**THE HIGH COURT**

**CHANCERY**

**[2012 No. 3715 P]**

**BETWEEN**

**KBC BANK IRELAND PLC**

**PLAINTIFF**

**- AND -**

**BRUCE BLAKE**

**DEFENDANT**

**JUDGMENT of the Hon. Ms. Justice Stewart delivered on 12th day of April, 2019.**

1. These proceedings were instituted by plenary summons dated 12th April, 2012. The general indorsement of claim sets out a claim for rectification of a guarantee and indemnity of 24th February, 2006, made between the plaintiff ("KBC") and the defendant ("Mr. Blake") so as to embody the agreement actually reached between them. In the alternative, KBC seeks specific performance of the agreements of 12th December, 2005, and 7th May, 2009, which would require Mr. Blake to guarantee all sums due to them by Eileen O'Grady Blake ("the borrower"), who is Mr. Blake's wife. Judgment against Mr. Blake in the sum of €5,737,941.65 is also sought.

**Background**

2. KBC's version of events is set out in the statement of claim delivered on 2nd August, 2012. By facility letters dated 12th December, 2005, and 24th January, 2006, KBC advanced €5.32m to the borrower. These monies were secured by, *inter alia*, Mr. Blake's guarantee supported by his interest in the two properties in respect of which the funds were to be advanced ("the properties"). Correspondence between solicitors indicates that this guarantee was to be for the full amount of the loan, plus interest, costs and expenses, supported by Mr. Blake's interests in the properties. Effectively, this was to be an "all sums due" guarantee. KBC allege that its then-solicitors, BCM Hanby Wallace (now Byrne Wallace) solicitors, mistakenly sent a guarantee document to Mr. Blake which was limited to €50,000. This is the document that was signed on 24th February, 2006, which KBC now seek to have rectified. By facility letter dated 7th May, 2009, KBC agreed to vary the terms of the original loan to the borrower. By means of additional comment precedent to that letter, it was specifically stated that the security of the original facility letter was in full force and effect. Mr. Blake signed an acknowledgement appended to this letter, which confirms that his guarantee was for all sums due. In the months that followed the execution of this facility letter, BCM Hanby Wallace carried out a review of the Blake file and the alleged error in the guarantee document came to their attention. Through correspondence sent to the Blakes between late-2009 and 2011, KBC called on Mr. Blake to rectify the mistake in the guarantee document. This has yet to occur. On 8th February, 2012, judgment was granted against the borrower in the sum of €5,678,203.84. This is the sum that was due as of that date, which has since increased due to the ongoing accrual of interest. On the 27th March, 2012, KBC demanded payment of this sum from Mr. Blake pursuant to his guarantee. This demand was not met.

3. In his defence delivered on 9th November, 2012, Mr. Blake denied ever having agreed to provide a guarantee or indemnity for the borrower's loans. In the alternative, it was pleaded that such a guarantee was intended to be limited to €50,000. Without prejudice to that position, Mr. Blake pleads that, when he attended the meeting in which he executed the guarantee, he had believed that he was there to execute a family home declaration; the issue of the guarantee was not tabled until the meeting had commenced. In those circumstances, he suggests that KBC should have advised him to procure independent legal advice. He also argues that relief should be refused because the amount claimed for includes debt arising from a "SWAP" financial product, which he was never advised or informed about. Had he been aware that the borrower was availing of such a product, he says that he would not have executed the guarantee. He denies that there was any common continuing intention between the parties, that there was any mistake and/or that any such mistake gives rises to a remedy as against him. As for the document executed in May, 2009, Mr. Blake denies executing such a document. In the alternative, he alleges that he did not understand the document he was signing and was not appropriately advised as to its impact. In conclusion, he denies that KBC is entitled to any relief against him. He alleges that KBC have excessively delayed in seeking relief and that relief for this alleged mistake should properly be sought against their former solicitors.

