THE HIGH COURT

CHANCERY

[2018 No. 5224 P.]

BETWEEN

CATHERINE BARRY

PLAINTIFF

- AND -

ENNIS PROPERTY FINANCE DAC, JAMES ANDERSON and PETER ALLEN

DEFENDANTS

JUDGMENT of the Hon. Ms. Justice Stewart delivered on 21st day of December, 2018.

1. The plaintiff in these proceedings seeks a number of reliefs related to guarantees executed by her over the debt of her son's company, Niall Barry Plant Services Ltd ("NBPSL"). The plaintiff has five sons: Eugene, Niall, Paul, Leo and Greg. The guarantees were executed for the benefit of Bank of Scotland (Ireland) Ltd. ("BOSI"). They impact upon a number of the plaintiff's assets, including the property formerly known as Kilmacthomas Workhouse, Kilmacthomas, Co. Waterford. In the facility letters, the property is referred to as the Kilmacthomas Business Centre, Kilmacthomas, Co. Waterford. I am satisfied that these two descriptors refer to the same property, hereafter referred to as "the secured property". The first-named defendant ("Ennis") purchased the plaintiff's loan from BOSI. Ennis appointed the second and third-named defendants to act as receivers for the secured property. By notice of motion dated 8th June, 2018, the plaintiff seeks an interlocutory injunction restraining the defendants from selling, possessing, trespassing upon or otherwise dealing with the secured property. This is the application that is currently before this Court for determination.

Background

2. The plaintiff's application is grounded upon her affidavit sworn on 7th June, 2018, in which she sets out her understanding of the background facts. She refers to the difficult circumstances in which she found herself following her husband's sudden death from an undiagnosed cancer in October, 2000. These circumstances include the inheritance of her husband's struggling business, as well as the care required by her eldest son and an aging relative. Given her lack of business acumen, she began to place increasing reliance on her son, Niall Barry, in the running of her deceased husband's business. Niall Barry had worked in his father's business for the two years prior to his death. Allegedly, Niall was angry that his father's will had not properly provided for him and he therefore took advantage of the dependency his mother had placed upon him. He allegedly threatened to leave the family business if the plaintiff did not act as guarantor for loans that were to be made available to NBPSL. The plaintiff states that she had significant reservations about her son borrowing such large amounts of money, given his lack of experience. Nevertheless, she executed the guarantees under the duress and undue influence placed upon her by her son because she relied on her late husband's business for the family's livelihood and there would be no one available to run it if her son left. She states that she received no independent legal advice before executing the guarantees. BOSI allegedly did not meet with the plaintiff and did not seek to engage with her in any meaningful way regarding legal advice.

3. The plaintiff states that she was neither a director nor a shareholder in her son's company. She did not receive any income from its activities, nor did she receive any consideration under the loan agreements. She argues that these were non-commercial guarantees and she was acting in her capacity as a consumer, within the meaning of the Consumer Credit Act 1995, when she executed them. She has also exhibited a copy of the Consumer Protection Code 2006 to her affidavit. In her view, the guarantees contain a number of terms that breach the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995. The plaintiff argues that BOSI had constructive notice of her position. She states that there was another loan taken out with BOSI by the Barry Property Group (the "BPG"), which is also secured by the secured property. The plaintiff states that she is making repayments on this loan herself and that she has kept same fully up to date. It is alleged that, due to her son's default on the other two loans and the consequent realisation of her guarantees, Ennis has also called in this third loan. She highlights that, along with her tenants, she resides at the secured property and it serves as her constitutionally-protected family home. She makes the case that the rent paid to her by her tenants serves as her only source of income. If the receivers continue to interfere with her tenancy arrangements, she will have no source of income for daily living and the continued repayment of her own loan to Ennis. She makes a number of allegations regarding Ennis' continued operation in this jurisdiction and the impediments it could cause to recovering damages following the conclusion of this action.

4. Donal O'Sullivan, a company director of Ennis, swore an affidavit on 25th June, 2018. A booklet of documents is exhibited thereto. By reference to this documentation, Mr. O'Sullivan seeks to counter the plaintiff's self-characterisation as a housewife with no business acumen. He makes the case that the plaintiff was actually a driving force within the family business, both before and after her husband's death. This business would include a company previously operated by the Barry family, Mahon Valley Investments Limited ("MVIL"), which the plaintiff became involved with in 1993. He also directly challenges her suggestions that she received no benefit/consideration for her guarantees and that she was acting in her capacity as a consumer at the relevant time. He highlights that the mortgage and charge dated 28th March, 2007 ("the mortgage"), which the plaintiff executed over the secured property, is an "all-sums" mortgage. As for the issue of independent legal advice, Mr. O'Sullivan directs the Court's attention to the declarations contained in the security documentation, which the plaintiff signed to affirm that she had "been advised to take, and [had] been given a due opportunity to take, independent legal advice in respect of [her] obligations". It is averred that the plaintiff's solicitor, Joseph Nolan of Joseph Nolan & Co., witnessed these signatures personally. These same solicitors act for the plaintiff in these proceedings and were the authors of correspondence in which the issue of duress/undue influence was first raised.

5. Mr. O'Sullivan also exhibits a settlement agreement between the Ennis, NBPSL and the members of the BPG, in which the plaintiff acknowledges her indebtedness to Ennis. This agreement includes a waiver of independent legal advice, which the plaintiff executed on the same date she executed the settlement agreement. The agreement sets out a new system of repayments, which has also not been adhered to. Under the terms of this agreement, default on repayment results in all monies owed to Ennis becoming due and owing, including the loan that the plaintiff states she has kept up to date. It is argued in any event that this supposedly up-to-date loan was in arrears for some time before the plaintiff made a payment of €85,800 on 3rd May, 2018, to clear the arrears. The Court has not been informed what matters arose between the parties that gave rise to this settlement agreement, in lieu of commencing the normal debt collection process provided for in the mortgage.

6. In addressing the elements required for interlocutory relief, Mr. O'Sullivan disputes every aspect of the case set out by the plaintiff. In particular, he questions which business it was that Niall Barry threatened to leave if his mother did not comply with his demands. He avers that MVIL was insolvent by 2006, meaning that it would have made no difference to the plaintiff whether Niall Barry departed the company or not, as it was not providing her with any income. As for the BPG, Mr. O'Sullivan argues that Niall Barry's departure would also have had little impact, as his three brothers were also members of the Group. To the best of Mr. O'Sullivan's knowledge, the secured property is not the plaintiff's family home. He points out that the rent she collects is far higher than the figure specified in her grounding affidavit. He also questions why the plaintiff would have signed a settlement agreement which directed all of the rent be paid to Ennis if that same rent was her only source of income.

7. The plaintiff swore a replying affidavit on 2nd July, 2018. She states that her involvement in MVIL as a director was only arranged so as to meet the statutory requirements in place at that time, which required a company to have two directors. She highlights that she resigned from this position in 2003 and was replaced by two of her sons. While MVIL's financial statements might indicate that the company was solvent, the plaintiff says that this apparent solvency was offset by the suite of personal debt that her late husband left behind. By 2006, MVIL was insolvent and the company was liquidated in 2011. As for the BPG, the plaintiff avers that her sons set up this business at BOSI's request, as they wanted the loan to be received by a solvent business entity, which MVIL was not. She says that she had no active involvement in same, save for taking the steps that Niall Barry informed her were necessary to secure renovation funding. Mr. O'Sullivan's characterisation of the family borrowings is emphatically denied. The plaintiff also challenges any attempt to conflate the loan facility provided to NBPSL and the overdraft provided to NBPSL. She reiterates that she executed the guarantee on NBPSL's loan in her capacity as a consumer and denies that the full rent received from the secured property was to be paid to Ennis under the settlement agreement.

