THE HIGH COURT

[2014 No. 2862 S.]

BETWEEN

AIB MORTGAGE BANK AND ALLIED IRISH BANKS PLC.

PLAINTIFFS

AND

KEVIN O'BRIEN AND GILLIAN O'BRIEN

DEFENDANTS

JUDGMENT of Mr. Justice Binchy delivered on the 8th day of June, 2018

1. In these proceedings the plaintiffs seek summary judgment in the sum of €2,621,702.19 in respect of sums which they claim they advanced to the defendants pursuant to letters of loan offer dated 23rd September, 2010 and 29th October, 2010 ("the 2010 facilities"). The background to those advances however starts some years earlier. It should be explained from the outset that the 2010 facilities and earlier facilities to which I refer below were advanced by the first named plaintiff to the defendants. However, the plaintiffs entered into an outsourcing and agency agreement with each other on 8th February, 2006, and arising out of that agreement, the second named plaintiff undertook certain functions on behalf of the first named plaintiff in connection with the 2010 facilities. It is for that reason that the second named plaintiff joins in these proceedings as plaintiff.

2. In 2006 the defendants were residing at No. 23 Clonfadda Wood, Mount Merrion Avenue, Blackrock, Co. Dublin ("no. 23"). That premises was held in the sole name of the second named defendant (Mrs. O'Brien"), and at the time was subject to borrowings of approximately €80,000,00, which were secured over the property to the Bank of Ireland. Both defendants were approximately 55 years of age at the time with four young children in their care, one of whom is their own daughter who was at the time still a dependant of the defendants, and the other three of whom are foster children of the defendants, and are younger than their daughter. The first named defendant ("Mr. O'Brien") is a solicitor, Mrs. O'Brien is a housewife and homemaker.

3. During the course of 2006, the premises next door to that of the defendants, No. 24 Clonfadda Wood ("no. 24"), came on the market for sale. Although the houses were of a similar character, Mr. O'Brien considered that no. 24 was suitable for an extension of a kind which could not be undertaken at no. 23 and that, if extended, would be more suitable for the purposes of the defendants. In her first replying affidavit in response to this application, Mrs. O'Brien avers that she was apprehensive about the defendants incurring any debt at this particular stage in their lives. They were fortunate to be living in comfortable circumstances with modest borrowings attaching to their family home and Mr. O'Brien was due to retire aged 60. According to Mrs. O'Brien, she allowed herself to be persuaded by her husband, against her better judgment, that they should acquire no. 24, extend it and then sell no. 23 and apply the proceeds of sale of the latter towards the cost of the acquisition and extension of the former. Mrs. O'Brien avers that she knew little of the detail of any of this and was not involved in any way in the decision making process. She was not made aware by Mr. O'Brien of the amount of the purchase price or how much would have to be borrowed to fund the purchase. She says that having been informed by Mr. O'Brien that he had purchased no. 24, she was later presented with documentation, at home, by Mr. O'Brien, and signed such documents as she was requested by him to sign. She claims that at the time she was under extreme pressure as a result of issues concerning the children, and she was also struggling to manage medical conditions from which she suffered.

4. Mr. O'Brien says that by oral agreement made with an unidentified representative of the first named plaintiff, that the plaintiff agreed to advance 100% of the purchase price for no. 24 to the defendants. As part of this arrangement however, it was agreed that no. 23 would be sold, with the sale proceeds to be applied in reduction of the funds advanced by the first named plaintiff to purchase no. 24. More specifically, Mr. O'Brien claims that the first named plaintiff gave him an informal approval to purchase no. 24 for up to €3 million and promised that if necessary it would also advance additional funds in respect of the stamp duty payable and an unspecified amount in connection with the construction of the extension. In the event, Mr. O'Brien attended the auction and purchased no. 24 for the sum of €2,500,000.00. This was in March, 2006. Shortly thereafter, by letter dated 28th March, 2006, the second named plaintiff requested a solicitor's undertaking in relation to the funds advanced and this was completed and returned to the first named plaintiff by letter dated 27th June, 2006. The completion of the purchase of no. 24 took place on 9th August, 2006. On the same date, the defendants accepted an offer of mortgage loan from the first named plaintiff, and on 11th August, 2006 both defendants executed a Deed of Mortgage over no. 24 in favour of the first named plaintiff. The loan offer of 9th August was an interest only loan, for a term of twelve months.

5. Mr. O'Brien then set about getting planning permission in connection with the extension to no. 24. He clearly wasted no time about this because a final grant of planning permission for the extension was granted by the planning authority on 25th January, 2007. In the meantime, the defendants also let no. 24 to tenants to assist in servicing the interest repayments at the time..

6. According to the Mr. O'Brien, following the grant of planning permission, he approached the plaintiffs with a view to borrowing an additional €350,000.00 to fund the anticipated construction costs of the extension for which the planning permission had been obtained. To his great surprise, this request for facilities was declined. Mr. O'Brien claims that the plaintiffs then suggested that the defendants should consider a smaller extension, and that for that purpose they would be willing to advance additional funding up to €150,000.000. Mr. O'Brien claims that he felt he had no choice but to take this course and proceeded to have plans drawn up for a scaled down version of the extension, in respect of which planning permission was not required. He says that he was acutely aware of the need to move forward quickly in order to be able to move into no. 24, and sell no. 23, and thereby reduce his borrowings and the cost of servicing the same significantly. He therefore proceeded as quickly as possible and the smaller extension was eventually constructed and the defendants moved into no. 24 in December, 2007. He avers however that when he went back to the plaintiffs for the promised funding in relation to the smaller extension, that they reneged on their commitment to advance €150,000.00 towards the cost of the same, and he was obliged to raise the funds for that extension through a loan from his firm, and from friends and relations.

