Neutral Citation Number: [2011] IEHC 402

THE HIGH COURT

2010 5874 P

BETWEEN

CLAIRE O'MEARA

PLAINTIFF

AND

BANK OF SCOTLAND PLC

DEFENDANT

Judgment of Miss Justice Laffoy delivered on 28th day of October, 2011.

1. The factual background

1.1 The defendant in these proceedings was incorporated as Bank of Scotland (Ireland) Limited when the events the subject of these proceedings took place and when the proceedings were initiated. Since then, Bank of Scotland (Ireland) Limited has merged by absorption into Bank of Scotland Plc subsequent to a cross-border merger. Throughout this judgment I will refer to Bank of Scotland (Ireland) Ltd. and Bank of Scotland Plc as the defendant.

1.2 These proceedings relate to the monies in two deposit accounts in the joint names of John O'Meara (Mr. O'Meara), the plaintiff's late husband, and the plaintiff, which were opened in November and December 2008 with the defendant, the earliest bearing account No. 929260/101, to which I will refer as joint deposit account No. 101, and the later bearing account No. 929260/102, to which I will refer as joint deposit account No. 102. The primary relief sought by the plaintiff is a declaration that all monies standing in both accounts on 28th November, 2009, the day following the death of Mr. O'Meara, are the property of the plaintiff. The defendant's primary answer to that claim is that the set-off by the defendant of the monies standing to the credit of those accounts against the monies due by Mr. O'Meara on foot of a loan account in his sole name bearing No. 471216/128, to which I will refer as the loan account No. 128, which was effected on 5th January, 2010 by the transfer of monies aggregating €1.6m from the joint deposit accounts to loan account No. 128, was valid. The defendant seeks a declaration on its counterclaim to that effect.

1.3 Mr. O'Meara had been a respected and a valued customer of the defendant for many years prior to October 2008, when the events which have given rise to these proceedings commenced. Indeed, he had become a customer of the defendant's predecessor, ICC Bank Plc, as far back as 1994. Mr. O'Meara was involved in farming and in the beef industry. He reared, and purchased and fattened, livestock, and exported livestock to the Middle East. From the year 2000 onwards he had become involved in property investment, in respect of which he borrowed from various lending institutions, including the defendant. By the end of 2008 he had eleven loan accounts with the defendant.

1.4 Sometime before 26th November, 2008, probably during the previous week, Mr. O'Meara got in touch by telephone with Mr. Dave Savage (Mr. Savage), who was the divisional director of lending at the defendant and asked to meet him. The meeting took place at the defendant's office at St. Stephen's Green, Dublin, 2. It was attended by Mr. Savage, who was accompanied by Ms. Ruth Corrigan (Ms. Corrigan), a lending executive with the defendant, and by Mr. O'Meara. Mr. O'Meara indicated that he wanted a loan facility in the sum of €1.6m for working capital for his business. Mr. Savage's evidence was that he explained to Mr. O'Meara that the matter was not as straightforward as other loans which had been advanced in the past because the defendant's credit committee was getting "much tighter". Mr. Savage's evidence was that Mr. O'Meara indicated that he could "cash back" the loan facility and that he would put in place a deposit with the defendant. The defendant's officials understood that the monies for the deposit were monies that were coming to Mr. O'Meara from Anglo Irish Bank Corporation Plc (Anglo). The meeting was told that the purpose of the loan was to buy cattle for Mr. O'Meara's business. The joint deposit accounts Nos. 101 and 102 and the loan account No. 128 were put in place as a consequence of that meeting in the circumstances which I will outline below.

1.5 Joint deposit account No. 101 was set up first. It was the understanding of Mr. Savage and Ms. Corrigan at their meeting with Mr. O'Meara that the funds he had available to set up the deposit account were the sole property of Mr. O'Meara. However, when Mr. O'Meara arrived at the defendant's office on 26th November, 2008 to open the account he had a cheque drawn on Anglo in the sum of €1,534,126.60 on which the payees were named as "John and Claire O'Meara" and which was crossed "Account Payee only". The plaintiff's signature appeared on the back of the cheque. Although the procedures were gone through to do so and Mr. O'Meara signed an application form to open an account in his sole name and the account, which I understand to be deposit account No. 471216/126 referred to in the defence, was set up, it was decided by the officials of the defendant that the cheque could not be used to open a deposit account in the sole name of Mr. O'Meara. A decision was made to open a joint account in the joint names of Mr. O'Meara and the plaintiff.

1.6 Mr. O'Meara was given an application form to open a six month fixed deposit account to take away to be completed by both himself and the plaintiff, while the Anglo cheque was retained by the defendant. Some of the details on that form were completed by Ms. Susan Dwyer (Ms. Dwyer), an official in the deposits section of the defendant. Both Mr. O'Meara and the plaintiff signed the form at the appropriate place on the third page. Towards the end of the form on the fourth page, the mandate provisions under the heading "Withdrawal Instructions" appeared. It was stated on the form that instructions were to be given to the defendant by such persons and in such manner as was set out in the "Deposit Account Mandate" attached. As I understand it, what followed was the "Deposit Account Mandate". A number of options were then set out as follows:

> "* any one Account Holder // All Account Holders // Others (Please specify)".

As regards the asterisk before "any one Account Holder", the following explanation was then set out:

> "The Bank is permitted to act on the instructions of either one of you without the need for the consent of the other connected with the Account. For example, either one of you may withdraw all funds in the Account without requiring the consent or signature of the other."

The first option – any one Account Holder – was ticked and on the same line after three options the name "John O'Meara" in block capitals appears. Ms. Dwyer's evidence was that the application form/mandate was interpreted by the defendant on the basis that Mr. O'Meara was the only person who could give the defendant withdrawal instructions.

1.7 The Account which was opened, joint deposit account No. 101, was a six month fixed deposit account on which the rate of interest payable was 5.5% per annum. The defendant's general conditions governing that type of account contained special provisions in relation to joint accounts. Paragraph (a) of clause 3 provided:

> "Where an Account is held by two or more persons, the Account shall only be operated in accordance with the written instructions received from the Account Holders from time to time. The Bank shall not be concerned about the division of ownership of the monies lodged in the Account between individuals."

Clause 3(d) provided:

> "On the death of any joint Account Holder, the balance of the Account plus accrued interest may on the production of the appropriate Revenue and testamentary documentation be withdrawn in total or retained in the name of the surviving Account Holder(s)."

1.8 On the evidence it would appear that on 26th November, 2008 no enquiries were made by the defendant's officials as to the source of the funds represented by the Anglo cheque. *Prima facie*, as they were joint payees on the Anglo cheque, those funds were the property of Mr. O'Meara and the plaintiff jointly, although the beneficial ownership is an issue which will be addressed later. After joint deposit account No. 101 was opened on 28th November, 2008, value having been obtained for the Anglo cheque on the previous day, Mr. O'Meara made two withdrawals from it, one in the amount of €300,000 on 4th December, 2008 and the other in the amount of €300,000 on 15th December, 2008, which were effected by transfers to an account in the Naas branch of Bank of Ireland in the name of "John O'Meara Farms" and were obviously in connection with his business, so that the balance remaining therein when loan account No. 128 was subsequently set up was €934,126.60.

1.9 There were a number of steps in the process whereby the loan of €1.6m to Mr. O'Meara solely was sanctioned. The officials in the lending department submitted an application to the defendant's credit committee. The credit committee sanctioned the loan, whereupon a letter of offer issued to Mr. O'Meara, which was dated 17th December, 2008. The original of the letter of offer with acceptance signed by Mr. O'Meara was not available to be put in evidence. However, I am satisfied that, despite thorough searches, the original cannot be located and that the photocopy which was put in evidence is a true copy of the original. The document comprised twelve pages, which were stapled together. The first five pages set out the terms of the offer. The next two pages related to acceptance. The next four pages comprised attachments designated (1), (3) and (4). The latter attachment contained two pages. The final page was designated "Attachment (5)" and it is of very considerable significance in the resolution of the issues which arise in these proceedings.

1.10 As regards the offer of the loan, the purpose of which was expressed to be for working capital and no other purpose, and its terms, the advance was to be in the sum of €1.6m and the term was to be three years. Interest on the loan at the rate stipulated, was to be paid by monthly direct debit and the principal was to be repaid by one repayment at the end of the three year term. The loan was to be secured. It was provided that the security for the loan, which would extend to cover Mr. O'Meara's general liabilities to the defendant, would include five securities, two being extensions of two existing first specific charges over specified land held by the defendant, one being a continuing lien over a certain Portfolio Investment of Mr. O'Meara, and one being a continuing equitable deposit over Mr. O'Meara's share certificates in a certain development. As I understand the evidence, Dillon Eustace, Solicitors, were retained by the defendant in relation to the foregoing elements of the security. The final element of the security, which was dealt with "in-house", was described as follows:

> "A Lien incorporating a Right of Set-off over a Deposit Account with the Bank in the name of John O'Meara and Claire O'Meara in the Bank's standard form for an amount of €1,600,000 plus accrued interest thereon."

The acceptance of the offer on page 7 of the letter of offer was signed by Mr. O'Meara. Underneath his signature his name appears printed and in manuscript block capitals. The date is then given as 22nd December, 2008. His signature was witnessed by Muhammad Abdullah, whose address in Dublin is given, and whose occupation is given as "Security". I will set out the circumstances in which Mr. O'Meara executed the acceptance later.

1.11 Attachment (5), which is the twelfth page of the letter of offer, is headed "RIGHT OF SET-OFF". It is addressed to the defendant. Its text is in the following terms:

> "In consideration of your offering loan facilities as set out in your Facility Letter dated 17th December, 2008, I hereby agree that while any monies are due and owing by the Borrower John O'Meara to Bank of Scotland (Ireland) Ltd. (the "Bank"), the Bank may at any time and without notice to me debit any credit balance on any account in my name with any sums which are or may become owing to the Bank by myself. I undertake not to reduce below €1,600,000 the total credit balance of those accounts in which I have a credit balance."

Below that text there is space for the "Borrower/Account Holder" to sign. Mr. O'Meara signed at that point. Below that, the date of 20th December, 2008 was inserted. Below the date, there is facility for a witness to sign. The plaintiff signed her name opposite the word "Witness". At the hearing she acknowledged that the signature which appears on attachment (5) is her signature. Thereafter the address of the plaintiff and her late husband is set out and the date which appears below that is 22nd December, 2008. I think it is probable that the address and the date 22nd December, 2008 were inserted on attachment (5) by Ms. Corrigan, when Mr. O'Meara brought the completed form to the defendant's office on 22nd December, 2008. The signature details as they appear on attachment (5) are replicated at para. 15.2 below.

1.12 When Mr. O'Meara attended at the defendant's office on 22nd December, 2008 he had not completed the acceptance on page 7. Ms Corrigan got him to sign the acceptance and, as she felt she could not witness his signature, she asked Mr. Abdullah, who was a security man in the defendant's premises at the time to witness Mr. O'Meara's signature and he did so.