8. Regarding the prior involvement of Joseph Nolan and Co. in these matters, the plaintiff avers that Mr. Nolan witnessed her signature of the guarantees whilst acting on behalf of NBPSL. He was not instructed to provide the plaintiff with legal advice at that time and he did not propose to act on her behalf. She re-iterates that she did not have such advice, that she did not meet with BOSI beforehand and that the nature of the transaction she undertook in 2007 was not explained to her. In response to Mr. O'Sullivan's suggestion that one of the plaintiff's other sons could have stepped in if Niall Barry left the business, the plaintiff states that Eugene is disabled, whilst Leo & Greg were students at the relevant time. As for Paul, he was employed in the IT sector and had no business experience.

9. As for the settlement agreement, the plaintiff highlights that this agreement was supposed to be confidential and was therefore not disclosed in her grounding affidavit. She disputes Mr. O'Sullivan's characterisation of the agreement and her involvement in it. She says that the agreement was negotiated by Niall Barry and that she had no involvement in same. She says that the €85,800 payment, which cleared the arrears on her loan, came from two sources: 1) proceeds from the sale of her family home (the plaintiff now lives in a cottage adjoining the grounds of the secured property); and 2) monies that Ennis had improperly taken from her beforehand. She alleges that there are further financial irregularities which call the sum of her arrears into question. In any event, she argues that the settlement agreement was terminated by an agent of Ennis following the failure to comply with its terms. While the plaintiff makes no reference to it, Clause 4.4 of the settlement agreement states that the agreement immediately terminates following the threat or issuance of legal proceedings in relation to the facilities.

Submissions

- *The Transactions*

10. Entirely independent of the various legal issues and the status of the parties to these loans, there is a significant disagreement on the basic facts behind these borrowings. Who borrowed these monies? To what use were they put? Who is to be considered responsible for these debts? What precisely happened in the run up to these proceedings? In so far as the plaintiff maintains that one of these loans is "her loan", the defendants maintain that it was a loan to the BPG, and not to the plaintiff specifically. They submit that the financial background to this matter can be described as a mutual series of transactions, from which the Barrys all benefitted.

11. Regarding the Settlement Agreement, the defendants submit that, following the Barrys' failure to comply with its terms, the Agreement terminated and the full amount of monies owed became due and owing. It is argued that these duly owed monies were called in by the letters of demand. The plaintiff relies on the precise wording of the letter of demand to argue that the loans were called in on foot of the guarantee, and not on foot of the debts owed under a settlement agreement that has, under its own terms, been terminated. In the plaintiff's submission, it is not appropriate for the defendants to move the goal posts and seek to recoup all the debts owed, as that is not the basis upon which this particular debt collection was progressed. It is submitted that the debt sought to be collected by Ennis is the plaintiff's debt flowing from her guarantee of NBPSL's loans, and nothing more.

- *Undue Influence*

12. The parties rely on Clarke J.'s (as he then was) decision in *Ulster Bank v. Roche & Buttimer* [2012] 1 I.R. 765, which sets out the test for undue influence imposed by a third party (i.e. the principal debtor). They explore that decision in detail and refer to the Court of Appeal's interpretation of it, as expressed in *ACC Loan Management Ltd v. Connolly* [2017] IECA 119 and *Ulster Bank v. De Krester & Fox* [2016] IECA 371. The plaintiff also relies on the Court of Appeal's decision in *ACC Bank v. Walsh* [2017] IECA 166, whilst also seeking to distinguish the decisions in *Connolly* and *Bank of Ireland v. Curran* [2016] IECA 399. In the defendants' submission, the plaintiff's case is extremely vague and is constructed on bald-faced assertion, in contrast with the factual narrative that they put forward. Even if the Court were satisfied that undue influence is a live issue in this case, the defendants submit that BOSI acted entirely above board in obtaining the guarantees, meaning that there is no arguable case under the second leg of the *Roche* test. In making that submission, they rely on evidence of the plaintiff's extensive involvement in the background financial dealings for the family business, which would not have put BOSI on inquiry as to whether the guarantee was freely given.

13. The plaintiff submits that the operation of the *Roche* test in this case correlates precisely with the scenario envisioned by Birmingham J. (as he then was) in *ACC Bank v. McEllin & Ors*. [2013] IEHC 454. The plaintiff also relies on *Prendergast v. Joyce* [2009] 3 I.R. 519 as a statement on how the presumption of undue influence is to be interpreted and rebutted. She submits that neither BOSI (who were acting in their own interest) nor Joseph Nolan (who was acting for NBPSL) could provide the advice necessary to rebut that presumption. In her submission, Niall Barry was the primary point of contact in negotiating both the terms of the facility letter and the settlement agreement, and that this fact in and of itself should have put BOSI on inquiry as to whether her guarantee was freely given.

- *Status as a Consumer*

14. At the hearing, the plaintiff referred to Chapter 4 of the Consumer Protection Code 2006 as an example of how her consumer protections had not been complied with. The defendants maintain the plaintiff was acting in her capacity as a member of the BPG

when she involved herself in this series of commercial transactions. Even if the Court were to accept that she was acting in her capacity as a consumer, the defendants deny that there has been any breach of the consumer regulations. It is submitted that the Consumer Protection Code does not assist the plaintiff in her claim. In this respect, reference is made to *Zurich Bank v. McConnon* [2011] IEHC 75 and *Irish Life and Permanent v. Dunne* [2016] 1 I.R. 92. It is also argued that the Code did not apply when the plaintiff gave the guarantee. The defendants dispute whether the Consumer Credit Act 1995 and Consumer Protection Act 2007 can be applied to consumer guarantees over commercial loan facilities.

- Consideration

15. Regarding the plaintiff's allegation that the guarantee is unenforceable for lack of consideration, the defendants refer to Donnelly's *The Law of Credit and Security* (2nd Ed.), which states that the consideration that renders the contract binding is the consideration afforded to the principal debtor. In this case, it is submitted that the consideration comprises of the loans advanced to NBPSL. The defendants also re-iterate their submission that the plaintiff did receive consideration, as the guarantees also form part of the loan advanced to the BPG, which took on the plaintiff's personal liabilities.

- Miscellaneous

16. The plaintiff has asserted on affidavit that she has yet to be presented with evidence that Ennis purchased her loan. The defendants submit that it is for the plaintiff to prove her case, and not for the defendants to prove it for her. In any event, they highlight the documentation exhibited to Mr. O'Sullivan's affidavit, which evidences the transfer from BOSI to Ennis. They also refer to the plaintiff's admission of her liability to Ennis, as expressed in the Settlement Agreement, which was not referred to in any way when the plaintiff sought ex parte relief from the Court. In fairness to the plaintiff, this point was not pressed at hearing.

- The Remaining Elements for Interlocutory Relief

17. Regarding the adequacy of damages and balance of convenience, the plaintiff relies on Haughton J.'s decision in *Langan v. Promontoria (Aran) Ltd* [2017] IEHC 309. She maintains that the secured property does serve as her family home and that her case is even more deserving than that of Mr. Langan, as she is dependent on the rental stream from the property to pay for ordinary and necessary living expenses. She also relies on this Court's decision in *McGarry v. O'Brien* [2017] IEHC 740. She submits that the balance of convenience lies with the preservation of the *status quo*, which is the continued upkeep of the property and the ongoing payment of her own loan.

18. For their part, the defendants maintain that the secured property is a commercial premises and not the plaintiff's family home. As such, they argue that the plaintiff will be adequately compensated by an award in damages. By contrast, they submit that the plaintiff's continued collection of the rent prejudices their position, most especially in circumstances where she has not particularised how that rent is being dispensed. In addressing the *McGarry* decision, counsel argued that this Court's findings were premised on the very serious questions raised in that case, and that the decision was not to be taken as a viewpoint on the adequacy of damages in compensating for real property rights generally. It is submitted that the balance of convenience lies with the defendants, as the *status quo* of the receivership should be maintained. The substance behind the plaintiff's undertaking as to damages has also been challenged, as no information whatsoever has been provided to substantiate that undertaking.