4. Particulars were replied to on 8th February, 2013. Various pre-trial motions were litigated from 2013-2016. A notice of intention to proceed was filed on 2nd September, 2016. A reply to defence was delivered on 2nd January, 2017. KBC denies therein that the meeting on 24th February, 2006, was held for the purposes of executing a family home declaration. They also deny that this was the first time the issue of a guarantee was raised or that there was any obligation to advise Mr. Blake in respect of receiving legal advice. In any event, it was pleaded that Mr. Blake was granted the opportunity to obtain legal advice and his failure to do so has no impact on the validity of the guarantee. The objection taken by Mr. Blake in respect of the "SWAP" financing is fully denied. Indeed, it is pleaded that KBC and the Blakes entered into an ISDA Master Agreement in 2006, which expressly anticipated such financing. It was pleaded that the guarantee was designed in such a way that the rights and liabilities outlined therein were insulated from any change in arrangements between KBC and the borrower.

5. Notice of trial was filed by KBC on 17th January, 2018, and notice to admit documents was filed on 19th April, 2018. Such documents include the 2005 facility letter, the guarantee document, the 2009 facility letter and the ISDA Master Agreement. The 2005 loan is a repayable-on-demand facility secured by, *inter alia*, "the guarantee of Bruce Blake supported by his interest in [the properties]". Clause 1 of the guarantee would appear to be "all sums due" in nature, until Clause 1(a)e), where it is stated "…Provided Always that the total amount recoverable hereunder shall not exceed the sum of €50,000.00…". This would appear to contrast with Clause 1(b), where it is stated that Mr. Blake shall indemnify KBC against all loss, damage or liability of whatsoever nature sustained by reason of having provided credit to the borrower. Clause 4 states that the guarantee shall be construed as a guarantee for the whole and every part of the ultimate balance owed to KBC. The amendments to the 2005 facility letter made in 2009 specifically state that the security set out in the original facility letter remains in full effect. Page 6 of the 2009 letter is signed by Mr. Blake. That same page includes a warning box, which states that Mr. Blake will have to pay off the debt if the borrower does not. It also advises him to seek independent legal advice before signing. A number of acknowledgements are set out beneath that warning box. This includes a confirmation that the guarantee referred to in the 2005 letter of loan offer is "all sums due" in nature and that it remains in full effect. Interrogatories were delivered by KBC on 3rd May, 2018, querying whether Mr. Blake had signed the admitted documents. By affidavit sworn on 30th May, 2018, Mr. Blake confirmed that he did sign those documents. He also averred that the intentions of the parties to those agreements was an issue for determination at the hearing of the action.

**The Hearing**

6. The first witness was a Mr. Garrett O'Donohoe, who is employed as the Head of Business Managing for KBC Ireland. However, back in 2005, he was a deputy manager within KBC's Business Banking Dept. He stated that relations between KBC and the borrower were facilitated by a broker called Michael Gilhooly. On the borrower's behalf, Mr. Gilhooly was seeking re-financing for one of the properties and funds to purchase the other one. As far as he could recall, the original borrowing was with First Active. The process for securing funds commenced and, during that process, Mr. O'Donohoe was introduced to the borrower. Funding was approved and a facility letter was drawn up, including the security term of a guarantee supported by Mr. Blake's interest in the properties. According to Mr. O'Donohoe, this particular phrasing was used because the borrower's property portfolio had been originally purchased using monies acquired through the sale of a business in which both of the Blakes were involved. Thus, there was a concern on KBC's part that some equitable interest in the properties could vest in Mr. Blake, notwithstanding the fact that the properties were held in the sole ownership of the borrower. Mr. O'Donohoe stated that he was not involved in the review of draft documentation related to the guarantee, as that function was performed by KBC's solicitors. The first time Mr. O'Donohoe became aware of any issue with the guarantee was in 2010, when a colleague notified him of it. He stated that there had never been any discussion about limiting the guarantee to a specific amount.