1.13 To recapitulate in relation to the joint deposit account No. 101, the position as at 22nd December, 2008 was that the balance on the account was €934,126.60, following the withdrawal by Mr. O'Meara of the two amounts of €300,000 each in December 2008. Accordingly, there were not sufficient funds in that account to satisfy the lien/set-off requirement in the letter of offer of 17th December, 2008. What the defendant did in order to bring the monies on deposit with it in the joint names of Mr. O'Meara and the plaintiff up to €1,600,000 was to open a second joint deposit account, that is to say, joint deposit account No. 102, in the joint

names of Mr. O'Meara and the plaintiff and to transfer €665,873.40 from loan account No. 128 to that account. This was done on 23rd December, 2008. The sum of €665,873.40 represented the two withdrawals of €300,000 each which Mr. O'Meara had made in December together with the difference between the amount of the Anglo cheque and the sum of €1,600,000. The reason a new account was opened, rather than transferring those monies to joint deposit account No. 101, was that in the interim since the opening of that account the rate of interest payable by the defendant on six months fixed deposit accounts had been reduced from 5.5% to 5%. Although, on the evidence, Mr. O'Meara did not sign any documentation in connection with the opening of the new account nor have any involvement in it, it is reasonable to infer that he tacitly consented to the approach adopted by the defendant. On the expiry of the fixed terms of the two joint deposit accounts during 2009 the accounts were rolled over for further fixed terms, albeit at lower interest rates. In my view, nothing turns on this.

1.14 As regards loan account No. 128 which had been opened on 23rd December, 2008, in addition to the transfer of the sum of €665,873.40 to joint deposit account No. 102, Mr. O'Meara drew down the sum of €250,000 on 23rd December, 2008. In the first four months of 2009 Mr. O'Meara drew down further amounts aggregating €680,000. Some of the withdrawals were effected by transfer by the defendant to the account of Mr. O'Meara at the Naas branch of Bank of Ireland, that is to say, the account named "John O'Meara Farms" and others by cheques in favour of Mr. O'Meara, which were collected by him. The interest due on the loan account was paid monthly up to and including the month of September 2009. The debit balance on loan account No. 128 at that stage was €1,597,057.40, which factored in some small amounts debited for bank fees. The next direct debit for interest was due on 23rd October, 2009.

1.15 On 8th July, 2008 Mr. O'Meara had informed the plaintiff that he had been diagnosed with cancer and that he had between a year and eighteen months to live. Despite that and a serious setback in the summer of 2008, Mr. O'Meara continued to run his business. The evidence of the officials of the defendant who met him between October and December 2008 was that they were unaware that he was unwell, although, when his accounts were reviewed in July 2009, the fact that he had lost a considerable amount of weight was remarked on. In any event, on the evidence, I am satisfied that the officials of the defendant were not told by the defendant that he was terminally ill and that they were not aware of that fact during 2008 or during the first three quarters of 2009. On 16th October, 2009 Mr. O'Meara's accountant, John P. Greely, wrote to Mr. Savage referring to the fact that Mr. O'Meara had been in hospital and would, hopefully, be released the following weekend. Mr. Greely stated that Mr. O'Meara had been advised by his doctor, in order to assist with a speedy recuperation, not to take any act or part in the business for at least six weeks. The purpose of the letter was to inform the defendant that Mr. O'Meara had no option but to cancel the direct debit payments for October and November 2009.

1.16 The response of the defendant, in a letter from Mr. Savage to Mr. Greely dated 20th October, 2009, was that in order to avoid "these facilities" falling into repayment arrears, the defendant proposed to utilise "the funds currently on liened deposit in a/c 929260 to fund these repayments". An application form to be signed by Mr. O'Meara and the plaintiff, requesting that the defendant make transfers from the joint deposit accounts "to meet loan repayments on loan facilities attaching to reference 471216" was enclosed for signature. While it is not of any particular relevance to the issues the Court has to decide, I understand that the proposal did not relate solely to the interest payments on loan account No. 128. Mr. Greely's response on behalf of Mr. O'Meara on 6th November, 2009 was that Mr. O'Meara was unable to accede to the request in relation to the "liened deposit account".

1.17 Mr. O'Meara died on 27th November, 2009. His will, which was not put in evidence, has not been proved. As I understand the evidence, the plaintiff is the principal beneficiary under his will. However, that, unfortunately, is of no benefit to the plaintiff because the Court was informed that his estate is "very insolvent".

1.18 The officials of the defendant had become aware of the death of Mr. O'Meara by 1st December, 2009. At a meeting held on 18th December, 2009 with Mr. Greely, the defendant's officials, Mr. Savage and Michael Corcoran of the defendant's BRU (Business Restructuring Unit), who had "taken over the file" in relation to Mr. O'Meara, Mr. Greely was informed that the defendant intended setting off the sum of €1.6m in joint deposit accounts Nos. 101 and 102 against the loan facility. Although, as the documentation discovered by the defendant illustrates, in late December 2009 internally some of the defendant's officials had concerns as to whether the defendant was entitled to exercise a right of set-off against the funds in the joint deposit accounts, on 5th January, 2010, as I have recorded earlier, sums aggregating €1,600,000 were transferred from the two joint deposit accounts to loan account No. 128. As I understand the position, the effect of those transactions was to close joint deposit account No. 102, but a balance remained in joint deposit account No. 101, which by late March 2010 had grown to €46,209.51.

1.19 No contact was made by the defendant with the plaintiff following the death of Mr. O'Meara and prior to the transfers from joint deposit account Nos. 101 and 102 on 5th January, 2010. While no issue arose on this point in the course of the evidence, it is clear on the documentation before the Court that Mr. Greely's client was Mr. O'Meara, not the plaintiff. The plaintiff attended at the defendant's office at St. Stephen's Green in Dublin on 22nd March, 2010. She met with Ms. Dwyer. The plaintiff's evidence was that she wished to withdraw €20,000 from the joint deposit account with her late husband. Ms. Dwyer's understanding was that she wished to withdraw all of the funds lodged to that account. In any event, Ms. Dwyer informed the plaintiff she could not withdraw the funds because there was a right of set-off on the account. The plaintiff requested that the balance on the account be transferred electronically to her personal current account at the Kilcock branch of Allied Irish Banks Plc and signed a withdrawal form on 22nd March, 2010. By letter dated 22nd March, 2010 Ms. Dwyer, on behalf of the defendant, and referring to the withdrawal request, required the plaintiff to furnish the following documentation: an original or a certified copy of the death certificate of Mr. O'Meara; an affidavit by Mrs. O'Meara confirming her marriage; and a copy of the marriage certificate. Subsequently, in April 2010 the plaintiff furnished the required documentation. However, the balance in joint deposit account No. 101 was not transferred to her personal account as she had requested.

1.20 These proceedings were initiated by a plenary summons which issued on 18th June, 2010.

2. The plaintiff's case and the defendant's defence and counterclaim as pleaded

2.1 There are some subtle differences between the case made on behalf of the plaintiff in the pleadings and the submissions made at the hearing. For that reason I consider it necessary to consider the pleadings in some depth.

2.2 To a large extent, the narrative contained in the statement of claim delivered on 12th July, 2010 is consistent with what I have outlined above. However, it is recited in the statement of claim that on or about 22nd December, 2008 the plaintiff and Mr. O'Meara opened joint deposit account No. 102 and authorised the transfer into the said account of monies in the sum of €600,000. The figure mentioned in incorrect, but, more importantly, it was contended on behalf of the defendant that the plaintiff had no involvement in the opening of that account. I will return to the issue to which that contention, which I am satisfied is factually correct, gives rise later.

2.3 In paragraph 6 of the statement of claim it is pleaded that the sums lodged to both deposit accounts were lodged by the plaintiff

and Mr. O'Meara for the benefit and future welfare and security of the plaintiff and their sons, that the lodgement by Mr. O'Meara was intended to be "an advance" to the plaintiff and that Mr. O'Meara and the plaintiff intended that, in the event of the death of Mr. O'Meara, the plaintiff should have sole legal and beneficial ownership of the monies standing to the credit of the two joint deposit accounts. The defendant in its defence denies each of those assertions and further asserts that the purpose asserted by the plaintiff, namely, to provide for the future welfare and security of the plaintiff and her two sons was never disclosed to the defendant. On the contrary, it is contended that at the time of the creation of the deposit accounts and at all material times thereafter it was represented to the defendant that the monies would provide "cash-backing" for the loan advanced to Mr. O'Meara.

2.4 It is pleaded in the statement of claim that it was an express or an implied term of the contract between the plaintiff and Mr. O'Meara, on the one hand, and the defendant, on the other hand, that no monies would be withdrawn from the joint deposit accounts "without the express authority in writing of one of the Account Holders namely the Plaintiff and/or the said John O'Meara". While the defendant does not admit the plea as to the express or implied contractual term, the defendant does admit that the defendant would be entitled "to set-off monies standing to the credit of" the joint deposit accounts or any of them "with the authority (express or implied) of *any one* of the account holders, namely, the Plaintiff and/or the late John O'Meara" (emphasis in original). Further, it is pleaded by the defendant that it was entitled "to set-off monies standing to the credit of" the joint deposit accounts or either of them on the instructions, authority or consent (in each case express or implied) of Mr. O'Meara. In other words, as I understand it, the position of the defendant, as pleaded, assuming it assimilates withdrawal instructions with "set-off" instructions, is not wholly in line with Ms. Dwyer's interpretation of the withdrawal instructions on the mandate – that one account holder, Mr. O'Meara, was the only person who could give the defendant withdrawal instructions on the account.

2.5 The plaintiff pleads that the document entitled "Right of Set-Off" attached to the facility letter of 17th December, 2008, on its true construction, as regards the granting of a right of set-off, applied only to such accounts as were maintained in the sole name of Mr. O'Meara. In response, the defendant pleads that the plaintiff signed the "Right of Set-Off" document and that, although it appears from the face of the document that she signed as a witness to the signature of Mr. O'Meara, in signing the document –

> (a) she expressly or impliedly gave her authority to the defendant setting off sums standing to the credit of the account(s) to which the right of set-off document related in reduction of the personal liabilities of Mr. O'Meara; and/or
>
> (b) she became estopped from denying that she gave such authority.

Further, it is denied that the effect of the right of set-off document was to give the defendant a right of set-off only in relation to accounts maintained in the sole name of Mr. O'Meara.

2.6 The plaintiff pleads that the defendant acted wrongfully, unlawfully and in breach of contract and/or negligently and in breach of duty and of fiduciary duty on 5th January, 2010 in exercising a purported right of lien and set-off against the two joint deposit accounts. It is pleaded that the defendant did not have authority or the consent of the plaintiff or of Mr. O'Meara to transfer the funds as it did. The defendant denies all the allegations of wrongdoing and, additionally, denies that any duty of care was owed by the defendant to the plaintiff or that at any material time the defendant stood in a fiduciary capacity to the plaintiff.