Preliminary Findings of Fact

19. As this is an interlocutory application, this Court cannot make final findings of fact in this matter. That said, I will first set out the facts which are not in dispute and/or are indisputable. There are eight members of the Barry family that are relevant to these proceedings: the plaintiff, her late husband, their five sons and an elderly relative who died in 2006. MVIL was incorporated in 1993, with the plaintiff and her husband serving as its directors. Niall Barry began working in the business in 1998. The plaintiff's husband died in 2000. After that date, Niall Barry took up his late father's role as a director of MVIL. The documentation establishes that MVIL was solvent at that time, but the plaintiff disputes this, having averred that the overall business was in debt. After her husband's death, the plaintiff became responsible for the care of her younger sons (who were students at the time), her eldest son (who is disabled and was reliant on her care at the time) and an elderly relative (who has since died). She was also bequeathed her husband's interests in the secured property. NBPSL was incorporated in March, 2002, with Niall and Leo Barry serving as its directors. Around the three-year anniversary of her husband's death, the plaintiff ceased to act as a director of MVIL and was replaced by two of her other sons, Leo and Paul. Some time after this, Niall, Paul and the plaintiff personally borrowed €303,000 from BOSI under a facility letter dated 9th June, 2005. This loan was used to refinance Bank of Ireland and to renovate semi-derelict buildings located on the secured property. It was secured by, *inter alia*, the borrowers' interests in the secured property. It is somewhat confusing how this facility could have been drawn up, and the loan drawn down, if the plaintiff truly is the sole owner of all the lands contained in the secured property.

20. By 2006, MVIL had truly entered financial difficulties. On 13th July, 2006, the BPG business name was registered, with the plaintiff and her four younger sons listed as its owners. From that point forward, the BPG was the family business. Three financial transactions were arranged by facility letters dated 3rd November, 2006. The first ("Transaction 1") is a €50,500 loan between BOSI and NBPSL. This loan was used to refinance Bank of Ireland. It was secured by, *inter alia*, a guarantee & indemnity of NBPSL's directors and a guarantee & indemnity of the Barrys trading as TBG, supported by a charge over NBPSL's interest in the secured property. The second transaction ("Transaction 2") involved BOSI opening a Business Current Account in the name of NBPSL with an overdraft facility limited to €200,000. It was to be used solely for working capital. This facility is secured by, *inter alia*, a guarantee & indemnity of NBPSL's directors and a guarantee & indemnity of the Barrys trading as TBG, supported by a charge over NBPSL's interest in the secured property (the clause refers to "Borrower", which this Court presumes to mean "Accountholder", as specified at the start of the facility letter). The third transaction ("Transaction 3") involved a €464,950 loan between BOSI and the Barrys trading as the BPG. The loan was secured by the interest held in the secured property by the Barrys trading as the BPG. It was used to renovate a portion of the secured property, to refinance Bank of Ireland, to refinance a loan drawn down by the plaintiff personally and to refinance two further loans drawn down by the plaintiff & Greg Barry. No information has been provided as to the provenance and purpose of these latter three loans, nor has any information been provided to explain how the Bank of Ireland debts came to be. If they relate to the serious debts that the plaintiff's husband held at the time of his death, that position was not stated on affidavit. Transactions 1-3 were designed so that the security for one also covers that borrower's general liability to the Bank. Transactions 1 and 2, which are secured by guarantees, have documents appended to them which state that the guarantor has been advised to take, and was given due opportunity to take, independent legal advice. The acceptance form for Transaction 3 includes a declaration that the borrowers are acting in the course of their business, trade or profession.

21. An amending facility letter, dated 1st March, 2007, was sent by BOSI to the Barrys trading as the TBG. It seeks to amend a Loan Agreement dated 3rd November, 2006. The amending letter is titled "Re: Loan Account Number: 803244/101". Bearing in mind the addressees on the letter and Section 2A of the Settlement Agreement, it seems clear that the agreement sought to be amended is

Transaction 3. There is another amending facility letter, dated 21st May, 2007, sent by BOSI to the directors of NBPSL. The letter amends a Loan Agreement dated 3rd November, 2006. This amending letter is titled "Re: Loan Account Number: 701814/103". Again by reference to addressees and the Settlement Agreement, it seems clear that the agreement sought to be amended is Transaction 1.

23. The effect of these amendments was to state that the interest held by the plaintiff in the secured property was the intended security for these transactions. It is important to state at this juncture that the plaintiff has not advanced a claim that the guarantee is invalid by reason of past consideration, as is commonly argued in cases such as this. This is not a matter of a new or extended guarantee being executed by the plaintiff for which there was no present consideration provided by the lender. If that is a point of dispute between the parties, it was not explicitly stated at hearing and no authorities were opened on that point. This amendment was made for the purposes of rectification, so that the contract between the parties better reflected their intentions at the time of execution. Without that rectification, the security would have been limited to NBPSL's interest in the secured property. While no amendment to Transaction 2 has been exhibited, it seems clear that the security for these loans is to operate generally, meaning that the security for a borrower's transaction serves as the security for all of that borrower's transactions. This is reflected in the terms of the mortgage deed.

24. MVIL was liquidated in 2011. At some point, the Transactions fell into arrears. In 2015, BOSI's interest in the facilities became vested in Ennis. It remains unclear what precisely occurred during the early months of Ennis' commercial relationship with NBPSL and the Barrys. It is clear that some sort of negotiation took place in respect of Transactions 1-3. The final terms of that negotiation are set out in the Settlement Agreement dated 13th June, 2016. Clause 3.1.19 of that agreement states:-

> "… If any of the terms of this Agreement are not fully complied with by the Borrowers at any time to the full satisfaction of the Company:
>
> > (i) This Agreement shall immediately terminate upon notice from the Company to the Borrowers to that effect and the Parties' rights and obligations under this Agreement shall come to an end; and
> >
> > (ii) all amounts payable under the Facilities (the "Full Amount") shall become immediately repayable by the Borrowers as if this Agreement has never existed…"

Clause 4.4 states that the Agreement would immediately terminate if legal proceedings were issued. While the plaintiff has now paid off the arrears on Transaction 3, it seems clear that the repayment obligations set out in the Agreement were not complied with. An agent of the Pepper Group, who act on behalf of Ennis, sent notice of the Agreement's termination by e-mail dated 21st March, 2018. From that date onwards, all monies were repayable and the terms governing the Barrys' relationship with Ennis reverted back to those contained in the facility letters for Transactions 1-3, as amended. While the Agreement is no longer binding on the parties, it still has evidential value. This issue will be referred to in more detail later on in this judgment.

25. Ennis sent a letter of demand to NBPSL on 8th May, 2018, seeking repayment. The letter is titled "Account: 701814/102 (the "Loan Account")". It is clear from this title, and from para. 6 of the letter, that repayment is sought in respect of Transaction 2. No mention is made of Transaction 1, bearing account no. 701/814/103, and I am satisfied that Ennis have not yet sought repayment on that debt. Following NBPSL's failure to repay the debt, a letter of demand dated 14th May, 2018, was sent to the plaintiff. This letter also refers solely to Transaction 2. The second and third-named defendants were appointed to act as receivers by deed of appointment dated 28th May, 2018. As these Transactions were secured on a general liability basis, they were therefore appointed to act over the plaintiff's interest in the secured property, through the amended guarantee to NBPSL's other credit facility, Transaction 1. Correspondence between the parties' legal representatives ensued on 1st June, 2018, and these proceedings were instituted on 8th June, 2018.