7. Before moving into no. 24, the defendants had placed no. 23 on the market for sale. It was placed for sale in an auction on 26th September, 2007, together with four other residential properties, but not a single bidder turned up to the auction. It is not very difficult to guess in general terms what followed. There was a significant delay in achieving a sale of no. 23 and when it was eventually sold, in 2012, it was sold at the very bottom of the property market for a sum of €762,000.00. Thus, the defendants were left with an enormous shortfall in the anticipated sale price for no. 23, and it is that shortfall that has given rise to these proceedings.

8. Between 2008 and 2012 the defendants let no. 23 and applied the rental income towards their indebtedness to the plaintiffs. According to Mr. O'Brien, an offer of €1 million was received in early 2008 for no. 23. He claims that he sought the consent of the plaintiffs to dispose of the property at that price, such consent being necessary because no. 23 was subject to a mortgage in favour of the first named plaintiff . This mortgage had been completed pursuant to a loan facility advanced by the first named plaintiff to the

defendants in June, 2008, and the mortgage itself was completed on 16th September, 2008. In any case Mr. O'Brien asserts that the plaintiffs refused consent to the sale of no. 23 at this price, insisting that it was "a vulture price" which should be rejected. For their part, the plaintiffs deny that they refused consent, and claim that they did no more than point out that a sale at that price would result in the defendants owing a very significant amount to the plaintiffs. This is borne out by an email from a Mr. Michael Deegan of the plaintiffs to Mr. O'Brien dated 18th March 2009, in which it is stated:-

> "Kevin, as no. 23 forms part of the security for your facilities, you will need to revert to the bank prior to agreeing a sale. As you will be aware, a sale at €1m euro would represent a significant shortfall on the previously estimated value and would have a significant impact on the residual gearing and your repayment capacity".

9. The loan facility referred to in the last preceding paragraph was one of two letters of loan sanction issued to the defendants by the first named plaintiff on 13th June, 2008. These facilities were offered to both defendants jointly. The first loan was in the sum of €2,500,000.00 and the second was in the sum of €760,000.00. The letters of offer do not specify the purposes of these loans. However, it is clear that the facility in the sum of €2,500,000.00 related to the funds that had already been advanced in connection with the purchase of no. 24. The facility in the sum of €760,000.00 related to other existing indebtedness, the bulk of which was held solely in the name of Mr. O'Brien, and at least some of which had been incurred in connection with the acquisition of a holiday home in Wexford and also an apartment in Venice. However, it appears that about €70,000 of this facility was required to clear the existing mortgage over no. 23, which was presumably in the name of Mrs. O'Brien. The latter loan sanction required that no. 23 should be secured to the first named plaintiff. It will be recalled that up to this point in time, that property had been secured in favour of bank of Ireland for the relatively modest balance then due to that Bank, which by this time had reduced to €70,000 approximately. In a letter sent by email on 21st November, 2008 to the solicitor acting on behalf of the defendants (a Mr. Dario di Murro, of Kilroys solicitors, the firm in which Mr. O'Brien is a partner) a Mr. Emmet Molloy of the first named plaintiff sets out how the proceeds of the second loan of €760,000 are to be applied. Firstly the Bank of Ireland mortgage was to be discharged. The balance was to be paid into specified accounts, which it appears were loan accounts in the sole name of Mr. O'Brien. Ultimately, as mentioned above, no. 23 was sold in 2012 for the sum of €762,000.00, and the proceeds of sale thereof were applied in reduction of the facility of 29th October, 2010, which by this time had effectively replaced the 2008 loan facility in the sum of €760,000.

10. Following further engagement between the parties, the first named plaintiff issued the 2010 facilities to the defendants. The defendants, however, failed to adhere to the repayment terms required by the 2010 facilities. Following a period of further engagement between the parties, the second named plaintiff, by letters dated 4th September, 2014, on behalf of the first named plaintiff, demanded repayment of the sums then claimed to be due and owing by the plaintiffs pursuant to the 2010 facilities, being the sums of €2,614,719.86 and €6,982.33 respectively.

11. The application for summary judgment is grounded upon the affidavit of Mr. David Nolan, an employee of the first named plaintiff, dated 2nd February, 2015. The defendants are separately represented in these proceedings, and Mr. O'Brien delivered replying affidavits dated 16th April, 2015 and 19th May, 2015, and Mrs. O'Brien delivered a replying affidavit on 8th May, 2015. Mr. Nolan swore another affidavit on 24th July, 2015, which gave rise to two further replying affidavits on the part of Mr. O' Brien dated 16th October, 2015 and 2nd November, 2015, as well as a second replying affidavit from Mrs. O'Brien on 28th June, 2016. Mr. Nolan swore a further affidavit dated 25th January, 2017. Affidavits in support of the cases of the defendants were also sworn by a Mr. Anthony Layng, a solicitor of Kilroys solicitors on behalf of Mr. O'Brien, and Ms. Patricia Heavy of Patrick F. O'Reilly solicitors on behalf of Mrs. O'Brien.