2.7 In addition to claiming a declaration in the terms set out at para. 1.2 above, the plaintiff also seeks an order directing the defendant to pay the monies standing on 28th November, 2009 to the credit of joint deposit accounts Nos. 101 and 102 to the plaintiff together with interest thereon at the rate applicable by the defendant to six month term deposits up to the date of such payment. The plaintiff also claims various ancillary reliefs including damages for negligence, breach of duty, statutory and fiduciary duty and breach of contract and interest pursuant to the Courts Act 1981 or contractual interest. The position of the defendant is that the plaintiff is not entitled to any of those reliefs.

2.8 In its counterclaim, the defendant pleads that the common intention as between the defendant, the plaintiff and Mr. O'Meara was that the plaintiff would be a party to the right of set-off document, not only as a witness but also as a signatory to the joint deposit accounts to which the document related, but through inadvertence or mistake, the defendant, Mr. O'Meara and the plaintiff omitted to make sure that it was made clear in the text that the plaintiff signed not only as a witness but also as a party to such arrangement. Accordingly, the defendant seeks to have the document rectified so as to reflect the true intentions of the parties and seeks an order to that effect.

2.9 In its counterclaim, the defendant pleads that it has at common law a right to exercise the right of set-off in respect of the two joint deposit accounts. Finally, in its counterclaim the defendants pleads that, if the defendant has no entitlement to exercise the right of set-off in question, any sums which were unlawfully set-off enure for the benefit of the estate of Mr. O'Meara, subject to grant of probate and the taking out of letters of administration.

2.10 In general, in her reply and defence to the defendant's counterclaim the plaintiff joins issues on the various matters which are pleaded in the defence and counterclaim, specifically denying any contract between her and the defendant other than the contract in relation to the joint deposit accounts. She denies that she agreed that the monies in the joint deposit accounts or any part thereof would provide "cash backing" or any security for the loan to Mr. O'Meara. She denies that there was a common intention that she should be a party to the right of set-off document and any intention to become bound thereby in her capacity as a co-signatory or in any contractual capacity. Finally, the plaintiff pleads that, in seeking the equitable relief of rectification, the defendant has failed to do equity and is guilty of equitable fraud and by its actions and omissions had disentitled itself to claim equitable relief. That plea is particularised by various alleged failings and actions on the part of the defendant, for example –

> (i) failing to explain to or advise the plaintiff of the nature of the obligation which the defendant alleges it intended her to undertake by signing the right of set-off document,
>
> (ii) failing to advise her that she should seek legal advice before executing that document,
>
> (iii) attempting to exploit the weakness of the plaintiff's position, particularly in the absence of legal advice, and
>
> (iv) failing to inspect the signed document and draw to the plaintiff's attention that it showed her signature as merely that of a witness rather than a party.

On the basis of the conduct particularised, which is considerably more extensive that I have recorded here, it is pleaded that the plaintiff is entitled to rescind the contract contended for by the defendant, if it came into effect.

2.11 It is noteworthy that it is not alleged by the plaintiff that either the execution of the mandate to open joint deposit account No.

101, or the execution of the right of set-off document, was procured by pressure, undue influence or any unconscionable conduct on the part of Mr. O'Meara. Moreover, there was nothing in the evidence of the plaintiff which would suggest that Mr. O'Meara exercised duress or undue influence over her. She was the only witness who could testify as to what transpired between her and Mr. O'Meara. I now propose to consider her evidence in relation to the transactions with the defendant.

3. The plaintiff's evidence

3.1 To put the plaintiff's evidence in relation to the transactions with the defendant into context, it is necessary to outline the personal circumstances of the plaintiff and her late husband to some extent. In 2008 the plaintiff was 45 years of age and her husband was approximately two years older than her. They had lived together since 1992 and had married in 2005. They had two children, a boy born in March 2004 and a boy born in May 2005. As I have already recorded, the plaintiff became aware of her late husband's cancer diagnosis in July 2008 and he died less than a year and a half later. There is no doubt that testifying was very stressful for the plaintiff. It emerged during cross-examination that she herself had had breast cancer in 2001 but had recovered. It was the plaintiff's evidence that the respective roles of herself and her husband were very well defined. Her role was to rear the children and to be the homemaker. He was the provider. The plaintiff's evidence, which I accept, was that Mr. O'Meara was a very private person. She did not know about his business or his bank accounts. Before the opening of joint deposit account No. 101, as far as she was aware, she never had a joint bank account with Mr. O'Meara. He provided her with signed cheques on a current account in his sole name at the Naas branch of AIB and she had a current account for household related expenses in her sole name in the Kilcock branch of AIB.

3.2 The plaintiff's evidence was that towards the end of November 2008, after he had started chemotherapy treatment, Mr. O'Meara told the plaintiff in the kitchen of their home that he was opening a joint account in both of their names and he was going to put "over a million and a half into it in cash" for the plaintiff and "the boys", should anything happen to him. The plaintiff's evidence was that she knew nothing about the defendant bank. As regards the documents she signed in relation to accounts with the defendant, her evidence was that she did not remember specifically any documents, although she recollected that her late husband got her to sign something. She did not remember seeing the front of the Anglo cheque but acknowledged that her signature was endorsed on it. She also acknowledged that the signatures on the application/mandate and on the right of set-off document were her signatures. She had no specific recollection of signing either document. Her evidence was that her late husband would have just asked her to sign her name and she would have done so. She received no explanation as to why she was signing the right of set-off document.

3.3 I accept the plaintiff's evidence in relation to the matters referred to in the next preceding paragraph. I am satisfied that her late husband did not involve her in his business or financial affairs, save to procure her signature when it was necessary. Although the address of Mr. O'Meara and the plaintiff, as shown on the bank statements and other documentation in relation to joint deposit account Nos. 101 and 102, was their family home, Pitchfordstown Stud, Kilcock, County Kildare, the plaintiff's evidence was that post was not delivered to the house but was collected by her husband from what she described as a "pigeon hole" in the Post Office. Her evidence was that she never saw post from a bank or even utility bills. I accept her evidence on that, because it is consistent with the documentation which was put in evidence. Mr. O'Meara's address as shown on the bank statements or other documentation in relation to loan account No. 128 was his business address in the town of Naas. Many of the relevant documents were marked with a date stamp showing the date of receipt and the same type of receipt appears on the documentation in relation to joint deposit account Nos. 101 and 102.

3.4 Early in the course of her cross-examination the plaintiff stated that she knew nothing about the "Anglo money" and that she did not recall any form of joint investment in Anglo and she had no knowledge of her husband and herself making other joint investments previously. The plaintiff's evidence was that she was unaware of the withdrawal by Mr. O'Meara of the two sums of €300,000 each from joint deposit account No. 101 in December 2008 and her explanation was that she never discussed money with her late husband. Later, she stated that in November 2008, when her husband told her he was depositing €1.5m, she was not concerned to check as to whether all the "paper work" was "legal". She trusted him. She gave that evidence in a very distressed state and the remainder of her cross-examination was postponed until the following day.

3.5 A number of controversies arose when the cross-examination of the plaintiff was resumed on the following day. First, as was pleaded in the statement of claim, the plaintiff, in an affidavit to ground an application for an interlocutory injunction, which had been brought on behalf of the plaintiff at an early stage in the proceedings, had averred that the joint deposit account No. 102 had been opened on 22nd December, 2008 by her and Mr. O'Meara. It was put to her that that averment was not correct. Her response was that it was absolutely correct on the basis of the information she had seen in the bank statements. That, I believe, was her honest understanding of the situation. The plaintiff did not agree with the explanation put to her by counsel for the defendant as to the circumstances in which joint deposit account No. 102 was opened, which I do not find surprising. However, she did say that her understanding was that the monies which went into joint deposit account No. 102 were her and her husband's money.

3.6 Secondly, contrary to the submission made on behalf of the defendant, I did not understand the plaintiff to make a concession in her evidence that the proceeds of the Anglo cheque were the sole property of her husband and were not joint property of herself and her husband, as the cheque *prima facie* indicated. The particular response of the plaintiff in cross-examination on which the defendant relies to support that submission arose in the context of counsel for the defendant putting to the plaintiff that Mr. O'Meara had effective control over the monies represented by the Anglo cheque, that the plaintiff gave him control over the monies, that she had not been induced into or tricked into so doing and that it was implausible that, given the knowledge she had at the time about Mr. O'Meara's health, she would not have read at least the important points of the relevant documents and would not have understood their import. The plaintiff's response was that her husband was an exceptionally wealthy man, she had no reason to be "intricately reading any small print", she signed "millions of documents", she did not know what she was signing, she trusted her husband emphatically, he was a wonderful provider and there was nothing they ever wanted and she knew nothing "about intricacies". She went on to say that she believed he had a cheque for €1.5m in his hand. At that stage counsel interjected saying "With respect". The plaintiff then stated:

> "and it sounds now like he stole it, you are saying and he didn't. It was his money."

When that last sentence is considered in the context of all of the evidence of the plaintiff and, indeed, all of the evidence adduced by both parties, in my view, it cannot be taken as a concession by the plaintiff that she was not the beneficial owner jointly with her husband of the monies represented by the Anglo cheque.

3.7 The impression I formed of the plaintiff was that she was an intelligent and honest woman who respected her late husband and, as regards the business and financial matters, deferred to him. Her perception was that her husband was a very wealthy man and that perception may have been justified before the fateful events of mid-September 2008 and subsequently globally. I can fully appreciate why in late 2008 and throughout 2009 there were matters of greater concern to her other than the meaning and detail of business and financial documents which her husband asked her to sign.

4. Submissions/issues
4.1 The Court has had the benefit of comprehensive written submissions from both sides to which I will refer, as appropriate, when analysing the issues, the legal principles applicable and in setting out my conclusions hereafter.

4.2 Out the multiplicity of issues which arise on the pleadings, the evidence and the submissions made by the parties, I propose addressing the following, which I consider to be the key issues:

> (a) Who was the beneficial owner of the monies represented by the Anglo cheque and what is the relevance of the answer?
>
> (b) How did the monies in joint deposit account No. 101 devolve on the death of Mr. O'Meara?
>
> (c) Were the monies in joint deposit account No. 101 impressed with a trust?
>
> (d) What was the effect of the death of Mr. O'Meara on any valid right of set-off vested in the defendant?
>
> (e) How was the defendant permitted to operate joint deposit account No. 101 having regard to the terms of the mandate given by the joint account holders?
>
> (f) What was the effect of the operation of joint account No. 101 by the defendant from the time it was opened to 23rd December, 2008?
>
> (g) Did the defendant have a right of set-off against joint deposit account No. 101 on 5th January, 2010 on any basis – at common law, in equity or contractually?
>
> (h) If it is found that a contractual right of set-off was not created over joint deposit account No. 101, should an order rectifying the right of set-off document, that is to say, attachment (5) to the letter of offer of 17th December, 2008 be made?
>
> (i) Is the plaintiff estopped from contending that the defendant had no right of set-off against joint deposit account No. 101?
>
> (j) Does the beneficial ownership of joint deposit account No. 102 differ from the beneficial ownership of joint deposit account No. 101 and, if it does, what are the consequences?