Preliminary Findings of Law
- Undue Influence

26. The primary authority on the issue of undue influence is Clarke J.'s decision in *Ulster Bank v. Roche & Buttimer.* As stated therein at para. 16, the Court must undertake a two-part exercise when assessing a claim of undue influence emanating from a third-party: the Court must determine 1) whether the claimant was, as a matter of fact, actually under the undue influence of that third party, and 2) whether the circumstances are sufficient for this undue influence to provide the claimant with a defence. The first leg of the test is a finding of fact based on the evidence. In respect of the second leg, the question is relatively straightforward if it can be shown that the Bank was aware of the undue influence exerted over the claimant. But matters become more complicated in cases of constructive knowledge. At para. 25, Clarke J. reduces the concept of constructive knowledge down to two key factors: a) whether the Bank was put on inquiry, and b) whether the necessary steps were taken so as to put those inquiries to rest. While Clarke J. does not go so far as to set out the parameters of these concepts, it seems clear that the Bank would be put on inquiry when it becomes aware of facts which ought to suggest that there is a significant non-commercial element to the guarantee. Such facts would include the guarantor having no active involvement in the business. It would also include the hallmarks of a personal/familial connection, such as a shared home address or a shared surname. As yet, there is no list of steps required to put a bank's inquiries to rest and this Court does not intend to provide one at this juncture. Such findings could only be made when an appropriate case reaches plenary hearing. But it is generally considered sufficient if the Bank insisted the influenced party take independent legal advice before executing the agreement.

27. The test set out by Clarke J. in *Roche* is the primary mechanism through which a claim of undue influence by a third party is assessed at plenary hearing. But the matter currently before this Court has not yet reached the plenary stage. This is an application for interlocutory relief. Therefore, it is worth considering how a claim of undue influence is to be assessed at the interlocutory stage. In reaching my findings on this point, I am assisted by the Court of Appeal jurisprudence, as expressed in *Connolly, Curran, De Krester* and *Walsh*. Those decisions dealt with applications for summary judgment. The party claiming undue influence was a defendant seeking to establish that they had a credible defence to the relevant plaintiff's claim. As stated in *Curran* and *De Krester*, while the evidential standard is only that of an arguable defence (or, for the purposes of an interlocutory injunction, a serious issue to be tried), the scope of the Court's analysis is identical to that employed at the plenary stage: a successful undue influence claim is fact specific and the Court must consider the facts as a whole. As stated at para. 46 of *Connolly* and para. 32 of *Walsh*, it is not simply a matter of the claimant establishing arguable grounds that they were actually acting under the undue influence of a third party; the claimant must establish arguable grounds under each aspect of the Roche test. This means that there must be arguable grounds (or, in this case, a serious point to be tried) with regard to the claimant actually acting under undue influence, the Bank being on inquiry and the Bank's failure to take the necessary steps to put those inquiries to rest.

28. When establishing those grounds, the claim generally does not even get off the ground if the claimant has failed to specifically

raise the issue of undue influence on affidavit. As stated in *Curran*, it is also insufficient for the claimant to simply make bald assertions on affidavit. A substantial and evidenced claim must be set out. This raises the question of how that standard is to be met at the interlocutory stage, particularly regarding the first leg of the *Roche* test. An interlocutory hearing generally takes place when a set of proceedings is in its infancy. The discovery process has yet to take place and there is no evidence from the witness box. The parties are only just beginning to martial their case. One also cannot under-estimate the insidiousness of undue influence. Undue influence is a creature that thrives on intimacy. It is more likely to be employed during casual conversation, as opposed to during a minuted meeting in the boardroom. How is a person supposed to provide evidence of pressure that was applied to them in times of personal confidence, and generally by unwritten means? While bald assertion is undoubtedly insufficient, it cannot be said that a claim consisting entirely of affidavit evidence should necessarily fail. The claimant in the *Roche* case, Ms. Buttimer, was most fortunate, in that, at plenary hearing, she was able to call upon the evidence of a clinical psychologist who had contemporaneously assessed her at the relevant time. It seems to me that, especially at the interlocutory stage, that level of evidence is not always available. At this stage, the Court is tasked with ascertaining if there is a serious issue to be tired. Oftentimes, the only evidence to indicate undue influence (other than the plaintiff's averments on affidavit) is the evidence of the influencer (who, for obvious reasons, may actively avoid participating in the proceedings) and the loan account file (which is in the possession of the lender).

29. In my view, there are a number of questions which claimants should address on affidavit if undue influence is to even be considered as a serious issue to be tried. Those questions include:

- What commercial experience does the claimant possess, both in general and in relation to the commercial ventures currently at issue?

- What is the relationship that the claimant says gave rise to this undue influence?

- What is the series of events that led to a situation wherein this relationship exposed the claimant to undue influence? In particular, what was the influencer's motivation for unduly pressurising the claimant?

- What did this person do and/or say to impose undue influence upon the claimant?

- What decisions was the claimant motivated to make by that undue influence?

- What would the claimant's attitude to those decisions have been were it not for the undue influence imposed upon them?

- How did these impelled decisions contribute to the set of facts currently being considered by the Court?

In short, and as stated at para. 33 of *Curran*, undue influence is determined based on the circumstances at hand. It would behove claimants to detail and evidence those circumstances as best they can, even at the interlocutory stage. This is not to say that it will always be sufficient to simply set out a claim on affidavit. In order to facilitate the Court's assessment of all the facts, a claimant should produce as much evidence as they can from as many sources as they can, including any written communications between themselves and the lender. In an action where credibility is central, it would certainly reflect very poorly on a claimant if it transpired at a later point in the legal process that they had, without reasonable excuse, withheld evidence from the Court or failed to avert to facts they knew to be relevant.

30. For the lender's part, the insidious nature of undue influence raises a host of complications. If it is hard for a claimant to establish that undue pressure was applied on an oral basis in a private setting, it is even more difficult for the lender to advance its position that such pressure was not applied. However, it is at times like this that the loan account file is invaluable. The documents contained in this file can provide a contemporaneous record of steps taken by the Bank to put any inquiries to rest. It can evidence engagement between the lender and the claimant, efforts made by the lender to ensure the claimant received independent legal advice, any prior commercial experience held by the claimant etc. Of course, the absence of such evidence in the loan account file can go directly towards establishing that undue influence was at play when the loan documentation was executed.

31. The Court of Appeal's decision in *De Krester* is a perfect example of this issue in practice. In that case, the claimant's long history of dealings with the lender, no doubt proven by Ulster Bank's detailed records of their prior relationship with her, proved central to the Court's finding that she did not have a credible defence to the lender's claim. In this case, the lender is a property fund. It is often the case that the successor in title to the lender's interests in the loan does not possess a complete loan account file, as they purchased many dozens of loans all at once from the distressed original lender. This obviously impedes the fund's ability to resist a claim of undue influence at the interlocutory stage. However, that is a failing for the fund to bear alone and cannot feature in a court's assessment.

- *The Consumer Point*

32. While the *McEllin* decision was opened to the Court within the context of the undue influence point, Birmingham J. also addresses the consumer issue, starting at para. 24. In the course of considering this point, he relies primarily on the decision of Kelly J. (as he then was) in *AIB v. Higgins* [2010] IEHC 219. The findings of Birmingham J. broadly reflect my own conclusions on this issue, as expressed in *Hogan v. Deloitte* [2017] IEHC 673. While neither party referenced my decision in *Hogan*, I see no reason to reach a conclusion in this case that differs from my previous findings, so I will refer to it summarily as a matter of convenience. As I found therein, the *Higgins* decision is the primary Irish authority on the status of a consumer, as codified in s. 2 of the Consumer Credit Act 1995. The Higgins decision in turn primarily relies on the European Court of Justice's decision in *Benincasa v. Dentalkit* (Case C-269/950 1997 I-037670). The doctrine of supremacy is a fundamental tenet of EU law (and, therefore by extension, Irish law). When interpreting s. 2, it is the views of the ECJ that hold sway. Having considered a number of authorities opened to me by the parties in Hogan, I concluded that the correct interpretation of s. 2 and, by extension, the interpretation most in keeping with the CJEU case law, was the interpretation contained in the Higgins decision and in O'Regan J.'s decision in *McCambridge v. Anglo Irish Bank Corp. Ltd*. [2016] IEHC 327.