12. In the course of his affidavits, Mr. O'Brien raised no less than twelve different points in opposition to this application. At the hearing of the application however these were reduced to three core points as follows:-

> (1) The facilities offered by the plaintiffs to the defendants in 2010 were no more than an internal banking exercise and did not give rise to any actual advance of funds by the plaintiffs to the defendants. Accordingly, those loan agreements are void for want of consideration or on the grounds that the consideration moving between the parties was past consideration.
>
> (2) Mr. O'Brien relied upon his oral agreement with the first named plaintiff that it would advance funds to him to construct an extension at no. 24. The failure on the part of the first named plaintiff to honour this oral agreement caused the defendants a delay in constructing an extension. In turn, this caused a delay in placing no. 23 on the market for sale and as a result of this delay the defendants, instead of selling no. 23 at the top of the property market, were ultimately forced to sell that dwelling house at the very bottom of the market. If these proceedings are remitted to a full plenary hearing, it is the intention of the defendants to counterclaim for what they say is the resulting loss.
>
> (3) The plaintiffs failed to comply with the code of conduct of mortgage arrears in circumstances where the defendants made every effort to co-operate with the plaintiffs, including by signing the very agreements relied upon by the plaintiffs in support of this application. By seeking summary judgment, the first named plaintiff seeks to avoid determination of any issues in relation to the code of conduct on mortgage arrears.

13. Mr. O'Brien acknowledges having received a loan from the plaintiffs to purchase no. 24. Somewhat confusingly, at para. 36 of his affidavit of 16th October, 2015, he avers:-

> "I admit for the purposes of the proceedings herein, and not otherwise, that I am indebted to the first named plaintiff in respect of sums advanced to me in August 2006 in order to complete the purchase of 24 Clonfadda Wood. I do not accept that the said sums are due and owing at the present time. I say that the sums advanced to me and drawn down and paid over by bank draft to the vendor's solicitors for 24 Clonfadda Wood totalled the sum of €2.5 million. Critically, I say that the last advances of the mortgage loan to me by the plaintiffs were in August 2006 and that no further or other funds were advanced by the plaintiffs to me thereafter. I say that from 2006 onwards the actions taken by the plaintiffs were with a view to protecting only their own positions and not providing me with any financial payments, consideration or benefits."

14. I think that the apparent contradiction on the part of Mr. O'Brien in acknowledging that he is indebted to the first named plaintiff for the sums advanced in 2006 but at the same time stating that no sums are due and owing at the present time, is probably explained by reference to the counterclaim that he maintains that the defendants have against the first named plaintiff on account of its failure honour the agreement that Mr. O'Brien alleges that he had with the first named plaintiff in relation to the funding of the extension at no. 24.

15. It is submitted on behalf of Mr. O'Brien that this matter should be sent to a full plenary hearing in order that evidence can be

adduced as to the oral agreement that Mr. O'Brien alleges he reached with the representatives of the first named plaintiff. It is also submitted that it is necessary to adduce evidence from expert witnesses pertaining to the depreciation in the value of houses during the period concerned and furthermore that discovery of documents will be required in relation to all the issues raised by the defendants.

16. It is further submitted on behalf of Mr. O' Brien that it is necessary to remit the dispute to a plenary hearing due both to issues of law and issues of fact. The issue of law is whether or not the delay that Mr. O'Brien alleges the plaintiffs caused in the disposal of no. 23 is one for which the plaintiffs are liable in law to the defendants and if so, whether that operates so as to prevent the plaintiffs from demanding repayment of the 2006 loan in full or at all. Mr. O'Brien relies upon the case of the *Leopardstown Club Ltd. v. Templeville Developments Ltd*. [2006] IEHC 133 where the Court held at pp. 10-11 that the defendant had raised untested points of law which could only be determined by way of plenary hearing.

17. Similarly, it is submitted on behalf of Mr. O'Brien that the case should be remitted to plenary hearing to determine issues of fact which are disputed. I was referred to a number of cases in this regard including the well-known authorities of *Harrisgrange Ltd. v. Duncan* [2003] 4 I.R. 1 and *Chadwicks Ltd. v. P. Byrne Roofing Ltd.* [2005] IEHC 47. In the former case McKechnie J. said, as regards the summary judgment procedure:-

> "where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure".
>
> 18. This was developed further by Clarke J. In *Chadwicks* Clarke J. stated:
>
> "where the facts are in dispute the court should only grant summary judgment where either:-
>
> (a) Even on the facts asserted by the defendant no defence would arise; or
>
> (b) The facts asserted by the defendant amount to a mere assertion of a defence where there is no credible evidence for the defence which the defendant seeks to assert …
>
> Finally it may be observed that the defence may amount to a mixed question of law and fact in which case the court must exercise a judgment as to whether the factual matters in respect of which a credible dispute has been established combined with any legal issues which are not capable of being resolved on a summary judgment motion give rise to a fair or reasonable probability of the defendant having a real or *bona fide* defence."

19. It is submitted that the plaintiffs have relied exclusively upon the 2010 facility letters without any qualification, and that the plaintiffs have not contested the contents of Mr. O'Brien's s affidavits in relation to the background leading up to the 2010 facilities and in particular the fact that the monies owing by the defendants to the first named plaintiff were advanced in 2006. Mr. O'Brien maintains that he at all times tried to co-operate with the plaintiffs in arriving at a resolution in relation to the repayment of the loans. He says that he has offered to pay all of the interest payable under the loan facilities which at the time he made the offer would have come to €43,000.00 per annum, together with an additional €7,000.00 per annum towards the capital. He says that he should not have been deemed to be a non-cooperating borrower for the purpose of the Mortgage Arrears Resolution Process (MARP), but he acknowledged that when he was so designated by the plaintiffs, he failed to appeal that decision within the permitted time. He says that he completed all necessary forms as regards the provision of financial information and had numerous meetings with representatives of the plaintiffs. He further says that he has used his best endeavours to apply as much of his earned income and rental income to the plaintiffs in discharge of the entirety of the interest due together with a limited and modest repayment towards capital.