5. Beneficial ownership of the monies represented by the Anglo heque/relevance
5.1 While on the pleadings and in their submissions the parties addressed the beneficial ownership of the monies in the joint deposit accounts, in my view, the starting point for the Court has to be consideration of who was the beneficial owner of the monies represented by the Anglo cheque before those monies were lodged in joint deposit account No. 101. As I have already indicated, *prima facie*, the cheque being payable to Mr. O'Meara and the plaintiff jointly, the monies were owned by them jointly. The provenance of those monies was not traced, although the evidence suggests that they represented the proceeds of an investment, which it must be inferred was in the joint names of Mr. O'Meara and the plaintiff, with Anglo, which had matured. This is supported by the application to the defendant's credit committee, which is a reliable source as to what was known to the defendant's officials, which records that Mr. O'Meara "received €1.6m cash from a matured Anglo Irish Bank investment". Save that it establishes that Mr. O'Meara alone put up the entire money to acquire the joint investment with Anglo, because of the application of the equitable principles which I will outline, it is immaterial to the issue of the beneficial ownership thereof that the plaintiff was unaware of the existence of the joint investment.

5.2 In their written submissions, counsel for plaintiff asserted, reflecting what is pleaded in paragraph 6 of the statement of claim, that the monies deposited in joint deposit account No. 101 were contributed by both Mr. O'Meara and the plaintiff through the medium of the Anglo cheque, which was payable to them jointly. It was reiterated that the purpose of so doing was for the benefit and future welfare and security of the plaintiff and her two sons. Having referred to their relationship of husband and wife, it was asserted that Mr. O'Meara "is presumed to have advanced his "contribution" to the plaintiff", without citing any authority. Counsel for the defendant did not, in their submissions, address the plaintiff's reliance on the presumption of advancement. While I consider that the presumption of advancement does bear on the ownership of the funds lodged to joint deposit account No. 101, I consider that its application must be considered by reference to the acquisition of the investment with Anglo in the joint names of Mr. O'Meara and the plaintiff.

5.3 The core question which has to be considered as a prelude to determining all of the issues outlined earlier is what was the effect of Mr. O'Meara contributing the entire monies for the acquisition of the investment with Anglo but acquiring it in the joint names of himself and his wife, the plaintiff. Professor Delany in Equity and the *Law of Trusts in Ireland* (5th Ed.) quotes (at p. 170) the following passage from the judgment of Keane J., as he then was, in *JC v JHC* (High Court, unreported, 4th August, 1982), which explains the doctrine of advancement:

> "Where property is taken in the joint names of two or more persons, but the purchase money is advanced by one of them alone, the law presumes a resulting trust in favour of the person who advanced the purchase money. This presumption may however be rebutted; and in particular the circumstances of the person in whose name the property is conveyed being the wife of the person advancing money may be sufficient to rebut the presumption under the doctrine of advancement."

As Professor Delany observes, in that case, Keane J. appeared to base his decision on the fact that the evidence "overwhelmingly" reinforced the presumption of advancement, which he said would arise had there been no other evidence of the parties' intentions. Professor Delany suggests that one could argue that Keane J. regarded the presumption of advancement as being relevant only where evidence to establish the parties' true intentions was lacking. Moreover, Professor Delany later (at p. 172) observes that, having regard to the decision of the Supreme Court in *RF v. MF* [1995] 2 ILRM 572, the presumption can readily be rebutted by evidence establishing a contrary intention and in practice it is only likely to directly influence the outcome of a case where there is little or no evidence to show what the parties' intentions in relation to the ownership of the property actually were.

5.4 The Anglo cheque was payable to Mr. O'Meara and the plaintiff jointly and, *prima facie*, represented monies jointly owned by Mr.

O'Meara and the plaintiff. Even if, as one must assume was the case, Mr. O'Meara was the sole contributor to the matured investment, the proceeds of which were represented by the Anglo cheque, in the absence of rebutting evidence, the presumption that Mr. O'Meara intended to advance the plaintiff in acquiring the investment in joint names applies, so that it must be assumed that Mr. O'Meara and the plaintiff were the beneficial owners of the matured investment and monies represented by the Anglo cheque.

5.5 The foregoing analysis is based on the assumption that the matured investment was some type of investment, for example, a bond, purchased by Mr. O'Meara in the joint names of himself and the plaintiff. If that assumption is incorrect and the matured investment was a fixed term deposit in their joint names, which matured by expiry of the fixed term, the position as to beneficial ownership is the same. Professor Delany states (at p. 162):

> "So, where money is deposited by a husband in an account in their joint names the presumption of a resulting trust in these circumstances may be rebutted by the presumption of advancement and *prima facie* the relationship between the parties will usually result in the wife taking the balance remaining in the account beneficially."

However, Professor Delany issues a note of caution, in stating that such a result should not always be assumed and one question which must be addressed is whether the account was opened merely for the parties' mutual convenience or whether it was intended as a means of making provision for the other spouse. On the evidence, there is nothing to suggest that the purpose of the joint investment in Anglo was for the mutual convenience of Mr. O'Meara and the plaintiff. In my view, the only reasonable inference which can be drawn is that Mr. O'Meara's intention was to make provision for the plaintiff should he predecease her.

5.6 The defendant attempted to establish through cross-examination of the plaintiff, that Mr. O'Meara was the sole beneficial owner of the monies represented by the Anglo cheque, which was at variance with the position adopted by the officials of the defendant in their dealings with Mr. O'Meara. On 26th November, 2008 the officials of the defendant became aware that Mr. O'Meara and the plaintiff were the joint payees on the cheque. Aside from the fact that the cheque was crossed "Account Payee only", the officials of the defendant obviously formed the view that Mr. O'Meara and the plaintiff were the joint owners of the proceeds of the cheque and all of the defendant's conduct thereafter is consistent with that conclusion. In particular, the defendant required that the application to open a six month deposit account in which the proceeds of the Anglo cheque were to be lodged be made in the names of, and by, both Mr. O'Meara and the plaintiff, and this was done. In consequence, joint deposit account No. 101 was opened in the joint names of Mr. O'Meara and the plaintiff. I have come to the conclusion that the defendant has not displaced the presumption of advancement which applies to the creation of the joint investment with Anglo. Accordingly, I find that Mr. O'Meara and the plaintiff were the joint beneficial owners of the money in joint deposit account No. 101 when it was opened with the proceeds of the Anglo cheque.

5.7 If the Court was only concerned with the effect of the opening of joint deposit account No. 101 and the fact that the plaintiff was the surviving joint account holder, that conclusion would be of little relevance, having regard to the decision of the Supreme Court in *Lynch v. Burke* [1995] 2 I.R. 159. On the authority of that decision, the legal effect of the opening of that account in the joint names of Mr. O'Meara and the plaintiff on foot of the application signed by both of them was that the defendant became contractually bound to both account holders and, as a matter of contract between the plaintiff, as surviving joint account holder, and the defendant, she became entitled to the balance in the account on the death of Mr. O'Meara. The relevance of establishing the beneficial ownership of the monies on deposit in joint account No. 101 relates to the defendant's claim to a right of set-off.

6. Devolution on death of Mr. O'Meara

6.1 Leaving aside for the moment the implications of the defendant's claim to a right of set-off against the monies in joint deposit account No. 101, it follows from what is stated at para. 5.7 above that, in accordance with established law, on the death of the first of the joint owners to die, that is to say, on the death of Mr. O'Meara, the monies which remained in that account accrued to the surviving joint owner by right of survivorship. Indeed, counsel for the defendant accepted in their written submissions that, where a deposit account is held in joint names, upon the death of one of the parties, the proceeds devolve to the surviving account holder, as was held by the Supreme Court in *Lynch v. Burke.* The defendant's subsequent contention, both as pleaded and in its written submissions, that, if the Court were to hold that the defendant has no right of set-off, the monies in both joint deposit accounts devolved to Mr. O'Meara's estate, and that the plaintiff has no direct personal claim to the monies, in my view, is wholly contradictory and at variance with the true legal position.

6.2 It may be that that proposition is based on the contention that Mr. O'Meara was the sole beneficial owner of the monies lodged to joint deposit account No. 101. If that is the case, it is based on a false premise in the light of the conclusion I have reached as to the beneficial ownership of the monies represented by the Anglo cheque. As I have indicated–

> (a) *prima facie* the monies represented by the Anglo cheque were owned jointly by Mr. O'Meara and the plaintiff,
>
> (b) given the husband and wife relationship of Mr. O'Meara and the plaintiff, the presumption of advancement, rather than the presumption of a resulting trust, has arisen in relation to the beneficial ownership of the matured investment, in respect of which the cheque issued,
>
> (c) there is no evidence, objective or otherwise, to rebut the presumption of advancement and, in the absence of any other evidence, there is no basis for inferring that the conduct of Mr. O'Meara in proffering *ex post facto* the Anglo cheque to "cash-back" the loan he was applying for is inconsistent with the finding of advancement, and, in any event, it is reasonable to infer that he did not anticipate that the defendant would have to resort to those monies; and
>
> (d) the conduct of the defendant was wholly consistent with the monies being jointly owned by Mr. O'Meara and the plaintiff.

Accordingly, in my view, if the defendant has not established a right of set-off against those monies, the plaintiff is entitled to so much thereof as remained in joint deposit account No. 101 at the death of Mr. O'Meara.

6.3 Different considerations apply to the monies in deposit account No. 102, which I will address later.

6.4 It is difficult to understand the rationale of Clause 3(d) of the terms and conditions in relation to joint deposit account No. 101, which I have quoted at para. 1.7 above, in requiring production of "testamentary documentation", whether Mr. O'Meara died testate or intestate, and whether representation has been raised to his estate or not. As a matter of law, the plaintiff, as the surviving account holder, was entitled to the monies in joint deposit account No. 101 at the date of his death, if the defendant has not established that it is entitled to a right of set-off against that account.

7. Trust?

7.1 While I consider that, as between Mr. O'Meara and the plaintiff, on the one hand, and the defendant, on the other hand, the defendant, having regard to the documentation and information it had, had to, and did, assume in November 2008 and at all material times subsequently that monies on deposit in joint deposit account No. 101 were owned jointly by Mr. O'Meara and the plaintiff and became contractually liable to them on that basis, I accept as correct the submission made on behalf of the defendant that the plaintiff has not established that the monies lodged to that account were impressed with a trust for the benefit of the plaintiff and her two sons on the basis of either the plea in the statement of claim that the monies were lodged "for the benefit and future welfare and security" of the plaintiff and her two sons, or the plaintiff's evidence, because the defendant was not on notice of any such trust.

7.2 The following passage from *Paget's Law of Banking* (13th Ed., 2007) (at para. 11.28) quoted by counsel for the defendant in their submissions represents the law in this jurisdiction:

> "If a bank has notice, however received, that an account is affected with a trust, express or implied, or that the customer is in possession or has control of the money in a fiduciary capacity, it must regard the account strictly in that light. Of course, where there is no such notice, the mere fact that, unknown to the bank, monies are held by the customer in a fiduciary capacity in no way affects the bank's right to treat them as the absolute property of the customer."

