanding to think that the case is about proof of a document and not proof of an agreement.

It is about loan agreements and their terms and whether they were breached. Has the bank proved that it lent the money to Mr. Deacon on the terms stated in the facility letters? The bank can prove the agreement by oral evidence and copy documents to show what was agreed between the parties.

What did the bank prove? In respect of each of the eight loan transactions, the ACC sent loan facility letters to Mr. Deacon and to his solicitors. The solicitors got a loan pack including the facility letter and the terms and conditions plus a list of other items that were required to be performed or provided before the transaction was completed. One of the requirements was that they send back to the bank the facility letter signed by their client and that is what happened in each of the eight cases. The solicitors returned the facility letters "duly completed", ie. in accordance with what the bank required. The evidence of the solicitors was that Mr. Deacon either signed the facility letters in their presence or else he brought in the documents already signed and handed them over for transmission to the bank. In one case there was an agreed alteration of terms that was evidenced by his signed acceptance of the change, which occurred in correspondence between the bank and his solicitors.

A document sent by a solicitor stated to have been duly completed by her client is evidence of the fact stated. It is not open to the client to impugn the evidence subsequently in the absence of some challenge to the solicitor's authority or instructions. This point seems too obvious to require to be stated, but the defendant's submissions and Mr. Deacon's own evidence actually seek to escape this elementary proposition. What a party does by his solicitor he does by himself. The fact that his solicitors dealt with the correspondence and sent documents expressed to be duly completed and containing the defendant's signatures and processed all the mortgage and other transactions that were associated or concomitant with the arrangement is evidence that Mr. Deacon did all these things. He cannot disavow all these arrangements, undertakings and transactions that were done on his behalf.

In the case of loan facilities 5 and 6, which replaced the two pension backed loans, Mr. Deacon says that he did not know what they were and he did not consent to those loans. But again, they are evidenced by the testimony of the solicitor who dealt with them and the document trail that is similar to the other loans. He executed the documents and his solicitors, acting on his behalf, confirmed his assent.

The question is what was the contract and here there is clear evidence from the solicitors as to what materials they got from the bank and what they did with them. There is, accordingly, undisputed evidence as to what the contract was and what Mr. Deacon agreed to. Even if there was a different document on file with the bank in the sense that it looked like a different signature or if the date on it was different from the date on the solicitors' copy, that is really of no significance to Mr. Deacon's liability.

If he himself sent a signed document to the bank, that was acceptance of the contract. The loan pack sent to the solicitors required them to furnish a signed acceptance. The bank could prove the terms of the loan by producing either document. It is not as if there is one to the exclusion of the other. A contract may be proven in a number of ways, among them being that documents were sent to

the party's solicitor and returned with acceptance endorsed.

The averments in the defendant's affidavit of the 251h June, 2012 confirm the receipt of the money for the purposes specified in the facility letters and represent substantial confirmation of the claim.

In the result, the conclusion is irresistible that Mr. Deacon agreed to the loans in the terms of the facility letters. The bank has proved that it lent the money to Mr. Deacon on the terms stated in the facility letters.

If the bank had been unable to establish the terms on which it had advanced the funds to Mr. Deacon, there would have been an implied obligation on him to repay in a reasonable time after demand. See *ACC Bank plc v Fahey* [2010] IEHC 41; *Seldon v Davidson* [1968] 1 WLR 1083; *Chapman v Jaume* [2012] EWCA Civ 476.

The graphologist's evidence
Mr. Deacon got his documents from the bank and brought them to Mr. Sexton, asking him to examine them. He did not specify any particular documents that he alleged were forged, but simply gave the documents to Mr. Sexton. It is worth recalling what Mr. Deacon's position is. He does not disagree with the evidence that his former solicitors Ms Deacon and Ms Carthy gave to the court. But when he was asked as he was by counsel for the bank, Mr. Redmond SC, whether he agreed that he had signed the facility letters, he was evasive. This is consistent with his answers in regard to the loans. His attitude to the signatures is not to admit any particular signature but to say that he signed a lot of documents and he cannot remember any particular one. Mr. Giblin did not present the documents in turn to Mr. Deacon and ask him whether it was his signature on this document or that one or the other.

Mr. Sexton's evidence is considered separately above. In brief, his opinion was that five of the eight loan acceptances had genuine signatures of the defendant. His report said of another, loan No.4, that it might be genuine. No.2 he said was not the usual and customary signature of Mr. Deacon and on the balance of probabilities it was not genuine. He also condemned No. 8, which was a pension backed loan that is not the subject of claim because it was replaced.

I have indicated previously some reservations about Mr. Sexton's expertise and his methodology of examination and presentation but not as to his integrity. In respect of the signatures he condemned, I find it difficult to accept that he has demonstrated a scientific and rational basis for his conclusions. Mr. Sexton by his own admission did not make appropriate inquiry of his client to resolve issues of uncertainty, including why there might have been differences in signatures. And he was not aware when he reported that there were different original versions of acceptances.