20. Mrs. O'Brien resists this application for judgment on two grounds. The first is on the ground of *non est factum*. Secondly, she maintains that she was subjected to duress and undue influence in relation to the loan transactions. She advances the *non est factum* defence on two bases. Firstly, she said that at all times she entrusted the management of the financial and business affairs of the household to her husband. She did not receive any independent legal advice in connection with the transactions with the plaintiffs and she did not have any direct contact of any kind with the plaintiffs until February, 2012. She avers that she was never made aware of the true nature and extent of the financial arrangements that were put in place in 2006, 2008 and 2010. She deposes as to the discussions that she had with Mr. O'Brien in 2006 in relation to the proposed acquisition of no. 24 and the intended sale of no. 23. She says that she expressed very grave reservations to her husband in relation to these proposals, having regard to their ages at the time, their various responsibilities to their children and the fact that she owned no. 23 which was subject to a modest loan at the time. She avers that she would have been happy to remain in no. 23 for these reasons, and while she understood the reasons advanced by her husband for moving house, she did not agree that those reasons merited making the move, having regard to the increased indebtedness that would be incurred. She acknowledges that she was informed of the decision but she says that she was not in any way involved in the decision-making process. She was not made aware of the purchase price of no. 24 or how much would have to be borrowed to fund the purchase and costs of construction of the extension thereto. She was unaware that she had signed a loan facility in 2006, but she did recall signing documentation presented to her at home by her husband and she signed that documentation on his request. However, she says that at that time she was labouring under extreme personal pressures.

21. In her second affidavit she exhibits a report from a Dr. Niall Pender, Principal Clinical Neuro Phycologist at Beaumont Hospital. This report was obtained during the course of these proceedings for the purpose of providing an opinion as to the capacity of Mrs. O'Brien at the time of the 2006, 2008 and 2010 transactions. The report contains a lot of personal information and it is unnecessary to summarise it in any detail here. Dr. Pender concludes by saying that he cannot say definitively that Mrs. O'Brien did not have the capacity to manage her financial affairs between 2006-2011, but he opines that during this period she was very vulnerable emotionally, and having regard to this and also to chronic pain and migraine and also to the demands of her children, in his opinion she did not have any "spare capacity" to engage with her finances.

22. Mrs. O'Brien says that she felt she was presented with a *fait accompli* by her husband in 2006, he having bid for and purchased no. 24 at auction. She says however that she never wanted to embark upon the purchase of no. 24 and that her objections and reservations where not listened to by her husband. She asserts that the plaintiffs should have met with her as part of their duty to her as a customer. She says that in 2008 she was approached by Mr. O'Brien who asked her to sign mortgage deeds. He said that this was at the insistence of the plaintiffs. She says that she felt entirely in the dark as to why documentation was being put in place in 2008 when the property had been purchased in 2006. She was completely unaware that loan facilities were being made available to Mr. O'Brien in relation to borrowings that were unrelated to no. 24, which borrowings were personal to Mr. O'Brien and in respect of

which the plaintiffs had no security at the time.

23. In relation to the 2010 loan facilities, Mrs. O'Brien agrees with Mr. O'Brien that no new advances were made to the defendants and that what occurred at this time was merely a restructuring of existing facilities. She claims that Mr. O'Brien exerted considerable pressure on her to enter into these transactions, on the basis that he was being put under pressure by the plaintiffs to do so.

24. The above is the factual background against which Mrs. O'Brien claims to have available to her the defence of *non est factum*. In support of her defence under this heading, the she relies upon a number of authorities, but most particularly the cases of *Friends First Finance Ltd. v. Charlotte Lavelle & Anor* [2013] IEHC 201 and the decision of Clarke J. in *Ulster Bank (Ireland) Ltd. v. Roche & Buttimer* [2012] 1 I.R. 765. In *Lavelle*, Mrs. Lavelle and her husband were being pursued by the plaintiffs for the sum of €1.75 million. Mrs. Lavelle was being pursued in her capacity as principal borrower, and her husband was being pursued on the basis of a guarantee that he had signed in respect of the liabilities of his wife. However, Mrs. Lavelle claimed that she relied entirely upon her husband in connection with all financial matters and that she had not borrowed the monies claimed by the plaintiffs. She accepted that she had signed the documentation relied upon by the plaintiffs, but she claimed that she thought that these documents were of a character that she had previously signed in relation to a family trust. The plaintiff accepted that it did not know the circumstances in which Mrs. Lavelle had signed any of the relevant documents. No representative of the plaintiff had ever met Mrs. Lavelle and none of the plaintiff's personnel knew whether she received any letters in relation to the borrowing that was in her name. Somewhat unusually, such correspondence had issued from a third party namely Quinlan Private Investments. Charleton J. found this to be a radical departure from the procedures of the plaintiff financial institution.

25. Charleton J. considered the very strict criteria that must normally be met before a court will make a finding of *non est factum* and having cited the relevant authorities, he referred to the three criteria that must be established:-

> "(a) That there was a radical or fundamental difference between what [the person relying on the defence] signed and what he/she thought he/she was signing;
>
> (b) That the mistake was as to the general character of the document as opposed to the legal effect; and
>
> (c) That there was a lack of negligence i.e. that he/she took all reasonable precautions in the circumstances to find out what the document was."