The authority cited by the editor of *Paget* for the proposition in the second sentence quoted above is the decision of the House of Lords in *Thomson v. Clydesdale Bank Ltd*. [1893] AC 282.

7.3 As regards the application of that proposition in the case of joint deposit account No. 101, even if the account holders, Mr. O'Meara and the plaintiff, regarded themselves as holding the money in a fiduciary capacity, that was not known to the defendant, and the defendant was entitled to, as it did, treat the funds as the absolute property of both Mr. O'Meara and the plaintiff, the account holders. However, the manner in which the defendant was permitted by the account holders to operate that account is crucial to the determination of the ultimate ownership of the monies lodged to it in November 2008.

8. Effect of the death of Mr. O'Meara on any valid right of set-off

8.1 Before addressing that issue, I think it is appropriate to record that I agree with the submission of the defendant that, if a valid right of set-off against the funds in joint deposit account No. 101 was created prior to the death of Mr. O'Meara, Mr. O'Meara's death did not eradicate or prejudice that right. I agree with the submission that, as regards the effect of a pre-existing right of set-off, the implication of the death of one of two joint account holders, in this case, Mr. O'Meara, on the respective rights of the surviving account holder, the plaintiff, and the defendant is analogous to the effect of the commencement of a liquidation on a pre-existing right of set-off. In the case of a voluntary liquidation, in *Dempsey v. Bank of Ireland* (the Supreme Court, Unreported, 6th December, 1985) Henchy J. stated (at p. 11):

> "The intervention of the winding up did not override or pre-empt the Bank's ability to give effect to that right, any more than it would affect an enforceable lien or charge on those accounts existing at the relevant date. It follows that the bank's accrued right to debit took precedence over the liquidator's title to the accounts."

8.2 The right referred to in that passage was a right which had been given by EuroTravel Limited, the company in liquidation, to Bank of Ireland that, if Bank of Ireland was called upon to pay on foot of a guarantee given by it on behalf of the company, Bank of Ireland could debit any account in the company's name with any sums payable by the bank under the guarantee. The underlying rationale of the decision was that the liquidator could only get such title to the assets as the company had – no more, no less. By analogy, in my view, if the defendant had a valid right of set-off against joint deposit account No. 101, that right would have been exercisable notwithstanding the death of Mr. O'Meara and the plaintiff's entitlement by way of survivorship would have been subject to it.

8.3 In the interest of clarity, I should say that, while recognising that on the death of Mr. O'Meara the banker/customer relationship between him and the defendant terminated, the submission made on behalf of the plaintiff, in reliance on a passage in Derham on *The Law of Set-Off* (4th Ed. 2010) at p. 739, that the defendant was precluded after his death from combining accounts, which could have combined during the lifetime of Mr. O'Meara, although strictly an issue between the personal representative of Mr. O'Meara and the defendant, is not in line with the rationale underlying the decision of the Supreme Court in *Dempsey v. Bank of Ireland*.

9. Permitted operation of joint account No. 101

9.1 The manner in which the defendant was permitted to operate joint deposit account No. 101 was determined by the terms of the application form and, in particular, the "Withdrawal Instructions" segment thereof, which was signed by both account holders. I am at a loss to understand why, according to Ms. Corrigan's evidence, the officials of the defendant could have interpreted the withdrawal instructions given by the applicants as limiting the authority to withdraw to Mr. O'Meara alone. The option which was ticked was "any one Account Holder" which, in accordance with the explanation given immediately underneath, permitted the defendant to act on the instructions of either account holder. If Mr. O'Meara alone was to be entitled to give withdrawal instructions, the "Others" option should have been ticked and his name should have been specified in relation to that option. In any event, I consider that nothing much turns on that because, as I have set out earlier, there seems to be consensus on the pleadings, at any rate on the basis of the assumption I have made in the last sentence in para. 2.4 above, that no monies could be withdrawn from joint deposit account No. 101 without the express authority of "any one" of the account holders.

9.2 However, both on the pleadings and in its counsel's written submissions, the defendant goes further, in that it contends that the defendant was entitled to set-off monies standing to the credit of joint deposit account No. 101 with the authority (express or implied) of any one of the account holders, namely, the plaintiff or Mr. O'Meara. The submission made on behalf of the defendant, while superficially attractive, is fallacious. It is based on the well established principle that, while the normal relationship between a banker and its customer is that of debtor and creditor, quoad the drawing and payment of the customer's cheques as against the money of the customer in the banker's hands the relationship is that of principal and agent as stated by Lord Atkinson in *Westminster Bank Ltd. v. Hilton* (1926) 43 TLR 124 at p. 126. On the basis that the instructions given on the application form were that "any one Account Holder" could give written instructions, it was submitted that either Mr. O'Meara or the plaintiff could instruct the defendant to withdraw money from the account without reference to the other. That is undoubtedly correct. However, whether it is correct, as the defendant contends, that the creation of the right of set-off document was a form of withdrawal instruction, and that it was entitled to treat the execution of attachment (5) as an instruction by Mr. O'Meara only and, as such, as having been provided by any one account holder, so that the defendant was entitled to act upon it and effect the set-off without further reference to the plaintiff, is primarily a matter of construction of the withdrawal instructions in the application form.

9.3 When it was executed by the plaintiff, the application form, which included the withdrawal instructions, was a "standalone" document. It would not be correct to regard its commercial context as subsuming the terms of the letter of offer dated 17th

December, 2006 which stipulated the terms on which the loan would be granted to Mr. O'Meara.

9.4 When one looks at the entirety of the application form it is clear that it was envisaged that the completed application form might be brought in person by the applicant to the defendant or might be sent in by post. It set out, for instance, identification requirements generally regarded as "anti-money laundering" requirements, although they seem not to have been a consideration in this case. Taking an overview of it, the terms of the application form were addressed to the ordinary bank customer, who might or might not attend in person at the defendant's office. Applying "commonsense principles" advocated by Lord Hoffman in *ICS v. West Bromwich B.S.* [1998] 1 WLR 896, which were adopted by the Supreme Court in *Analog Devices B.V. v. Zurich Insurance Company* [2005] 1 I.R. 274, given the purpose and nature of the application form, in my view, the withdrawal instructions which I have quoted are not open to the construction that, by ticking the "any one Account Holder" option, one joint account holder was permitting the defendant to put in place what would, in effect, be a form of security over the monies in the account, such as a right of set-off, without the consent of the other joint account holder. The words used in the explanation to the customer, which I have quoted earlier, must be given their natural and ordinary meaning. The explanation points to the withdrawal of funds, even all of the funds, by one account holder without requiring the consent or signature of the other. It does not point to, or envisage, a withdrawal of the funds by the defendant pursuant to a right of set-off given by one account holder.

9.5 Moreover, the reality of the situation is that the defendant did not consider that the right of set-off could be put in place without the consent of the plaintiff. In fact, Ms. Corrigan's evidence was that when Mr. O'Meara brought the letter of offer back to the defendant on 22nd December, 2008 she considered that the right of set-off document "looked okay" because it was signed by Mr. O'Meara and the plaintiff, she having noted that the account was in joint names.

9.6 Accordingly, I have come to the conclusion that the defendant cannot make the case, in reliance on the withdrawal instructions in the application form, that the right of set-off could be validly put in place on the written instructions of Mr. O'Meara only as one account holder.

10. Operation of joint deposit account No. 101

10.1 The next question which requires to be considered is how joint deposit account No. 101 was operated between the time it was opened and the 23rd December, 2008 when joint deposit account No. 102 was opened, and the implications of that for the plaintiff and the defendant. In acting on Mr. O'Meara's withdrawal instructions of 4th December, 2008 and 15th December, 2008, the defendant clearly acted in accordance with the withdrawal instructions given to it by both account holders. Therefore, the plaintiff cannot advance any claim to the two sums aggregating €600,000 were transferred to Mr. O'Meara's business account in Bank of Ireland in Naas. The reality of the situation is that by 23rd December, 2008 she could only claim a joint legal interest in and joint ownership of the balance in joint deposit account No. 101, which at the time was €934,126.60.

10.2 Counsel for the defendant, properly in my view, took issue with the plaintiff's contention that the sum of €665,873.40 which was lodged in joint deposit account No. 102 when it was opened on 23rd December, 2008 was from monies provided by Mr. O'Meara and the plaintiff jointly. The source of that money was loan account No. 128 in the sole name of Mr. O'Meara. It is clear from the statement of account that the transfer was made out of that account on 23rd December, 2008. The purpose of the transfer was to "top-up" the monies on joint deposit in the joint names of Mr. O'Meara and the plaintiff to the level of the security by way of right of set-off specified in the letter of offer of 17th December, 2008. The practical aspects of the transaction were that the joint deposit account No. 102 was opened and there was an internal transfer from loan account No. 128. On the basis of the documentation and oral evidence before the Court, it is clear that neither Mr. O'Meara nor the plaintiff were in any way consulted in advance about the implementation of the transaction, although, as I have stated earlier, clearly Mr. O'Meara tacitly accepted what was done. The account holders were not required to fill out a new application form because joint deposit account No. 102 was considered by the defendant's officials to be a "sub-account" of joint deposit account No. 101.

10.3 As to what the implications of the transactions were, it was submitted on behalf of the defendant that, in commercial terms, the defendant's "own" monies were used to "top-up" the joint deposit account over which Mr. O'Meara was required to give security. From a banking law perspective, as regards the first step in the transaction, the withdrawal from loan account No. 128, Mr. O'Meara became a debtor of the defendant in the amount drawn down. As a result of the second step in the transaction, that the sum drawn down was placed by the defendant's officials in the joint names of Mr. O'Meara and the plaintiff in joint deposit account No. 102, the question arises as to whether the ownership thereof, including any right to which the ownership was subject, was the same as affected the balance which remained in joint deposit account No. 101 or different. As a matter of principle, one must come to the conclusion that it was not the same, for the reasons I have set out later at para. 17. Indeed, one must also conclude that, notwithstanding that her name was put on joint deposit account No. 102, there was no contractual relationship between the plaintiff and the defendant in relation to the monies in that account.

10.4 Having regard to those conclusions, it is necessary to address the remaining issues in relation to both joint deposit account No. 101 and the joint deposit account No. 102 separately.

11. Right of set-off against joint deposit account No. 101 – general observations

11.1 Although the security condition in the letter of offer of 17th December, 2008, which I have quoted at para. 1.10 above, referred to a "lien" incorporating a right of set-off over a deposit account, as was held by the House of Lords in *Westminster Bank v. Halesowen* [1972] 1 All ER 641, no man can have a lien on his own property. As the money lodged to joint deposit account No. 101 became the defendant's money, although the defendant was indebted to the account holders for the balance on the account, a lien could not have been created. Indeed, I did not understand the defendant to claim that it had a lien. It claimed that such security as it obtained under the right of set-off document, that is to say, attachment (5), was a right of set-off or a right to combine accounts.