33. The concept of a consumer is to be construed strictly and objectively. Only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer. In this case, the agreements executed by the plaintiff have, as Birmingham J. put it, all the hallmarks of a commercial transaction. While the plaintiff avers that the secured property comprises her family home, it certainly did not serve that purpose when she originally executed these agreements ten years ago. The guarantee of NBPSL's loans contains no aspect of private consumption. I am completely satisfied that the plaintiff was acting in a commercial capacity when she executed these contracts and the consumer point does not warrant any further consideration.

- The Consideration Point

34. There can be absolutely no doubt that there is valid consideration for Transaction 3, as the plaintiff is a member of the BPG and a large amount of her own personal borrowings were refinanced by that loan. With respect to Transactions 1 and 2, the defendants refer to paras. 18-57 and 18-58 of Donnelly's *The Law of Credit and Security* (2nd Ed.), which state as follows:-

> "18-57 As with all contracts, …contracts of guarantee and indemnity must be supported by (lawful) consideration (although this does not have to be stated in the contract). Lack of consideration or failure of consideration will result in the guarantee being unenforceable.
>
> 18-58 With a guarantee, the consideration is rarely provided in the form of a personal benefit for the surety but is instead in the form of a benefit conferred on the principal debtor [normally through] the provision of credit or a loan…While consideration must be legally sufficient, it does not have to be adequate. In fact, it has long been said that, "the least spark of consideration" with suffice."

The defendants have argued that the three financial transactions set out in the facility letters dated 3rd November, 2006, form an interlinked relationship that gives rise to consideration as between each other. Once again, it is somewhat surprising that the defendants have not produced more detailed information on how these loans were originally negotiated and agreed, information which is undoubtedly contained in the loan account file they should have in their possession. This highlights an ongoing concern held by this Court when dealing with these types of cases; successors to the lender's title in the loan attempt to speak on behalf of that original lender and the business relationship they originally cultivated with the borrower, without producing any paperwork or evidence drawn up by that original lender, which would give substance to those submissions.

35. In any event, it is not necessary to engage with the issue of this interlinked relationship in order to dispose of this argument. I can find no fault in the reasoning outlined in the above quoted paragraphs and the interpretation of the law as set out therein. It also coheres with the legal position outlined in McDermotts' *Contract Law* (2nd Ed.) at para. 3-05. Reference is made therein to Birmingham J.'s decision in *Anglo Irish Bank plc v. McKenna* [2014] IEHC 122. On its face, that decision can be distinguished from the case currently before the Court; the defendants in *McKenna* were directors and shareholders of Kapada Ltd., which was the principal debtor in the case. Therefore, they stood to gain directly from the consideration afforded by the Bank to Kapada. However, footnote 12 to para. 3-05 also refers to the Court of Appeal's decision in *Connolly* as having followed *McKenna*. Finlay Geoghegan J. stated as follows at para. 53 of her decision in *Connolly*:-

> " *53. The bank does not dispute that the trial judge incorrectly decided this issue by reference to s. 64 of the 2009 Act. However, it submits that even prior to that Act there was no requirement that a guarantee be executed under seal to be valid. It refers to* [McKenna] *in which Birmingham J. found that the guarantee in question was not executed under seal, but held that there was no such requirement where the bank had provided consideration for the guarantee by way of loan and overdraft facilities to the principal debtor. It submits that there was on the facts herein consideration for the guarantee in the form of the loan facility advanced to the first named defendant.*
>
> …
>
> *55. Whilst the trial judge rejected any arguable defence by reason of the absence of a seal for an incorrect reason, the decision reached was correct for the reasons advanced in the above submissions on behalf of the bank."*

The party claiming undue influence in *Connolly* was a Mr. Maurice Connolly. Maurice Connolly was the father of John Connolly and had acted as guarantor for his son's debts. I have considered the decisions of Hogan and Finlay Geoghegan JJ. in the Court of Appeal, as well as the decision of Fullam J. in the High Court [2015] IEHC 188. Bearing in mind Finlay Geoghegan J.'s comments at para. 47 and Hogan J.'s comments at paras. 17 & 18 (where they state that Maurice Connolly had no involvement at all in the proposed business development and had no commercial interest in it), I am satisfied that the plaintiff's situation in respect of Transactions 1 and 2 is comparable to that of Maurice Connolly. The Court of Appeal nevertheless followed *McKenna* and I am therefore also satisfied that it can be applied to the plaintiff's case. The consideration which renders the plaintiff's guarantee binding is the credit provided to NBPSL.

- Miscellaneous

36. The plaintiff raised two issues on affidavit which were addressed in the defendant's submissions but were not seriously pressed during the plaintiff's submissions. These issues were challenges to the plaintiff's level of indebtedness and to the transfer of the loans to Ennis. While these points were not pressed at hearing, the Court will address them briefly for the sake of completeness. With respect to the latter, the plaintiff has the right to challenge the defendants' assertions that they hold a binding contract with the plaintiff and that they have complied with the terms of that contract. This includes an entitlement to challenge certain background instruments which allegedly bring the defendants into compliance with the terms of the contract between the parties. But there are limits to that entitlement. The plaintiff is a stranger to the defendant company and is, in all likelihood, not a party to all of the contracts executed for the purposes of Ennis acquiring an interest in a legal agreement with the plaintiff. The fundamental principles of corporate governance and privity to contract would prevent the plaintiff from fully challenging corporate instruments and contracts to which she is not a party. Such challenges would only be allowed as far as is necessary to ensure that the plaintiff's contract has been complied with. Once it is has been established that the terms of the plaintiff's contract have been adhered to, it is no longer possible for her to challenge an instrument to which she is not a party. For example, it would not be open to her to challenge the wording in an instrument and suggest that it has a meaning other than the one put forward by the company, unless she can provide some evidence to indicate that the meaning attributed to the instrument by the lender is patently incorrect. In the event that the instrument does not provide the necessary support to demonstrate compliance with the borrower's contract, but the lender can show that the terms of the contract has been effectively met by some other means, then a challenge to the instrument also cannot be maintained by that borrower. Traditional legal principles would operate thereafter in the normal way. On the facts of this case, Mr. O'Sullivan has exhibited the relevant documentation and the plaintiff did not progress that point further at hearing.

37. As for the level of indebtedness owed, it is important not to confuse summary judgment with injunctive relief which involves a receiver. In an application for the former, there is an onus on the lender to establish that the precise sum that they are claiming for is due and owing. In an application for the latter, all that is required is clear evidence of an event of default and clear evidence that some amount of money is due and owing, as this is what triggers the entitlement to appoint the receiver in the first place. In order for the receiver's appointment to be impacted, the borrower would need to establish either that there has been no default or that there are no monies due and owing whatsoever. As the plaintiff has not come anywhere close to establishing either of those things, there is no relevance to be found in a dispute over how much money she owes.