26. Having regard to the particular background in the case, Charleton J. was of the view that there was no lack of care on the part of Mrs. Lavelle. He also considered that there had been an abrogation of duty on the part of the plaintiff "in arranging a loan for someone whom they had never met and in circumstances where the relevant contract, which is supposed to be a meeting of minds, was entrusted through other parties, namely, her husband Peter Lavelle and Quinlan Private Investments". He stated:-

> "In terms of finding want of care, the balance comes down firmly against the plaintiff financial institution"

27. Charleton J. went further and stated:-

> "Even if the relevant defence of *non est factum* were not to succeed in this case, I would regard it as repellent that a financial institution could hold someone to a bargain in the borrowing of a huge amount of money when there was never any meeting of mind, never mind any meeting in person, whereby that individual could truly be called a borrower as a matter of contract."

28. In these proceedings, it is contended that a clear analogy can be drawn between the facts as presented in this case and those as described by Charleton J. in *Lavelle*. It is submitted that there has been a total abrogation of duty by the plaintiff financial institution, as in *Lavelle* in that Mrs. O'Brien had no contact whatsoever with the plaintiffs and was not a party to the negotiations that ultimately lead to the 2006 loan facility. Nor did the plaintiffs discuss any aspect of the 2008 loan facility with her, and nor did they at any time consult with Mrs. O'Brien at any stage in 2010 in relation to the agreements signed by the defendants in 2010, even though the plaintiffs are relying on those agreements. The plaintiffs were at all times satisfied to allow Mr. O'Brien to communicate on their behalf with Mrs. O'Brien and to present all loan documentation and mortgage documentation to her for signature. It is not disputed that the first meeting between the plaintiffs' representatives and Mrs. O'Brien occurred in February, 2012.

29. As in *Lavelle*, Mrs. O'Brien relied entirely on her husband to manage the financial affairs of the family and had no previous experience of dealing with financial matters. Any suggestion that she herself was negligent must be seen in the light of the particular pressures to which she was subject at the time by reasons of issues relating to her children and her own medical condition. These are not mere assertions, but are assertions of fact supported by the evidence of Professor Pender. It is further submitted that, on the basis of the authority of *Lavelle*, there must be an arguable defence of *non est factum* on the grounds that there was no meeting of minds and therefore no agreement between the plaintiffs and Mrs. O'Brien at all.

30. It is further submitted on behalf of Mrs. O'Brien that she was subjected to considerable pressure by Mr. O'Brien to sign loan documentation. Mr. O'Brien indicated to her that the plaintiffs were putting pressure upon him to complete the documentation, especially the 2010 facility letters relied upon by the plaintiffs. In this regard, reliance is placed upon the case of *Ulster Bank (Ireland) Ltd. v. Louis Roche & Buttimer*. In that case, the second named defendant, who was in a personal relationship with the first named defendant, was also a director of a company owned by the first named defendant, but she had no role nor gained any benefit from the business of that company. Clarke J. held that in certain circumstances, a financial institution is placed on inquiry where it is aware of the facts that would suggest a non-commercial element to a guarantee upon which it intends to rely. He held that a court, in considering the issue, should first establish whether or not the person giving the guarantee was under the undue influence of the person benefiting from the same. If this question is answered in the affirmative, the court may then consider whether there are sufficient circumstances to set aside the guarantee. Having found that Ms. Buttimer was indeed under the undue influence of Mr. Roche, the Court accepted that the plaintiff had no actual knowledge of that undue influence. Nonetheless, Clarke J. was satisfied that as a general principle, a bank taking a guarantee is placed on enquiry where it is aware of facts which suggest, or ought to suggest, that there may be a non-commercial element to a guarantee. He said:-

> "That 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 a spouse or, in the modern context, a civil partner who has at least certain potential legal rights in the assets or income of the other spouse 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."

Having found that the bank was placed on inquiry in that case, and that in failing to take any steps to ensure that the second named defendant was entering into the guarantee freely and of her own will, Clarke J. held that the bank was not entitled to rely on the guarantee.

31. Counsel for Mrs. O'Brien accepted that in order to be able to rely on the authority of *Ulster Bank (Ireland) Ltd. v. Roche & Buttimer*, it is first necessary for the Court to determine whether or not Mrs. O'Brien was acting under the undue influence of her husband. It is submitted that there is sufficient evidence of such undue influence to send this question forward for determination at a full plenary hearing. While acknowledging that there are some significant factual difficulties between this case and *Ulster Bank (Ireland) Ltd. v. Roche & Buttimer*, it is further submitted that in circumstances where Mrs. O'Brien was at the relevant time the sole owner of no. 23, there was a manifest divergence of interests between Mr. and Mrs. O'Brien in particular insofar as certain loan facilities, unrelated to the acquisition of no. 24, were in the sole name of Mr. O'Brien and were then secured, at the behest of the plaintiffs, over no. 23, a property of which Mrs. O'Brien was the sole owner. This factual matrix should have placed the bank on inquiry to determine that Mrs. O'Brien fully understood the implications of the security that she was being asked to give to the first named plaintiff. This, it is submitted, is sufficient to meet the low threshold to refer the matter to plenary hearing.

Plaintiffs' Submissions

In response to arguments of Mr. O'Brien

32. In response to the argument that Mr. O'Brien makes that he received no funds pursuant to the 2010 loan sanctions, the plaintiffs point to the fact that it is clear from both correspondence received from Mr. O'Brien's solicitors and from bank statements at the time that this is not so. In a letter sent by e mail on 22nd December, 2010, Mr. di Murro, the solicitor in Kilroys who was handling the transaction on behalf of the defendants wrote in the following terms to the first named plaintiff :-

> "Please now drawdown the funds available under the new loan facilities and lodge them in clearance of our clients' existence home loan facilities".