This witness did demonstrate a number of irregularities, inconsistencies and emendations in the bank's documents but no evidence was adduced as to when changes were made or where or by whom or for what purpose or as to how any of that happened.

There is, however, a more fundamental issue about Mr. Sexton's evidence and that is whether it would make any difference to the defendant's liability even if his opinions were to be accepted in their entirety. In circumstances in which it is beyond dispute or not disputed that Mr. Deacon accepted each and every loan by way of solicitors' correspondence and that he took all the other steps and drew down the loan funds to buy the lands he wanted and that he paid back the loans according to their terms over a significant time period, what possible difference can it make if Mr. Sexton is able to show inconsistencies and discrepancies in some of the documents or copies that are in the bank's files?

In fairness to the graphologist, Mr. Deacon gave him documents without telling him which ones that he accepted as being genuine and simply left it to Mr. Sexton to work out for himself what documents that he thought were or were not genuine based on the signatures. This may well be a reasonable academic or objective scientific approach but it is scarcely of great value in this case where we have the evidence of the defendant's solicitors. The fact that Mr. Sexton did not even see the documents in the solicitors' file, which was in the defendant's possession, restricts not only the value but even the relevance of his opinions. The critical documents are the ones that accepted the terms of the loans. Since it is perfectly clear that this happened, I do not think that Mr. Sexton's evidence is of great materiality, even if it were to be accepted at face value.

It is embarrassing for the plaintiff but obviously irrelevant to the defendant's liability that documents relating to other customers of the bank named Samuel Deacon were furnished.

Financial Advice
The defendant's complaint that he was persuaded to enter into the PBL's by being given financial advice by the bank officials would be relevant if he could demonstrate some breach of statute law or regulations in respect of an account that was in issue in the case. He has not done so, preferring to leave the point as a matter of general allegation.

The bank's claim does not relate to the pension backed loans. Neither has Mr. Deacon established that he was given general financial advice as such and not mere information about the financial product. The fact that the pension fund did not perform as well as was expected does not mean that the form of loan was mis-sold. There were significant tax advantages to the schemes. The defendant's accountant was not in favour of such products but that is not evidence that there was anything wrong with them or that they should not have been offered to Mr. Deacon.

The argument is that the bank induced the defendant to enter into the pension backed loans but there is no evidence that it was wrong to do so. He was treated as an important customer and entertained by the bank but it is not suggested that his will was overborne by way of undue influence. Mr. Deacon was free to accept or reject the offer of funds on the basis of a pension backed mortgage and in fact he accepted the offer and proceeded to put the loan transaction into effect with the knowledge of his accountant and using his solicitors. Even if it is the case that Mr. Stamp is not a Qualified Financial Adviser within the meaning of the relevant legislation, he was clearly somebody who understood finance and who would in the normal way be available to Mr. Deacon to give him advice about matters financial. He could also have asked his solicitors about that, again subject to the qualification that they were not certified as being expert in that area. Mr. Deacon is an experienced businessman who was perfectly capable of understanding what was being offered and making up his mind.

The idea was that Mr. Deacon would take out a pension policy with an insurance company- which he did with Hibernian (later Aviva). He paid the interest on the money borrowed, the company paid the pension premiums and at the end of the pension term there would be sufficient funds - it was believed - to pay down the capital sum of the loan. That was the theory and, just like endowment mortgages, these financial products had a certain vogue and they had their believers and their sceptics. Mr. Robert Stamp was a sceptic. But the nature of the transaction is not particularly complicated. The advantage was that where somebody had a business like Mr. Deacon the pension premiums could be paid by the company and could enjoy substantial tax allowances. The cost of the borrowing was reduced very substantially.

The combined book of authorities that the parties provided for the court has an extract from the Encyclopaedia of Banking Law, Issue 123 April2013, from para [69] of which I take the following.

> "Where a bank assumes the role of financial adviser to its customer, it owes the customer a duty to exercise reasonable care and skill in the execution of that role. However, a bank does not usually assume the role of financial adviser to a customer who merely approaches it for a loan or for some other form of financial accommodation. As Scott LJ said in *Lloyd's Bank plc v Cobb* (18th December 1991):
>
> > '... the ordinary relationship of banker and customer does not place on the bank any contractual or tortious duty to advise the customer on the wisdom of commercial projects for the purpose of which the bank is asked to lend money. If the bank is to be placed under such a duty, there must be a request from the customer, accepted by the bank, or some other arrangement between the customer and the bank, under which the advice is to be given.'"