38. With regard to my decision in *McGarry*, a dispute arose at hearing as to my findings on the adequacy of damages. In that case, I concluded that damages would not be adequate remedy for the interference with the plaintiff's real property rights in circumstances where "serious questions" subsisted over the defendant receiver's powers and appointment. Counsel for the defendants argued that this finding does not operate in every case where a court has concluded that there is a serious issue to be tried related to the plaintiff's property rights in land. Rather, it is submitted that the finding applies to situations where very serious questions arise from the facts, and not just an issue to be tried. This is an accurate interpretation of my decision. It reflects my own comments in *Whelan v. Promontoria (Finn) Ltd* [2017] IEHC 739, beginning at para. 40:-

> *"40. In assessing the law in relation to the adequacy of damages, the Court is cognisant of two opposing legal rules of thumb: damages aren't an adequate remedy for a trespass and damages are an adequate remedy for commercial investments. Identical considerations arose in this Court's decision in McGarry v. O'Brien (Rec No: 2017/4686P), which is being delivered contemporaneously to this decision. With respect to the adequacy of damages, the Court's reasoning is broadly similar in both cases. In attempting to reconcile the above rules, the emerging analytic theme is to use a fact-based approach. The property rights at stake in this case relate to real property. Each parcel of land is unique and, where a defendant has improperly disposed of that land, it is impossible to fully compensate for the loss suffered because no other piece of land is identical to the one that was lost. However, where the land is involved in some commercial or monetary venture and the predominant feature of the plaintiff's investment in the land is for some financial purpose, it is quite correct for a court to conclude that such loss can be compensated with an award in damages, as the predominant feature of the plaintiff's investment in the land does not touch upon any of the aspects of that land which make it unique.*
>
> *41. If, on the facts, I were to counter-balance the commercial features of a mortgagor plaintiff's investment in real property, I would look for some fact which 1) displaces financial gain as the predominant feature of the investment (e.g. the property is also that plaintiff's family home), or 2) establishes a potential violation of the plaintiff's property rights in land of such significance as to amount to a violation of the special status those rights hold in the field of property law by virtue of the considerations outlined above. In this case and in McGarry, the predominant feature of the plaintiff's investment in the land was financial. However, in their actions, the defendants in both cases have potentially violated the base level of respect that property rights in land attract. In McGarry, almost the entirety of the defendant's case was in disarray, with affidavits loosely drafted, vital pieces of evidence left out and the receiver's powers exercised in a manner that had the potential to raise serious public policy concerns. The cumulative effect of these facts amounted to a situation where, if the questions to be tried were resolved in the plaintiff's favour, the defendant would have acted with such disregard to the plaintiff's property rights in land that it be simply wrong to allow the receivership to continue before the defendant got his house in order.*
>
> *42. In this case, the defendants have failed to exhibit documentation that should be in their possession and would obviate the Court's concerns with regard to the alleged estoppel by convention. There is also a fair question to be tried with regard to whether the first-named defendant has exercised its powers in circumstances that did not truly warrant such exercise and with an ulterior (and not entirely bona fide) motive in mind. If these issues were resolved in the plaintiff's favour, then such a flagrant disregard and disrespect for the plaintiff's property rights in the land would have occurred that damages could not be an adequate remedy.*
>
> *43. It is important to make clear that, in taking a fact based approach and performing the above assessment, it is not simply a matter of a fair question to be tried being established. I would seek to determine whether the mortgagor plaintiff has established issues which, if resolved in their favour, would mean that the defendant had behaved in such an improper manner that their actions are practically incongruous with the entire notion of real property rights and the special place they hold in Irish law. Such issues include, but are not limited to, high levels of incoherence or lack of care in preparation of the defendant's case or conduct, improper, capricious or arbitrary activity on the defendant's part and/or activity that has the potential to raise serious public policy concerns.*
>
> *44. My approach to this issue, as outlined above, is of course not a mandatory exercise that must be performed in assessing the adequacy of damages and there are a number of other considerations for the Court to also keep in mind, including the plaintiff's actions and attitude in respect of the monies owed, whether title to the lands is in dispute, whether damages would be an adequate remedy for the defendant, whether the undertaking as to damages is substantial etc. However, in cases where a mortgagor plaintiff's relationship to a property is predominantly financial, I am of the view that the relevant defendant(s) ought to demonstrate that, in their conduct before the Court and vis-à-vis the plaintiff, they have borne the plaintiff's real property rights in mind and acted accordingly.*

My reasoning on this issue is based on a fundamental premise that every person has a constitutional and legal right to their property. This is not an absolute right and it is entirely possible that a party can be monetarily compensated for wrongs committed against them within the context of those rights. That said, there are simply some infringements of these rights that money cannot compensate for, by virtue of the *laissez-faire* or contemptuous manner in which they were committed. It is not open to the lender to simply convince itself that it holds certain powers by implication and then, of its own motion, seek to enforce those powers against a protesting mortgagor (as was claimed by the plaintiff in *McGarry*). It is not open to the lender to seek to realise its security in circumstances that do not truly warrant such exercise simply because it wishes to make a quick profit or a larger profit (as was claimed by the plaintiff in *Whelan*). To put it more simply, a lender cannot throw caution to the wind and behave in any way it wants simply because it has large coffers and can afford to pay off any aggrieved parties, if it transpires after the fact that they were not entitled to act as they did. This is a long-standing principle of equity and law, most eloquently expressed (albeit in a radically different context) by Clarke J. in *AIB v. Diamond* [2011] IEHC 505 using the metaphor of one's personal home.

Decision

39. The first step in securing interlocutory relief is to establish that there is a serious issue to be tried. In the plaintiff's submission, the undue influence exerted over her gives rise to just such an issue. As stated at para. 27 above, the plaintiff must be able to prove all the elements of the *Roche* test to the standard required in an application such as this. The first leg of the test is that the plaintiff was actually acting under the undue influence of Niall Barry when she executed the relevant financial transactions. The plaintiff has set out a detailed case on affidavit, which goes well beyond bald assertion. She has addressed on affidavit all of the exemplar questions referred to at para. 29 above. It is the plaintiff's case that she had little to no commercial experience at the relevant time, having cared for her family and her home for the previous number of years. She maintains that she would not have been able to run that business by herself at that time. Motivated by the perceived slights made against him by his late father and the desire to establish his own business, her son threatened to abandon both her and the family business if the plaintiff did not provide a guarantee for the loans of NBPSL. The plaintiff had significant concerns about the wisdom and benefit of those transactions, but executed the guarantees so her son would remain with the family business. NBPSL's default in repaying its debts is a primary event that led to the

appointment of the defendant receiver.

40. In challenging this narrative, the defendants rely on the various facility letters sent by BOSI to the Barrys, all of which refer to the plaintiff in some way. They have exhibited a large volume of background material related to the Barrys and their business. This includes various corporate documents related to MVIL, NBPSL and the BPG. They have also referred to the terms of the Settlement Agreement executed by the Barrys, in which they acknowledge that the sums due are fully enforceable and are not subject to any defence or counterclaim by them. Dealing with this last point first, a waiver is appended to the Agreement, in which the plaintiff waived her right to independent legal advice prior to signing the agreement. The plaintiff has also averred that she did not receive such advice before signing. I have no doubt that the plaintiff is an intelligent woman. That said, she has no legal training herself. While the defence of undue influence has an extensive history in Irish jurisprudence, it is not the kind of defence which a layperson would be expected to identify or appreciate without the assistance of a legal professional. Indeed, this is very reason why lay litigants are often encouraged to seek legal representation (as Peart J. did at para. 49 of *Walsh*). Regardless of the fact that the Settlement Agreement has since been terminated, it would be rather extreme to hold against the plaintiff on this point and thereby prevent her from progressing a claim of undue influence against the defendants.

41. As for the facility letters and exhibited background material, I am not satisfied that any of this material necessarily demonstrates that the plaintiff possessed significant commercial experience and/or was not vulnerable to the undue influence of her son. While the plaintiff is involved in numerous commercial activities/transactions, the overwhelming majority of those activities/transactions also involved either the plaintiff's husband or some composition of her sons. There are some references to borrowings that are/were held solely in the plaintiff's name, such as the €139,900 loan held in the name of the plaintiff, which was refinanced by Transaction 3. However, no further information has been provided about this refinanced loan, which would assist the Court in determining whether the plaintiff was involved in a commercial venture by herself. It is important not to forget that, up until relatively recently, a company incorporated in this jurisdiction was statutorily required to have two directors. The plaintiff also became the sole owner of the secured property, not through any commercial activity on her part, but through the death of her husband. This property was the primary source of the family's income, as the secured property is the principal asset on which the operation of the family business is based. It was used to secure virtually all of the credit facilities extended to the Barry family. No financial institution acting in the whole of its senses would provide a loan without ensuring that the owner the property securing the loan was included somewhere in the paperwork. Indeed, this is most probably the reason why the facility letters for Transactions 1 and 3 were amended in May, 2007, in order to better reflect the intention of the parties and the interest in the secured property that was to serve as security for the transactions.