33. In reply to this letter, the first named plaintiff, on 24th December, 2010 wrote to the defendants as follows:-

> "Mortgage Loan
>
> Dear Mr. and Mrs. O'Brien,
>
> Property: 24 Clonfadda Wood, Mount Merrion Avenue, Blackrock, Co. Dublin
>
> Mortgage Loan Account No.: 67032346
>
> Loan Amount: €2,563,000.00
>
> I would like to take this opportunity to thank you for your business and wish to confirm that, as instructed by you, funds of €2,563,000.00 in respect of a full/final payment have been drawn down from your loan account … The details of your total mortgage now drawn (€2,563,000.00) are as follows:-

34. Bank statements at the time show a credit for the amount drawn down which is applied to discharge the amount then due on the housing loan account of the defendants, and a new loan account is opened with a corresponding debit. It is submitted that all of this makes it clear that, contrary to what is asserted by Mr. O'Brien, funds were drawn down and applied to the credit of the defendants and, therefore, there was consideration for the acceptance by the defendants of the 2010 loan offers.

35. Furthermore, following upon that it is apparent that the defendants made payments to the first named plaintiff, and Mr. O'Brien repeatedly makes reference in his affidavits in response to this application to his efforts to repay the loan drawn down. All of this is inconsistent with the proposition that no loan was drawn down in 2010, as asserted by Mr. O'Brien. The plaintiffs also place reliance upon the admission by Mr. O'Brien, referred to above, that for the purposes of these proceedings, and not otherwise, he is indebted to the first named plaintiff in respect of sums advanced to him in 2006 in order to complete the purchase of no. 24.

36. It is further submitted that the consideration advanced by the plaintiffs in respect of the 2010 facilities was the extension of supplemental loan facilities as recorded and accepted in writing by the defendants.

37. The plaintiffs also rely on the fact that the statement of account exhibited by Mr. Nolan in his affidavit of 24th July 2015, relating to the facility 23rd September, 2010 records twelve interest only payments of €5,343.51 made between January, 2011 and December, 2011 pursuant to and as required by that facility.

38. The plaintiffs rely upon averments made by Mr. O'Brien himself in relation to repayment of the first facility. For example, at para. 14 of his second affidavit he states:-

> "I say that as further evidence of my determination and my ability to contribute substantially to my mortgage that I made on 15th February, 2015 a payment of €19,666.22 on my home loan mortgage account."

39. In relation to the argument that the defendants have a counterclaim to the plaintiffs' claim, the plaintiffs firstly submit that that could not amount to a defence to the plaintiffs' claim and could only arise as an issue in the context of considering whether such a counterclaim might give rise to a stay on judgment pending the determination of the counterclaim. The plaintiffs rely on the decision of Clarke J. in *Moohan v. S. & R. Motors (Donegal) Ltd.* [2008] 3 I.R. 650, in which case Clarke J. affirmed the application of the principles set out by the Supreme Court in the earlier case of *Prendergast v. Biddle,* (Unreported, Supreme Court, 31st July, 1957), in which Kingsmill Moore J. said:-

> "It seems to me that a judge in exercising his discretion may take into account the apparent strength of the counterclaim and the answer suggested to it, the conduct of the parties and the promptitude with which they have asserted their claims, the nature of their claims and also the financial position of the parties."

40. The plaintiffs submit that if the Court considers there is any merit in Mr. O'Brien's assertion of a counterclaim, the appropriate

course to take is to grant judgment and put a stay on that judgment for an appropriate period, pending determination of the counterclaim.

41. On the substantive issue of a counterclaim, the plaintiffs submit that Mr. O'Brien does not assert that he concluded an agreement with the plaintiffs. The furthest he goes is to say that he was given to understand that the plaintiffs would advance funds to construct an extension. Mr. O'Brien also presumed that, having been given oral approval to expend up to €3 million in the acquisition of no. 24, and having bought the property for €2,500,000.00, he would have the "balance" of €500,000.00 to apply towards stamp duty and the construction of the extension. However, all of this falls significantly short of an agreement on the part of the first named plaintiff to advance a loan to fund the cost of the extension. Accordingly, it is submitted that Mr. O'Brien's case in this regard amounts to no more than a bare assertion that there was an agreement that the plaintiffs would advance funds to enable the defendants construct an extension, and it is well established that such assertions, unsupported by evidence, are insufficient for the purposes of resisting an application for summary judgment. The plaintiffs rely on the decision of Clarke J. in *Irish Bank Resolution Corporation (in special liquidation) v. Gerard McCaughey* [2014] IESC 44 where he held at para. 6.5.5:-

> "Insofar as facts are put forward, then, subject to a very narrow limitation, the Court will be required, for the purposes of the summary judgment application, to accept that facts of which the defendant gives evidence, or facts in respect of which the defendant puts forward a credible basis for believing that evidence may be forthcoming, are as the defendant asserts them to be. The sort of factual assertions, which may not provide an arguable defence are facts which amount to a mere assertion unsupported either by evidence or by any realistic suggestion that evidence might be available, or facts which are in themselves contradictory and inconsistent with uncontested documentation or other similar circumstances such as those analysed by Hardiman J. in *Aer Rianta*. It needs to be emphasised again that it is no function of the court on a summary judgment motion to form any general view as to the credibility of the evidence put forward by the defendant."