11.2 The contention of the defendant in this case, however, is that it is not limited to whatever right was created by the set-off document, but that its right of set-off falls within each of the following recognised categories of set-off, namely:

(a) a bank's common law right of set-off of accounts;

(b) equitable set-off, although that is not pleaded; and

(c) contractual set-off.

While I will consider the application of each category to the facts in turn, a preliminary observation is apposite. When the requirement of a right of set-off was conditioned into the letter of offer dated 17th December, 2008 by the defendant, the targeted deposit account, joint deposit account No. 101, was in the joint names of Mr. O'Meara and the plaintiff and the defendant's contractual relationship in relation to that account was with both account holders. What the defendant required was a contractual right of set-

off in the defendant's "standard form" from both joint account holders. Mr. O'Meara accepted the offer on the basis of that express condition. In my view, the only issue which could properly arise in relation to the monies in that joint deposit account on 22nd December, 2008 is whether the defendant followed through on the express condition and obtained an enforceable right of set-off in the standard form from both account holders. I can see no basis on which the Court could find that there was some other implied agreement in the "ether", which could be resorted to by the defendant if it did not ensure that the express term was effectively complied with.

12. Bank's common law right of set-off?

12.1 As regards the application of a bank's common law right of set-off to the facts as found, on the basis of the finding I have made that the joint deposit account No. 101 was legally (that is to say, contractually as against the defendant) and beneficially owned by Mr. O'Meara and the plaintiff, whereas the loan account No. 128 was in the sole name of Mr. O'Meara and he had sole liability for it, the defendant had no right at common law to set-off or combine the two accounts. The fundamental principle which underlies the entitlement of a bank to set off under the general law is mutuality, which requires that the debts be between the same parties in the same right. The finding that the defendant was contractually liable to Mr. O'Meara and the plaintiff jointly, who were beneficial joint owners of the monies on deposit in joint deposit account No. 101, precludes any application of the rule of set-off at common law.

12.2 Accordingly, it is unnecessary to express a definitive view on the submission made on behalf of the plaintiff, by reference to the decision of the Supreme Court in *Bank of Ireland v. Martin* [1937] I.R. 189, that, in the absence of a contractual arrangement, a bank may not combine a deposit account and a loan account, although I appreciate that particular emphasis was laid in the submission on the fact that the deposit account was a joint account, whereas the plaintiff was not indebted to the defendant and the plaintiff was not relying merely on the proposition that in this jurisdiction combining accounts at common law is confined to current accounts.

12.3 Nor do I consider it necessary to comment on the point made by counsel for the plaintiff in their submissions that, in any event, the defendant could not combine the loan account with any other account at any time prior to the death of Mr. O'Meara, because the loan account was for a term of three years, and the principal advanced had not become repayable prior to Mr. O'Meara's death. Having said that, the reality of the situation is that, apart from whatever, if any, right of set-off the defendant has, it is clear on the evidence that the defendant is not going to recover the amount due on loan account No. 128.

13. Equitable set-off?

13.1 As regards the principle of equitable set-off in the context of bank accounts, the requirement of mutuality in relation to the beneficial interests in the cross-debts pervades its application. Having made the finding that Mr. O'Meara and the plaintiff were the joint beneficial owners of the monies in joint deposit account No. 101, in my view, there is no basis on which the principle of equitable set-off could avail the defendant and the argument based on the principle is misconceived. Nonetheless, I propose analysing the argument made on behalf of the defendant.

13.2 As counsel for the defendant pointed out, the most recent exposition of the principle of equitable set-off is to be found in a note on the decision of the Court of Appeal in England and Wales in *Geldof Metaal Constructie NV v. Simon Carves Ltd.* [2010] 4 All ER 847, which, in my view, is of little assistance in addressing the application of the principle to the facts of this case. Having considered the jurisprudence on equitable set-off, Rix L.J. set out his conclusions in para. 43 of his judgment, which is quoted in full in the note. He set out his conclusion at page 849 as follow;

> "For all these reasons, I would underline Lord Denning MR's test, freed of any reference to the concept of impeachment, as the best restatement of the test, and the one most frequently referred to and applied, namely 'cross-claims . . . so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim'. That emphasises the importance of the two elements identified in *Hanak v. Green;* it defines the necessity of a close connection by reference to the rationality of justice and the avoidance of injustice; and its general formulation, 'without taking into account', avoids any traps of quasi-statutory language which otherwise might seem to require that the cross-claim must arise out of the same dealings as the claim, as distinct from vice versa. Thus, if the *Newfoundland Railway* test were applied as if it were a statute, very few of the examples of two-contract equitable set-off discussed above could be fitted within its language. I note that in *Chitty on Contracts* (30th edn., 2008) vol. II, para. 37 – 152 the test for equitable set-off is formulated in terms of Lord Denning MR's test."

13.3 The test of Lord Denning MR referred to in that quotation was postulated in *Federal Commerce v. Molena Alpha Inc* [1978] 3 All ER 1066, sometimes referred to as "The Nanfri", which is also of little assistance in addressing the application of the principle of equitable set-off to the facts here. Although there were three time charterparties at issue in that case, in reality it was a one-contract case. The matter came to court by way of an award of an umpire in the form of a special case, following an arbitration in which the two arbitrators disagreed. One of the questions which the Court of Appeal had to consider was whether the charterer was entitled to deduct from hire, without the consent of the owner, claims against the owner. It was held that he was by virtue of the terms of the charterparty and by reason of the fact that a rule of law in relation to a charterparty, which required payment in full without deduction, did not extend to hire payable under a time charterparty, so that the charterer was entitled to deduct claims which constituted an equitable set-off. Having alluded to the distinction made at common law between set-off and cross-claim and the strictures imposed by the courts of common law, Lord Denning MR stated (at p. 1077):

> "But the courts of equity, as was their wont, came in to mitigate the technicalities of the common law. They allowed deductions, by way of equitable set-off, whenever there were good equitable grounds for directly impeaching the demand which the creditor was seeking to enforce: see *Rawson v. Samuel* . . . per Lord Cottenham LC."

Later, having referred to the effect of the Judicature Act 1873, Lord Denning MR continued (at p. 1078):

> "We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? . . . This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with the demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim."

On the facts of that case, Lord Denning MR and Goff LJ held that in time charterparty cases, the equitable right to deduct should be limited to instances when the ship owner wrongly deprives the charterer of the use of the vessel or prejudices him in the use of it. It should not be extended to other breaches or default of the ship owner, such as damage to cargo arising from the negligence of the crew. What is significant for present purposes is that there is nothing in the test for equitable set-off as formulated by Lord Denning MR or in the *Geldof* decision which dispenses with the requirement of mutuality in relation to beneficial interests.

13.4 The application of the doctrine of equitable set-off in the context of bank accounts is considered in *Paget (op. cit.)* at paras. 29.27 *et. seq*. relied on by counsel for the defendant. Reference is made by the editors of *Paget* to the decision of the Court of Appeal in *Bhogal v. Punjab National Bank* [1988] 2 All ER 296 which, like many of the authorities on the issue of equitable set-off, arose in the context of entitlement of a plaintiff to summary judgment. The appeal related to two actions, in each of which the plaintiff, who had monies on deposit in the defendant bank, had obtained summary judgment for the amount on deposit, and the defendant bank appealed, contending that it should be granted unconditional leave to defend the actions because it had a valid defence by way of equitable set-off. The basis of the claim for equitable set-off was the defendant bank's contention that each of the plaintiffs was merely a nominee of a third party, who was indebted to the defendant bank and that it was entitled to set off the credit balance on each deposit account against the debit balance on the third party's account. It was held by the Court of Appeal that, since the evidence did not clearly establish that the deposit account of each of the plaintiffs was a nominee account, the defendant bank could not raise a defence of equitable set-off in their actions. In the Court of Appeal the following passage from the judgment of Scott J. at first instance in one of the cases was quoted and in the judgment of Bingham L.J. there was reference to "the wisdom of the rule" which Scott J. laid down. The passage (which appears at p. 306 in the judgment of Bingham L.J.) is to the following effect:

> "The commercial banking commitment that a bank enters into with a person who deposits money with it is just as needful of immediate performance as are a bank's obligations under a letter of credit or bank guarantee. I think it would be lamentable if a bank were able to defeat a claim by a person who had deposited money on such grounds as the bank is asserting in the present case. It is possible that this action will come to trial in some two or three years' time and that the bank will fail to make good the arguable case that it has set out before me. It would have succeeded in postponing for that considerable period its obligation to repay a customer who had made a simple deposit of money with it. That seems to me to be totally contrary to the basis on which banks invite and get money deposited with them. I hold that the bank is not entitled to refuse repayment of money deposited with it on the basis merely of an arguable case that some other debtor of the bank has an equitable interest in the money."

13.5 Of course, on the facts here, on the basis of the finding I have made, no question remains as to the ownership in equity of the monies in joint deposit account No. 101. Apart from the contractual liability of the defendant, which in my view is the paramount consideration, as I have found that Mr. O'Meara and the plaintiff were the beneficial owners of the monies on deposit in joint deposit account No. 101, they, or, after the death of the first to die, the survivor (subject to the fixed term aspect of the particular deposit, which is not in issue) was entitled to withdraw the balance in the account on demand. Because of the lack of mutuality, the defendant had no entitlement in equity to set-off Mr. O'Meara's sole liability for the debt on foot of loan account No. 128 against the balance in that deposit account.

13.6 The basis on which the defendant sought to demonstrate that there was an equitable right of set-off does not stand up to scrutiny. The defendant undoubtedly entered into two agreements with Mr. O'Meara which were closely connected from its perspective and probably also from Mr. O'Meara's perspective. Under one, say Agreement A, the defendant advanced a loan of €1.6m to Mr. O'Meara. Under the other, say Agreement B, Mr. O'Meara and the plaintiff deposited the proceeds of the Anglo cheque with the defendant. The defendant contends that the two agreements are intimately connected and it would be unjust to enforce Agreement B by requiring the release of the monies on deposit on the demand of the plaintiff, because to do so would be to ignore the defendant's claim to recover the loan advanced under Agreement A. That proposition ignores the absence of mutuality between the defendant's liability under Agreement B and its entitlement under Agreement A. In the absence of some contractual foundation binding not only Mr. O'Meara, but also the plaintiff, the requirement of mutuality cannot be overridden by the defendant. It is not unjust that the defendant should be compelled to release the monies on deposit to the surviving joint account holder, the plaintiff, in accordance with its contractual obligation. The principle of equitable set-off does not apply.