42. While the commercial documentation related to the plaintiff is quite substantial, I am not satisfied that this necessarily proves the plaintiff was not a housewife at the relevant time. It is perfectly plausible that the plaintiff was included on the basis of either statutory formality or by virtue of her sole ownership of the secured property. The fact that she resigned as a director of MVIL in 2003 (on the same date that her other sons became involved in the family business) also assists in tipping the balance in favour of the plaintiff's self-characterisation as housewife focused on caring for her elderly relative and vulnerable child.

43. Aside from the affidavit evidence of the plaintiff, it seems to me that there are only two other sources of evidence that are available at this early juncture in the proceedings, which would assist in applying the *Roche* test: 1) the evidence of Niall Barry as to his involvement in these matters, and 2) contemporaneously maintained records of the plaintiff's active involvement in running the family business and negotiating the loan agreements, which would show that she held sufficient experience to run the business herself and was not vulnerable to her son's machinations. Niall Barry's evidence in this matter would undoubtedly assist in disposing of this dispute. However, it would have to go beyond a mere self-serving averment, an approach that was condemned by Birmingham J. at para. 31 of *De Krester*. It should also be said that the plaintiff may have difficulty procuring Niall Barry's evidence at this early juncture, especially if it proves true that he conspired to take advantage of his vulnerable mother for his own financial gain. With regard to records of the plaintiff's active involvement in negotiating the loan agreements, the plaintiff submits that no such records exists, as she was a housewife and was not involved in the business at the relevant time. The defendants should have access such records, as they would have been preserved by BOSI in the loan account file. It would include evidence of BOSI negotiating with the plaintiff and/or meeting the plaintiff one-on-one. The file could also include evidence of the plaintiff's involvement in drawing down the loan and spending the borrowed monies. If Ennis have paperwork of this kind in their possession, they have not put it before the Court. There is no evidence before this Court which goes to the plaintiff's capacity as a competent commercial actor in her own right, who would be capable of running a business by herself following the death of her husband without the assistance of Niall Barry, and thereby maintain the family's primary source of income.

44. Having considered this matter as a whole, I am satisfied that the plaintiff has established an arguable case that she was actually acting under the influence of Niall Barry between 2006 and 2008, when the relevant financial transactions were issued. This finding is primarily based on the fact that no evidence has been adduced before me which would indicate that the plaintiff was a capable businesswoman at that time. If evidence were to come to hand further on down the line, which shows that the plaintiff was sufficiently proficient at that time, I might re-consider this finding. I would be especially receptive to such an application if it should transpire that the plaintiff concealed that evidence and did not disclose all relevant material during the course of these proceedings. For example, the Court would be most interested to receive any material related to the financial dealings of the plaintiff and her son, Greg Barry. The plaintiff has already averred that, at the relevant time, Greg was a student with no business experience. Why, therefore, by the end of 2006, was he saddled with over €100,000 in borrowings, borrowings which were taken out in his and the plaintiff's name and also re-financed by Transaction 3? A comprehensive overview of the Barrys' financial history has not been put before the Court. That said, I have not been presented with evidence that the plaintiff withheld relevant information. For now, I am satisfied that the first leg of the *Roche* test has been met.

45. Turning to the second leg of the test, the plaintiff also has to establish to the necessary standard whether BOSI was put on inquiry and whether the necessary steps were taken so as to put those inquiries to rest. The directors of NBPSL are Niall and Leo Barry. Given that Transaction 3 was made available on the same date as Transactions 1 and 2, there can be no doubt that BOSI knew that the plaintiff was the mother of Niall and Leo Barry. It is also clear that the plaintiff received no direct financial benefit from Transactions 1 and 2 or the activities of NBPSL. I am therefore satisfied that BOSI was put on inquiry as to the circumstances in which the plaintiff agreed to act as surety for Transactions 1 and 2. The plaintiff has averred that BOSI took no steps to put those inquiries to rest and Ennis have not put any evidence before the Court which would rebut that allegation. Reference has been made to the solicitor representing the plaintiff in these proceedings having witnessed her execution of the impugned guarantees. In response, the plaintiff avers that Joseph Nolan was representing NBPSL at that time and was not engaged by her for the purposes of providing independent legal advice. While the plaintiff did sign a declaration stating that she had been granted the opportunity to take independent legal advice, in circumstances where that same overall contract may be tainted by undue influence, I am not satisfied that this declaration necessarily prevents the plaintiff from satisfying the second leg of the *Roche* test. Although, I would note that this aspect of the plaintiff's claim is perhaps the weakest, as page 9 of the facility letter for Transaction 3 states that Joseph Nolan & Co. also acted as the nominated solicitors for the BPG. This means that the firm must have provided legal advice to the plaintiff in

some capacity at that time, most likely in respect of Transaction 3. If so, BOSI could be forgiven for believing that the plaintiff had been properly advised, which would mean that they may have taken the necessary steps to put their inquiries to rest.

46. This is but one of the difficulties I have in assessing the plaintiff's case. Nevertheless, I am cognisant of the fact that this is only an interlocutory hearing. The plaintiff has at all times stressed that the Transactions were negotiated by her sons, and primarily by Niall Barry. The defendants have not produced any evidence which would disprove this assertion, for example evidence indicating that the plaintiff took a primary role in the negotiation and running of the business at the relevant time. While there are some holes in the claim advanced by the plaintiff, I remain of the view that a fuller explanation of the facts could support a claim of undue influence in respect of Transactions 1 and 2. Having considered this matter in detail, I am satisfied that there is a serious issue to be tried as to whether the plaintiff's guarantee is undermined by the undue influence exerted over her by Niall Barry.

47. In normal circumstances, the Court would now go on to consider the adequacy of damages and the balance of convenience. However, the defendants maintain that the monies are due and owing under Transactions 1-3. While only Transaction 2 has been called in by Ennis, it would be a relatively simple matter for Ennis to simply serve letters of demand for the monies allegedly due and owing under Transactions 1 and 3, thus returning the plaintiff to the exact same position she started off in. Clause 9.1 of the mortgage also does not require the service of a letter of demand in order for the mortgagee to appoint a receiver. All that is required is that the power of sale has become exercisable. According to Clause 8.1, that power becomes exercisable after the occurrence of an event of default, which the defendants maintain has occurred in respect of Transactions 1-3. As stated in the General Indorsement of Claim, the plaintiff seeks to restrain the defendants from dealing with the secured property. It has to be said, therefore, that there is little point in granting an injunction if the plaintiff cannot establish a serious issue to be tried in respect of Transactions 1, 2 and 3, as Ennis' entitlement to appoint a receiver would subsist by virtue of the unchallenged Transaction. It would therefore be wrong to injunct them in their dealings with the secured property. On that basis, the Court will consider all three transactions and determine whether a serious issue to be tried has been established in respect of each.

48. During the hearing, counsel on behalf of the plaintiff argued that his client was still under the undue influence of Niall Barry when she executed the Settlement Agreement. Counsel for the defendants stressed that this claim was not put on affidavit. Counsel for the plaintiff made a valiant attempt to cobble such a claim together from the affidavit evidence currently before the Court. In my view, there is no substance to the claim that Niall Barry's undue influence continued through to 2016. If nothing else, para. 38 of the plaintiff's 2nd affidavit would indicate that she possesses a great deal of commercial sense regarding her property business. Whatever business sense she lacked in 2006-8, she certainly doesn't lack it now. There is absolutely no evidence before me which would support the suggestion that the plaintiff was not a fully competent commercial actor at the time the Settlement Agreement was executed. It also stretches the bounds of credulity that the plaintiff would have continued to place her trust and confidence in Niall Barry, when it would appear that he led her so woefully astray up to that point. NBPSL also played no role in Transaction 3 and the plaintiff has not suggested that Niall Barry unduly influenced her when she signed the facility letter and drew down those monies. It therefore seems clear that the Settlement Agreement and Transaction 3 are entirely insulated from the undue influence argument. The undue influence argument operates over the documents executed by the plaintiff (allegedly at the behest of Niall Barry) so as to secure the funding provided by BOSI through Transactions 1 and 2. Said documents include the guarantees appended to the facility letters for Transactions 1 and 2, as well as the mortgage and charge dated 28th March, 2007.