42. The plaintiffs point out that Mr. O'Brien refers to an oral agreement with unidentified representatives of the second named plaintiff, specifically. This, it is submitted, gives rise to two problems for Mr. O'Brien. The first is that the loan facilities were advanced to the defendants by the first named plaintiff and so any promises that might have been made by the second named plaintiff could not impact upon liabilities owed to the first named plaintiff. Secondly, Mr. O'Brien's claim in this regard amounted to no more than mere assertions unsupported either by evidence or by any realistic suggestion that evidence to this effect might be available. It is submitted on behalf of the plaintiffs that the counterclaim suggested by Mr. O'Brien suffers from a number of insuperable obstacles, namely:-

> "(i) There is no duty of care known to law of the type asserted by Mr. O'Brien;
>
> (ii) The refusal of loan facilities for the purpose of building a bigger extension to no. 24 than that original planned by the defendants can only have reduced the period of time which no. 23 could be placed on the market;
>
> (iii) Having entered into a five month lease of no. 24 on 13th September, 2006 the defendants could not have sold or marketed that property prior to 13th February, 2007; and
>
> (iv) The agreement between the defendants and the first named plaintiff specifically provides that:-
>
> > "All sums payable by the customer under this agreement shall be made to the bank in full in such manner as the bank may direct, free of any present or future taxes, levies, imposts, duties, charges, fees or withholdings and without set off or counterclaim or any restrictions, conditions or deduction whatsoever.""

43. The plaintiffs deny that there has been any failure on their part to abide by the terms of the code of conduct on mortgage arrears, and submit that the evidence demonstrates a protracted period of engagement on the part of the plaintiffs in keeping with the requirements of the CCMA ("CCMA"). But even if the plaintiffs are wrong about this, it is submitted that it is well established that failure to comply with a banking code of conduct issued by the Central Bank, does not affect the validity of a mortgage loan or the right to enforce the security attaching to same. These principles were applied in the case of *Harrold v. Nua Mortgages Ltd*. [2015] IEHC 15, in which the court quoted with approval the following passage from the judgment of McGovern J. in F*reeman v. Bank of Scotland (Ireland)* [2014] IEHC 284:-

> "It is clear therefore, that non-compliance with a statutory code does not relieve a borrower from his obligations under a loan to repay the lender, nor does it deprive the lender of its rights and powers under the loan agreement."

44. This principle was developed further by Clarke J. in I*rish Life and Permanent v. Dunne* [2015] IESC 46 where Clarke J. said at para. 5.24:-

> "It does not seem to me, therefore, that the statutory policy of the 1989 Act and the Code-making powers contained therein is such that same is intended to, as it were, by the backdoor, create a whole new jurisdiction for the courts in which the court would be required to assess in some detail the type of engagement entered into between a financial institution and a borrower who is in sufficient arrears to enable that financial institution, as a matter of law, to seek possession."

Having reached that conclusion, Clarke J. went on to say, at para. 5.27:-

> "In conclusion on this issue I should say that in those circumstances I am satisfied that, in the limited cases of a breach of the moratorium, but in no other cases unless and until appropriate legislation is passed, a court should decline to make an order for possession."

45. The plaintiffs also say that the defendants were deemed to be non-cooperating borrowers for good reason, namely the failure to furnish financial information in relation to their repayment capacity. The defendants were also informed of this decision, and of their right to appeal it, but did not exercise their right of appeal. Accordingly, it is submitted that there is no defence available to the defendants on any grounds associated with failure to comply with the CCMA or the MARP.

Submissions of Plaintiffs in response Mrs. O'Brien's Case

46. Firstly, it is submitted that even on Mrs. O'Brien's own case, she was not at any time operating under the duress or undue influence of her husband. She does not even assert this herself; the furthest that she puts it is that she expressed grave concerns to

her husband regarding the proposed purchase of no. 24, and that she was content to remain at no. 23. Notwithstanding her concerns however, her husband went ahead with the purchase of no. 24. She says that she was then later presented, by her husband, with documentation for her signature, and that when she signed the documents at that time she was under "extreme pressure" as a result of issues concerning the children of the defendants. None of this, it is submitted, is indicative of undue influence or duress. The same applies in relation to documentation signed for the purpose of both the 2008 facilities and the 2010 facilities. It is submitted that the plaintiffs, in reply to the first affidavit of Mrs. O'Brien, specifically put in issue the question of undue influence, by stating:-

> "Based on the averments in her affidavit it does not appear to be the case that the second defendant alleges any wrongful pressure, duress or undue influence on the part of the first named defendant."

Although Mrs. O'Brien subsequently swore another affidavit in the proceedings, she did not take the opportunity to expand upon what she had said previously to make any allegation of wrongful pressure, duress or undue influence.

47. For these reasons, it is submitted that Mrs. O'Brien could not possibly succeed with a case based on undue influence or wrongful pressure on the part of her husband. Moreover, it is submitted that there is no authority to suggest that pressure of the kind that Mrs. O'Brien describes in her affidavits could provide a defence to the plaintiffs' claim, not least in circumstances where whatever pressure she was under was not generated by the financial institutions seeking judgment. For these reasons alone, the case of *Ulster Bank (Ireland)Ltd. v. Roche & Buttimer* is not of any assistance to Mrs. O'Brien. But even if the Court were to find that she was under undue influence, that case would still not assist her, because this is not a case in which Mrs. O'Brien gave financial assistance without obtaining a benefit. In this case, it is submitted, the defendants jointly received loan facilities in order to purchase a family home in their joint names.