13.7 Furthermore, it ill behoves the defendant to seek to rely on an equitable principle in support of the exercise of a right of set-off against the plaintiff, having regard to the fact that there was absolutely no communication between the defendant and the plaintiff and, in particular, the defendant did not advise the plaintiff to obtain legal advice and made no inquiry as to whether she had the benefit of legal advice in accordance with the principles referred to later in para. 15.6, when dealing with the issue of rectification. Given the plaintiff's lack of understanding of what the defendant contends she was doing in subscribing her name to the right of set-off document, and her lack of understanding as to what was being agreed by Mr. O'Meara with the defendant, it would be unfair and inequitable to enforce the right of set-off against the plaintiff, if she is not contractually bound.

13.8 The kernel of the issue as to whether the right of set-off was validly exercised on 5th January, 2009 is whether the defendant, as it clearly had intended to do, effectively obtained from both of the account holders of joint deposit account No. 101 a contractual right to set-off Mr. O'Meara's liability on loan account No. 128 against the monies in that account.

14. Contractual right of set-off?

14.1 That question turns on the construction of the right of set-off contained in attachment (5). I think it is worth recalling that the plaintiff endorsed her signature on the Anglo cheque on or before the 26th November, 2008 in her home. Some time later Mr. O'Meara put the application form for the six month fixed deposit account, which he had been given after the defendant's officials decided that a joint deposit account should be opened, before the plaintiff and she signed on the third page. Just short of a month later, on 20th December, 2008, the right of set-off document was put before her. It was the twelfth page of the compendium of documents which comprised the letter of offer and attachments. The only reference to a deposit account with the defendant was on the second page of the letter of offer and it was in the provision in relation to security which I have quoted at 1.10 above, which refers to a deposit account in the names "of John O'Meara and Claire O'Meara". The entire document was complex. Having regard to the manner in which it was completed, it is reasonable to infer that Mr. O'Meara, an experienced and astute businessman, had difficulty navigating his way through it, in that he arrived back in the defendant's office on St. Stephen's Green on 22nd December, 2008 without having signed the most crucial part of it, namely, the acceptance on page 7, which resulted in the involvement of Mr. Abdullah as a witness. He had signed attachment (2) in relation to insurance instructions, apparently on the 19th December, 2008. He did not sign attachment (3), dealing with authorised signatures on the loan account apparently until 22nd December, 2008. Similarly, attachment (4) containing the instruction to Bank of Ireland, Naas Branch in relation to the direct debit in respect of the interest payments was not executed until 22nd December, 2008.

14.2 Counsel for the plaintiff submitted that the right of set-off document should be construed *contra proferentem.* They submitted that, as a matter of interpretation of that document, neither Mr. O'Meara nor the plaintiff agreed to a right of set-off being effected against the deposit accounts. In fact there was only one deposit account in existence at the time – joint deposit account No. 101. For illustrative purposes, and not intending to preclude any argument which the personal representative of the defendant may make in the future, it can be observed that, if that account had been in the sole name of Mr. O'Meara, as a matter of construction, it would appear to have been captured by the right of set-off document in that, as borrower/account holder, he agreed that the defendant might "debit any credit balance on any account in my name", which, *prima facie*, would capture the credit balance on a deposit

account in his sole name. The real problem with the right of set-off document, from the defendant's perspective, is that it was clearly drafted for execution by a sole account holder and, while it might have been, it was not adapted to bind joint account holders conferring a right of set-off on the defendant over a specific existing joint deposit account. The document did not signify that it was to be executed by a person other than a sole account holder and, *ex facie*, the plaintiff signed as a witness. Having regard to the finding I have made that Mr. O'Meara and the plaintiff had a joint legal interest in, and were jointly beneficially entitled to, joint deposit account No. 101, I consider that the right of set-off document was not effective to bind the plaintiff as one of the joint account holders and, in the events which happened, as the surviving account holder, so as to confer a right of set off on the defendant in relation to that account.

14.3 From the evidence of Mr. Savage, it is clear that when he reviewed the documentation following the meeting with O'Meara in July 2009, he noticed the fact that the right of set-off document was signed by the plaintiff only as a witness and had a concern about that. However, no steps were taken to rectify the situation.

14.4 It is convenient at this juncture to consider the relevance or otherwise of an authority relied on by counsel for the plaintiff – the decision of Costello J. in *O'Keeffe v. O'Flynn Exhams and Partners and Allied Irish Banks* (the High Court, Unreported, 31st July, 1992). The basis on which that case was decided against Allied Irish Banks in favour of the plaintiff, Mrs. O'Keeffe, is summarised in the judgment as follows (at p. 35):

> "In my opinion if a request is made for a joint loan to purchase property which is accompanied by an agreement to deposit the title deeds of the property then an equitable claim over the interest of both purchasers is created once the loan is made as requested and the land conveyed to both. But if contrary to the request the loan is made to one of the purchasers only and the property is subsequently purchased jointly the interest of the customer with whom the bank contracted and to whom it lent the money is the only interest which is subject to an equitable charge. When subsequently the title deeds are lodged the equitable charge created by the agreement over the customer's interest becomes an equitable mortgage by the deposit of the deeds. This means that in the events that happened in this case the bank obtained an equitable mortgage over Mr. O'Keeffe's undivided moiety in the Kilpeacon lands, but it obtained no equitable interest of any sort over Mrs. O'Keeffe's interest."

14.5 Frankly, I do not see the relevance of that finding to the factual circumstances of this case. It concerned the severance of a joint tenancy in land by one joint owner creating an equitable charge by deposit of title deeds. Here the Court is concerned with a joint deposit account at the defendant bank, in respect of which the defendant was contractually liable to both joint account holders. More importantly, in this case, the agreement between the defendant and Mr. O'Meara was that the loan would be to Mr. O'Meara solely and that is what happened. The defendant wanted security over the monies on deposit with it, the source of which was the Anglo cheque, which, as I have held, were beneficially owned by Mr. O'Meara and the plaintiff. The mistake the defendant made is that, as it could not either at common law or in equity obtain a right of set-off of the monies due from Mr. O'Meara on loan account No. 128 against the monies in the joint deposit account because of lack of mutuality, it needed to obtain a contractual right of set-off, which bound both account holders, but it failed to do that. Accordingly, it obtained no right of set-off against the monies in joint deposit account No. 101 as of 23rd December, 2008.

15. Rectification?

15.1 Emphasising that the issue which is being addressed is whether the Court should find that the defendant is entitled to exercise the claimed right of set-off against the balance of the monies on deposit in joint deposit account No. 101, as it purported to do on 5th January, 2010, I will now consider the defendant's counterclaim for rectification. In the circumstances which I have found prevailed, the defendant could only acquire a right of set-off by contract and the objective of the defendant clearly was to extend the general law to a tri-partite situation where the joint owners of the monies on deposit with the defendant would agree with the defendant that those monies might be set off against a debt due to the defendant by one of the joint owners, Mr. O'Meara, solely. I emphasise that, because it seems to me that the fundamental question is whether the other joint owner, the plaintiff, ever signified the intention to be bound by such agreement.

15.2 On the basis of the defendant's claim for rectification as pleaded, it is not suggested that the text of the right of set-off document as quoted at para. 1.11 above requires rectification. What is suggested is that the details of execution require rectification. If the application were acceded to, the details of execution (the words in bold type having been added) would read:

Signed/Witness John O'Meara

Borrower/Account Holder

Date: 20/12/08

Signed/Witness: Claire O'Meara

Borrower/Account Holder

Address: Pitchfordstown Stud

Kilcock

Date: 22/12/08

In the interests of clarity, I should say that the elements which are shown in italics are the signatures of Mr. O'Meara and the plaintiff, the date of execution by Mr. O'Meara, which I think it probable was inserted by Mr. O'Meara, and the address and final date, which also appear in manuscript and I think it probable were inserted by Ms. Corrigan on 22nd December, 2008. It was submitted on behalf of the plaintiff that, given that the preceding text is not proposed to be rectified, the additions to the right of set-off document proposed would still not expressly authorise the exercise of a right of set-off of the monies due on loan account No. 128 against the balance in joint deposit account No. 101.

15.3 The legal basis on which a court can order rectification is well settled. It was recently succinctly summarised by Clarke J. in *Mooreview Developments & Ors. v. First Active Plc & Ors.* [2009] IEHC 214 in the following terms (at para. 9.9):

> "Rectification is a discretionary remedy which allows a court to amend the wording, but not affect the making, of a contract, where the wording does not reflect the intentions of the parties to the contract. The party seeking rectification

must provide evidence of a common continuing intention in relation to the provisions of the contract agreed between the parties up to the point of execution of the formal contract. In *Irish Life Assurance Co. v. Dublin Land Securities Ltd* [1989] I.R. 253, Griffin J., at p. 263, described this standard of proof as 'convincing proof, reflected in some outward expression of accord, that the contract in writing did not represent the common continuing intention of the parties on which the court can act'. The court in *Irish Life* further held that there will be an especially onerous burden on a party seeking rectification where long negotiations have taken place between the parties, both of whom have taken legal advice during such negotiations."

15.4 The criterion stipulated in the last sentence in that quotation has no application to the facts of this case because, not only was no legal advice taken by the plaintiff but there was no engagement by the defendant with the plaintiff at all and, in fact, there was no direct communication or contact with her by any official or agent of the defendant in relation to the condition imposed by the defendant on Mr. O'Meara in the letter of offer of 17th December, 2008 that the defendant be granted a right of set-off against the monies in joint deposit account No. 101. There is absolutely no evidence in this case of a common continuing intention to which the plaintiff was a party that the defendant would be given security by way of right of set-off against joint deposit account No. 101 in respect of the monies to be advanced to Mr. O'Meara, which were subsequently the subject of loan account No. 128. The only evidence before the Court on which the defendant could rely in support of the existence of such an intention is that the facility letter, with attachment (5) stapled to it, was probably handed by Ms. Corrigan to Mr. O'Meara when he called to the defendant's office at St. Stephen's Green, probably on the 17th December, 2008. Ms. Corrigan, in her evidence said that it was "more than likely" that she told Mr. O'Meara that the plaintiff had to sign the right of set-off document. She had no exact recall of doing so, although she suggested that, if she did not say it to Mr. O'Meara, then she doubted that the plaintiff's signature would be on it. I do not think it is reasonable to infer that, because the plaintiff's signature appears on attachment (5), the plaintiff was signing in her personal capacity, rather than as a witness, as the document suggests. The fact that Mr. O'Meara signed attachment (5), which was the last page of the twelve page document and had the "witness" portion of the execution details completed by the plaintiff, while not having completed what was arguably the most important element of the document, the acceptance on page 7, is open to the inference that Mr. O'Meara got the plaintiff to sign as a witness rather than as a party to the transaction. Accordingly, the defendant's claim for rectification must fail because there is no evidence of a continuing common intention on the part of the plaintiff to execute a right of set-off document to comply with the security condition provided for in the letter of offer of 17th December, 2008.