Cases where a bank lending money to a customer has also assumed the role of financial adviser will be rare but *Verity and Spindler v Lloyd's Bank* [1995] CLC 1557 was just such a case.

The circumstances in which the court found that the bank became financial adviser in that case were so clear and exceptional that counsel conceded the point, "rightly" according to the editors. And the facts bear no comparison with the instant case and serve to reinforce the applicability of the general rule.

The defendant has not established any ground of defence in statute or common law under this head. If he did have a legitimate complaint about the pension backed loans, that could furnish a basis for counterclaiming but not for defeating the bank's claim on the six capital and interest loans.

Codes
The defendant's submissions argue that he was a consumer within the meaning of the Consumer Credit Act, 1995 and the Consumer Protection Act, 2007 but the consequences of this and the application to the case are not pursued. Counsel did not cite any particular breaches by reference to specific provisions of relevant legislation. These complaints refer to the pension backed loans, which are dated respectively 19th December, 2006 and 19th April, 2007 prior to the commencement date for the 2007 Act, which is 1st May, 2007. There is no evidence that the defendant suffered loss in consequence.

It is difficult to see how the defendant could be considered to be a private and not a business borrower in the circumstances in which the company paid the premiums and benefited from tax relief and Mr. Deacon was to pay down the interest until the policy matured. In this regard I adopt the observations of Kelly J in *Allied Irish Bank plc v Higgins & Ors* [2010] IEHC 219 that are cited above.

In his affidavit in the summary judgment application, Mr. Deacon listed paragraphs in the codes that he alleged had been breached by the bank. He exhibited Central Bank SME codes issued in 2009 and 2012. He alleges breaches not of specific provisions but by reference to pages in the 2012 document, which came into effect after the proceedings in this case were instituted.

The defendant also submits in a very general way that the bank was in breach of obligations under a Central Bank code for dealing with small and medium enterprises, SMEs.

The only specific breach alleged is that the bank did not conduct annual reviews of Mr. Deacon's accounts. It is a matter of debate whether the bank was actually in breach as alleged of offering the defendant the option of annual review meetings, having regard to the contacts that did take place. There is no evidence that he ever requested an annual review and was refused. Neither was there evidence of any conceivable loss. Indeed, Mr. Deacon's evidence was of many contacts following his default on the loans, including negotiations in which he was assisted by the IFA.

It seems clear that compliance with the SME code is not a prerequisite of establishing liability- failure to comply with the code does not wipe out the loan or furnish a defence. See *Zurich Bank v McConnon* [2011] IEHC 75, in which Birmingham J pointed out that in regard to the lending code in question in that case, the sanctions did not include "any suggestion that a breach of the Code renders the contract null and void or otherwise exempts a borrower from the liability to repay." Although courts have adopted a somewhat different approach to the provisions of other lending codes issued under the same statutory authority -s.117 of the Central Bank Act 1989-in regard to claims for repossession of family homes for reasons that are specific to such property, I think that the observation of Birmingham J is applicable here. There is nothing in the circumstances of this case to bring into play the considerations that led Laffoy J and Hogan J to their decisions refusing relief to the plaintiffs in *Stepstone Mortgage Funding Ltd v Fitzell* [2012] IEHC 142 and *Irish Life and Permanent plc v Duff* [2013] IEHC 43 respectively.

It is not easy to find a rational or lawful basis for refusing recovery to a lender that did not, for example, offer an annual review of his account to a borrower who had actively engaged in discussion of his liability and negotiated with a view to restructuring his liabilities.

Other Points
Mr. Deacon knew about the terms of the pension backed loans and he had available to him the assistance of Mr. Stamp. The investment and the administration of the pension funds were not the responsibility of the plaintiff. I accept that Mr. Dwan and Mr. Deering provided limited financial advice that consisted essentially of information about the product they were offering to Mr. Deacon. The defendant has not established any breach of statutory provision or regulation in this regard. Neither do I accept that the agreements were procured by way of misrepresentations or are voidable at the option of Mr. Deacon. He undertook these loans in full knowledge of what they entailed. They are not especially complicated. There were tax advantages but there were also risks that the investments might not perform as well as expected or predicted or hoped. One would only know the amount of the fund at the end of the term. In my view the pros and cons of a pension backed facility were discussed and the defendant chose to proceed.

The submission that because Mr. Deacon signed a waiver of a cooling off period, that means he was a consumer and not dealing by way of business is a non-sequitur.

Conclusions
1. The plaintiff has proved its case in respect of the six loans.

2. None of the many points raised by the defendant Sam Deacon constitutes a valid defence to the claim.

3. The defendant Ben Deacon did not advance any separate case on loan No. 1.

4. There must accordingly be judgment for the plaintiff in respect of loans numbered 1 to 6 against Sam Deacon and on loan No. 1 against Ben Deacon jointly and severally.