48. Moreover, it is submitted that there is nothing at all in Mrs. O'Brien's affidavits to indicate that she believed that she was signing anything other than the documentation that she did sign, or that she did not understand the nature of the documentation that she was signing. On the contrary, it is clear that she understood the nature of the documentation and the commitments undertaken in particular by executed deeds of mortgage. This, it is submitted, distinguishes this case from *Lavelle*.

49. The fact that the property market collapsed, with such terrible consequences for so many including the defendants, does not mean that Mrs. O'Brien did not get a benefit from the transaction at the time. She and her husband were intending to acquire and did acquire and extend a new family home more suitable for their family needs. The fact that ultimately things worked out for the worse does not mean that this was a transaction of the kind entered into either by Mrs. Lavelle or Ms. Buttimer.

Discussion and Conclusions

50. It is an undisputed fact that the first named plaintiff advanced to the defendants jointly the sum of €2,500,000.00 for the acquisition of no. 24, in 2006. While Mr. O'Brien thought that that entire transaction was pursuant to an oral agreement, and while both defendants averred that there was no loan agreement signed at the time, it is not disputed now that a loan agreement governing the advance was in fact signed by the defendants on 9th August, 2006, and a mortgage over no. 24 securing the same was granted by the defendants in favour of the plaintiffs on 11th August, 2006. That agreement however was for a period of twelve months only and the plaintiffs do not rely on it in these proceedings. Instead they rely on the 2010 loan facilities in making this application for summary judgment.

51. Mr. O'Brien resists this application on three grounds. The first of these is that no funds were in fact drawn down in 2010 and there is an absence of consideration in respect of 2010 loan facility. This argument is also put forward on behalf of Mrs. O'Brien. In reply to this, the plaintiffs say that the correspondence between the defendants' solicitor and the plaintiffs at the time clearly shows a request for drawdown of funds and, subsequently, the confirmation of drawdown of funds. They argue that the loans are also evidenced by the relevant accounts, in which in one account a credit in the sums drawn down can be seen, and in another account a debit in the corresponding amount may be seen. The defendants however categorised all of this activity as merely an internal bank exercise. The plaintiffs also rely on the payments made by the defendants subsequent to the acceptance of the 2010 facilities by the defendants.

52. The exercise in which the plaintiffs and the defendants were engaged in 2010 became very common practice in the years following the onset of the financial crisis. There are a number of reasons why this practice developed and the reasons for it will vary from case to case. In this case, the reasons were not put forward by the plaintiffs, and in these proceedings the transactions were characterised by the defendants in the manner described above, i.e. that the provision of the 2010 facilities by the plaintiffs amounted to no more than an internal bank exercise. *Prima facie* however, the underlying point made by the defendants is not an unreasonable one; while the plaintiffs may point to credits and debits on paper, the fact is that no new funds were advanced to the defendants by the plaintiffs. It is true that the defendants' own solicitor requested a "drawdown" of funds but this was all part of the very same exercise which the defendants describe as an internal bank exercise, and with which they were, in effect, obliged to co-operate. It may well be that the plaintiffs took this course as an act of forbearance rather than call in repayment of the monies due pursuant to the 2008 facility, and that that would represent consideration for the 2010 facilities, but the plaintiffs have not pleaded such an argument. They have relied exclusively on the documentation associated with the 2010 facilities, but this ignores the substantive reality that the plaintiffs did not in fact advance any additional funds to the defendants at this time, other than the €70,000 approximately to clear the Bank of Ireland loan over no. 23, to which I refer below.; they simply credited some loan accounts (which were then closed) and opened new loan accounts which were debited the amounts owing on the former accounts. Another way of looking at this is to ask the question: ignoring other transactions in the course of its business, would the first named plaintiff's accounts, if drawn up immediately after the acceptance of the 2010 letters of offer by the defendants, have disclosed any additional lending on the part of the first named plaintiff? It seems highly unlikely, other than the €70,000 approximately advanced to clear the Bank of Ireland mortgage over no. 23. But this was clearly advanced so that the plaintiffs could take security over no. 23, and is arguably not consideration given to the defendants, but a facility provided to benefit the plaintiffs so that they could take that security.

53. For these reasons it cannot in my view be said that there is not some substance in the argument that there was an absence of consideration provided by the plaintiffs to the defendants in connection with the 2010 facilities. Or, to put it in the words of Hardiman J in *Aer Rianta c.p.t. v. Ryanair Ltd* [2001] 4 I.R. 607, it cannot be said, under this heading, that the defendants affidavits "fail to disclose even an arguable defence". This does not mean that, even if they are successful with such a defence, the defendants are not indebted to the plaintiffs, whether pursuant to the original advance in 2006, or pursuant to the 2008 facility letters. But the exact amount due may vary depending on which loan facility is applicable to the debt, and the interest rate payable thereunder. But it is no function of the Court, on this application, to anticipate such matters. For this reason alone, I consider it appropriate to send the proceedings forward for plenary hearing.

54. The question then arises as to whether it is necessary or desirable to consider the other points raised by the defendants, with a

view to deciding whether or not they should be entitled to raise at the hearing all or some only of the issues raised by them on this application. Having considered the matter, it seems to me that having succeeded in establishing their entitlement to a full plenary hearing, it would not be appropriate in this case to restrict the defendants as to the matters they may wish to raise in their defence, other than to restrict them to the matters that they have already raised on this application, as set out above in this judgment.