15.5 Even if it were possible to conclude that it was the intention of the plaintiff to execute the right of set-off document not merely as a witness but in a manner which would bind her as one of the beneficial owners of joint deposit account No. 101, and that the document needs to be rectified to reflect that, a question would arise as to whether the Court should exercise its discretion to grant the equitable relief of rectification in circumstances in which the defendant took no steps whatsoever to ensure that the plaintiff understood the implications of executing a document which would have given the defendant the type of security it was seeking over the monies in joint deposit account No. 101. In particular, the question would arise as to whether the defendant should have advised the plaintiff to seek legal advice to avoid being disentitled to equitable relief. While, on the basis of the finding I have made in the next preceding paragraph, the question is hypothetical, I propose to comment on it generally.

15.6 Apart from reference to a text (Hodge on *Rectification*, 1st Ed., 2010 at para 1 – 41 *et. seq*.), no authority was specifically cited by counsel for the plaintiff to support their contention that the defendant did not take the steps it should have taken, including advising the plaintiff to obtain independent legal advice. I have noted earlier that the plaintiff did not allege either in the pleadings or in her evidence that Mr. O'Meara exerted undue influence over her or that he took any unfair advantage of her. Her position was that she just signed what Mr. O'Meara put in front of her without seeking or obtaining any explanation. There is authority in the United Kingdom that a bank is always on inquiry when a wife provides security for her husband's debt and that it must take reasonable steps to satisfy itself that the practical implications of the proposed transaction have been brought home to the wife, in a meaningful way, so that she enters into the transaction with her eyes open so far as its basic elements are concerned and reliance by the bank upon confirmation from a solicitor, acting for the wife, that he advised her appropriately is sufficient to discharge the bank's obligation (the decision of the House of Lords in *Royal Bank of Scotland v. Etridge (No. 2)* [2002] 2 AC 773). The manner in which the defendant went about obtaining what it considered as security for the loan it was advancing to Mr. O'Meara solely over a deposit account in the joint names of Mr. O'Meara and his wife, the plaintiff, is so egregiously at variance with the principles enunciated by the House of Lords in *Etridge (No. 2),* which, as academic commentators have suggested should be applied by the courts of this jurisdiction (Mee (2002) 27 Ir. Jur. 292; Delany *Equity and the Law of Trusts in Ireland*, 5th Ed. at p. 746), that it is unlikely that a court would afford an equitable remedy to the defendant to perfect its security, if such was necessary and it was appropriate to do so, without seeking to explore in depth the application of those principles in this jurisdiction, having regard to the conduct of the defendant and the potentially improvident nature of what the defendant was requiring the plaintiff to do.

15.7 Finally, it is pertinent at this point to make two general observations in the interests of clarity. First, in the context of the application of equitable principles, in my view, it is necessary to distinguish between the operation of a joint deposit account by the account holders, which banks, understandably, as reflected in condition 3(a) of the general conditions quoted at para. 1.7 above, leave to the account holders, on the one hand, and the creation of what, in effect is a type of security over a joint deposit account, on the other hand. Secondly, I accept the argument advanced on behalf of the defendant that the defendant did not occupy a fiduciary position vis-à-vis the plaintiff and that the plaintiff's claim, insofar as it is based on alleged breach of fiduciary duty, is misconceived.

16. Estoppel?

16.1 The basis on which counsel for the defendant contended that the plaintiff is estopped from asserting that the monies on deposit in joint deposit account No. 101 were not to be applied in reduction of Mr. O'Meara's liability to the defendant under loan account No. 128 was that all necessary ingredients of an estoppel are present, namely: a representation by the plaintiff; reliance on the representation by the defendant; and the defendant acting to its detriment. The defendant's officials appear to have assumed on 23rd December, 2008 that there was an effective right of set-off against the monies in joint deposit account No. 101 in place by reason of the plaintiff's signature on the right of set-off document. The defendant certainly acted to its detriment in advancing the loan to Mr. O'Meara when, as I have found, it had no right of set-off. The question which remains is what representation was made by the plaintiff, whether by word or conduct, to the defendant which, in the words of Griffin J. in *Doran v. Thompson Ltd.* [1978] I.R. 223 relied on by counsel for the defendant, amounted to "a clear and unambiguous promise or assurance" that she would participate in granting a right of set-off to the defendant against the monies on deposit in joint deposit account No. 101?

16.2 The defendant's submission was that it is to be found in the plaintiff's assent to the lodgement of the Anglo cheque, which was to be "cash backing" for the loan to Mr. O'Meara, and her agreement (in effect) that Mr. O'Meara could mandate withdrawals from that account without reference to her, and her knowledge (if not her explicit assent) of the set-off commitment provided by Mr. O'Meara. All the plaintiff did was that –

(a) she endorsed the Anglo cheque,

(b) she signed the application form to open joint deposit account No. 101, which included the withdrawal instructions, which resulted, in due course, in the joint deposit account being depleted to the extent of €600,000, and

(c) she subscribed her name as a witness to Mr. O'Meara's signature to the right of set-off document.

Those actions, separately or in conjunction with each other, did not amount to "a clear and unambiguous promise or assurance" that the defendant would have a right of set-off against the monies in joint deposit account No. 101.

16.3 The fundamental problem for the defendant in this case is that it did not get the commitment it required from the plaintiff in order to obtain the security which it sought. In fact, it completely ignored the plaintiff's interest. The result is that it must suffer the consequences of its own mistake.

17. Ownership/ rights over joint deposit account No. 102

17.1 The monies which the defendant transferred to joint deposit account No. 102 were sourced from loan account No. 128. Sole liability for the sum of €665,873.40 so transferred was assumed by Mr. O'Meara under loan account No. 128. The sole purpose of the drawdown was to meet the security requirement in relation to providing a right of set-off against a joint deposit account with a balance equivalent to the amount of the loan, €1.6m. It was the defendant's officials, on their own initiative, who put the joint deposit account in place in the joint names of Mr. O'Meara and the plaintiff to meet that requirement. While the "sub-account", as it was characterised, was opened in the joint names of Mr. O'Meara and the plaintiff, the plaintiff was not a party to it at any time. Therefore, the decision of the Supreme Court in *Lynch v. Burke,* in my view, does not assist the plaintiff. Moreover, before it was opened, she had no legal or beneficial entitlement to any part of the sum of €665,873.40 transferred by the defendant's officials to it. Accordingly, in my view, one has to look behind the names on the account.

17.2 On the basis of the doctrine of a resulting trust, as Mr. O'Meara, through the medium of the draw down from loan account No. 128, was the sole contributor to the monies in joint deposit account No. 102, *prima facie*, he was the beneficial owner of those monies, unless the presumption of advancement overrides the doctrine of resulting trust.

17.3 The plaintiff implicitly relied on the evidence of Mr. Savage in support of its contention that the monies in joint deposit account No. 102 were jointly beneficially owned by Mr. O'Meara and the plaintiff and passed to the plaintiff by right of survivorship. Mr. Savage was asked in cross-examination why a deposit account in the sole name of Mr. O'Meara was not opened to bring up to the level of €1.6m the balance on deposit with the defendant, given that the right of set-off document extended to any account in his name. The response of Mr. Savage was that Mr. O'Meara wanted it that way. He wanted the money to go back into the joint deposit account, which he had set up at the particular time. What he had instructed the defendant to do was to put the money in the name of himself and his wife. That response is inconsistent with the evidence of Ms. Corrigan and Ms. Dwyer, who were the officials of the defendant who were implementing the transactions on 23rd December, 2011 and who, on their evidence, did so without reference to Mr. O'Meara.

17.4 Even if Mr. O'Meara intended that the monies in joint deposit account No. 102 would be beneficially owned by himself and his wife, effect could only have been given to that intention subject to any trust or equitable interest known to the defendant to which the monies were subject. Mr. O'Meara was facilitated by the defendant in the draw down the sum of €665,873.40 from loan account No. 128 and its transfer to joint deposit account No. 102 for a specific purpose – to top up the monies on deposit to the level of the set-off requirement conditioned into the letter of offer of 17th December, 2008. Therefore, the monies in joint deposit account No. 102 must be deemed to have been impressed with an obligation in equity to fulfil that purpose. Accordingly, the right of the defendant to have that purpose fulfilled would have had priority in equity over the beneficial ownership of the monies, whether the beneficial ownership was vested in Mr. O'Meara and the plaintiff jointly or in Mr. O'Meara solely. It follows that, wherever the beneficial ownership was vested, the plaintiff cannot rely on beneficial ownership by right of survivorship to make the case that the defendant did not have a right of set-off as against those monies for Mr. O'Meara's sole liability on foot of loan account No. 128 on 5th January, 2010.

17.5 The question whether Mr. O'Meara and the plaintiff jointly were the beneficial owners, or Mr. O'Meara was the sole beneficial owner, of the monies on deposit in joint deposit No. 102 subject to the defendant's right of set-off arises between the plaintiff, on the one hand, and the personal representative of Mr. O'Meara, on the other hand. Representation has not been raised to the estate of Mr. O'Meara and his personal representative was not before the Court. Accordingly, it would be inappropriate for the Court to express any definitive view on that question. Notwithstanding the absence of the personal representative of Mr. O'Meara, it has been necessary to reach a conclusion as to whether beneficial ownership of the monies, wherever it lay, was subject to the right of the defendant to set-off, and I have concluded that it was.

17.6 Consistent with the view I have expressed earlier in relation to the analogy with the liquidation situation addressed by the Supreme Court in *Dempsey v. Bank of Ireland*, the personal representative of Mr. O'Meara would acquire no better title to the monies in joint deposit account No. 102 than Mr. O'Meara had.

18. Summary of conclusions and orders

18.1 As regards joint deposit account No. 101, I have come to the conclusion that the monies in that account were jointly beneficially owned by Mr. O'Meara and the plaintiff and that they passed to the plaintiff by right of survivorship on the death of Mr. O'Meara. I have further concluded that the defendant was not entitled to set-off the monies due on loan account No. 128 against those monies, as it purported to do in January 2010. Accordingly, the plaintiff is entitled to a declaration that all the monies which were standing to the credit of that account on 28th November, 2009 are the property of the plaintiff. As to how the plaintiff is to be compensated for the breach of contract by the defendant in not paying those monies to the plaintiff on being requested to do so, although the plaintiff claimed interest under the Courts Act 1981, as amended, in the statement of claim, no case was made on behalf of the plaintiff for pre-judgment interest at the Court rate. I consider that the plaintiff will be properly compensated by payment by the defendant to her of interest from 28th November, 2009 to the date of judgment at the rate applicable to six month fixed term deposits with the defendant and thereafter interest at the Court rate.

18.2 There will be judgment for the appropriate sum, the quantification of which should be agreed between the parties.

18.3 Having come to the conclusion that the plaintiff did not have a beneficial interest in the monies lodged in joint deposit account No. 102, the plaintiff is not entitled to any relief in respect of those monies. While, in the absence of the personal representative of Mr. O'Meara before the Court, I think it is inappropriate to make the declaration sought by the defendant in its counterclaim that the defendant was entitled to set-off the monies in that account, I propose that a declaration be made that the plaintiff has no claim to the said monies.

18.4 Subject to that, the defendant not being entitled to rectification of the set-off document, the defendant’s counterclaim will be dismissed.