49. As for Transaction 3, the plaintiff submits that this loan is currently up-to-date. However, there is no dispute that the plaintiff lapsed in repaying this loan and that it was in default both prior to the execution of the Settlement Agreement and after that Agreement was terminated. Under the terms of the facility letter for Transaction 3, which is the agreement currently binding the parties, the plaintiff has breached her repayment obligations. An event of default has occurred and the power of sale has become exercisable. If I understood the plaintiff correctly, she argues that the monies did become due and owing under that original default but, following the execution of the Settlement Agreement, that original default was absolved and, following the termination of the Settlement Agreement, the default under that Agreement was absolved as well. This would mean that the parties should act is as if no default ever occurred. This construction can only be described as a nonsense. It cannot be seriously entertained as the parties' intent at the time of execution, as it would render the Agreement entirely self-defeating.

50. It is difficult not to have some sympathy for the plaintiff on this issue. She did her level best to comply with the Settlement Agreement, even going so far as to sell her family home so she could pay off the arrears accrued under Transaction 3. Since those arrears were paid off, she has kept her repayments under Transaction 3 up-to-date. But the plaintiff entered into a legal agreement freely and voluntarily. She has failed to comply with the terms of that agreement, and certain consequences flow from that. The monies made available by BOSI under Transaction 3 are validly due and owing. Ennis is entitled to call them in.

51. But this is not the end of the matter. As noted at para. 48 above, the plaintiff has an arguable case that she was acting under the undue influence of Niall Barry when she executed the mortgage. This mortgage serves as the security document for all three transactions and is the mechanism by which Ennis appointed the receivers to realise its security. While the guarantee is stated to be that of the BPG, and all five members of the Group are listed in the deed as mortgagors, the plaintiff is the sole owner of the secured property. Only she can alienate an interest in the property. The other members of the BPG could not do it for her. It could also be considered unduly onerous to expect a person such as the plaintiff describes herself, i.e. a housewife with no commercial experience, to appreciate the legal distinction between a guarantee given in her own name and a guarantee given in her name as a member of the family business. If her execution of the mortgage deed has truly been tainted by undue influence, then what is its status in respect of Transaction 3 and where does this leave Ennis as it attempts to realise its security under that transaction? It is important to bear in mind that, should the security fall, there is no connective link between NBPSL's loans under Transactions 1 and 2 the BPG's loan under Transaction 3. In those circumstances, I am satisfied that there is also a serious question to be tried on this point.

52. In summary, I am satisfied that there are two serious questions to tried in this case, which may very well need to assessed sequentially. They are as follows:

- Are the mortgage and the guarantees appended to Transactions 1 & 2 tainted by undue influence?

- Where a party is unduly influenced into executing a security document, and that same document is also used by that party as security for a loan that they freely & consensually drew down for the use of an entirely separate commercial venture, is that security document also stripped of its validity in respect of that other loan?

53. As noted above, the plaintiff faces some significant hurdles if she is succeed at plenary hearing. However I am satisfied that she has just barely discharged the burden necessary to establish a serious issue to be tried. While I have expressed potential concerns as to the credibility and credulity of some of the plaintiff's claims, her assertions cannot be truly tested until she has the chance to enter the witness box and give her evidence at the plenary stage. It would be inappropriate for this Court to make determinative findings on the issue of credibility before that opportunity has been afforded to the plaintiff, unless of course sufficient evidence is

adduced which shows that her claims are patently inaccurate. I still view her claims with some significant scepticism. But, at the end of the day, this is an interlocutory application and the exercise which the Court is being asked to perform can only progress so far.

54. Turning to the adequacy of damages and the balance of convenience, it should first be stated that this is not a case to which my findings in *McGarry*, as expanded upon in *Whelan*, can be applied. While there are serious issues to be tried in this case, it cannot be said that those questions are extremely serious or that Ennis has acted in a completely improper manner. At all times, Ennis has sought to exercise its perceived legal entitlements, as outlined in the facility letters and security documentation. The events at issue arise from the time when BOSI were the mortgagees but it cannot be said that BOSI acted with extreme impropriety either.

55. For her part, the plaintiff highlights a number of issues. Firstly, part of the secured property comprises her family home. She moved into the property after she sold her previous family home in an admirable effort to pay off her arrears under Transaction 3 (although it must be said that the credit due to the plaintiff for those efforts is somewhat marred by the fact that she did not clear the arrears until a date three weeks before she issued these proceedings). I note the plaintiff's averment that her current residence "adjoins the grounds of the property". By this, I take the plaintiff to mean that the cottage is part of the secured property, and not that it is simply beside the secured property. If this were to be a determinative factor on interlocutory relief, the resultant injunction would only extend so far as the part of the secured property in which the plaintiff resides; it would not apply to the secured property as a whole, as the remainder of the property continues to be used solely for commercial purposes. It should be noted that this is not a case where the plaintiff moved into the secured property for the purposes of accruing rights and frustrating the receivership. Had I been presented with evidence to the effect, I would have little hesitation in refusing this application.

56. The plaintiff makes a second, broader point that the rent from the secured property is her only source of income. There is a dispute between the parties as to the amount of rent being collected by the plaintiff and the manner in which it is being expended. In my view, it would do the plaintiff's case some credit if she were to meet with Ennis and set out a detailed record of her financial incomings and outgoings, including any savings that she currently holds. If it should transpire that some surplus exists between her income and her cost of living, perhaps that surplus could be held in escrow until the proceedings are concluded. It is not open to the Court to order the plaintiff to take this approach, and so the Court will leave this matter in her hands, for her to consider as she sees fit.

57. While the two issues highlighted above are valid points when determining the adequacy of damages and the balance of convenience, the Court is even more concerned with the fact that there is a dispute as to which parties hold a valid interest in the secured property. If both of the questions outlined at para. 52 above were to be answered in the affirmative, then Ennis' claim to the property and its power to the appoint the receivers has been seriously undermined. This would also severely impede the ability to alienate any further interest in the property and realise its value. While the Court was not directly addressed on the value of the secured property, at no point was it suggested that the property is in negative equity. Thus, it can be assumed that the sale of the property would cover the plaintiff's debts and any damages flowing from this action, should the defendants be successful at plenary hearing. In all the circumstances, and bearing in mind the review of the authorities carried out by Haughton J. in *Langan*, I am satisfied that an application of the *Campus Oil* principles to the facts of this case resolves itself in favour of the plaintiff.

58. The defendants have challenged the substance of the plaintiff's undertaking as to damages. While a substantive undertaking as to damages is not an essential ingredient in order to secure an injunction, the failure to provide such an undertaking (or, indeed, any undertaking at all) can also serve as sufficient grounds in and of itself to refuse interlocutory relief. At para. 39 of my decision in *McGarry*, I commented that "while an unsubstantiated undertaking would normally militate against the grant of interlocutory relief, it would also seem to be quite unjust to decline highly warranted relief on the basis of a lack of resources". On the facts of this case, it seems to me that a subsequent sale of the secured property would also give rise to a profit sufficient to substantiate the plaintiff's undertaking as to damages.

59. For the reasons outlined above, I propose to grant the injunctive relief sought. I will hear from counsel as to the precise form of the order to be made by the Court. I would also urge the parties to progress this matter to a plenary hearing as speedily as possible.