7. Under cross-examination, Mr. O'Donohoe confirmed that KBC's dealings in respect of the loans took place through Mr. Gilhooly and the borrower. He could not recall any conversation with Mr. Blake in which Mr. Blake indicated that he had the means to facilitate an all-sums guarantee. He could not recall taking any steps to ensure Mr. Blake had taken proper independent legal advice before signing. It was Mr. O'Donohoe's understanding that both borrower and guarantor were represented by the same solicitor, a Mr. Justin McKenna of Partners at Law Solicitors. He clarified that he was not involved with this file in 2009. He could not speak to any undue pressure placed upon Mr. Blake by the borrower due to the pressure she herself was under in 2009, but he conceded it was possible such pressure might have been applied. A line of questioning was advanced regarding the ISDA Master Agreement between KBC and the Blakes. This line of questioning was premised upon the suggestion that such agreements are intended for inter-institutional use and are inappropriate instruments for non-institutional borrowers such as the Blakes. Mr. O'Donohoe stated that KBC's Treasury Dept. dealt with the ISDA Master Agreement, so he could not comment further on an issue outside his expertise.

8. The next witness was a Mr. Ronan Egan, a solicitor with Byrne Wallace Solicitors. Mr. Egan was instructed by KBC to prepare the documentation related to the borrower's loan, including the guarantee at issue in this case. He gave a broad outline of the procedures followed and the steps that he took before drawing up the documentation, including conversations with employees of KBC and with Mr. McKenna. When questioned as to how the €50,000 limitation clause had made its way into the guarantee, Mr. Egan stated that he had prepared the guarantee based upon his understanding of the terms of the facility letter and he could not explain how a limitation clause that had no basis in those terms had come to be incorporated. At best guess, he thought a precedent containing a limitation clause may have been used when drafting the guarantee, which he had overlooked and therefore failed to delete before finalisation. Mr. Egan did not recall discussing the terms of the document with Mr. McKenna. In his account of the meeting between all sides to close the deal, Mr. Egan did not recall speaking with Mr. Blake, nor did he recall seeing him sign the guarantee. But it was his understanding that the document set out the terms for an unlimited guarantee. He reviewed various security reports prepared over the years following the closing of the deal, in which the guarantee is referred to as being "for the full amount of the loan plus interest." Mr. Egan clearly stated there has only ever been one text for this guarantee and it was never amended after the first draft was finalised. The infirmity in the guarantee was brought to Mr. Egan's attention in 2009. At that point, two of his colleagues took over control of the file. On cross-examination, it was put to Mr. Egan that Mr. Blake had read the guarantee before signing it and had seen the limitation clause. When asked how a legal professional such as Mr. Egan could have missed it, Mr. Egan stated again that he had made a mistake.

9. The next witness was a Ms. Amy Fallon, who currently works for AIB but was employed by KBC at the relevant time to assist with portfolio management. She and her superior, a Mr. Frank Kennan, took over control of the Blake file from Mr. O'Donohoe. Ms. Fallon was involved in the 2009 security check which resulted in the drafting error in the guarantee coming to KBC's attention. Ms. Fallon then became involved in the various discussions with the borrower and with Partners at Law, seeking to have the guarantee rectified. A contemporaneous note of those conversations was handed into the Court. Using these notes and various e-mails between the parties, Ms. Fallon detailed her interactions with the Blakes. Of particular note is the 2009 letter extending the interest-only period of the borrower's loans, which also includes the signed affirmation from Mr. Blake that his guarantee is for the full amount of the loan. Notwithstanding that, the paperwork drawn up over the course of the next year indicates that Mr. Blake denied ever having agreed to provide an all-sums guarantee and he refused to amend the document as currently constituted.

10. On cross-examination, Ms. Fallon stated that she had no direct dealings with Mr. Blake and was familiar with him only on paper. She stated that she was unaware of any interest held by him in the properties. Ms. Fallon understood that Partners at Law were representing the borrower and took it as a given that they were also representing Mr. Blake, as this was a husband-wife borrower-guarantor arrangement. In her view, the ISDA Master Agreement was a sophisticated financial product that the Blakes qualified for at the time of its initiation.

11. The next witness was a Ms. Susan McCloskey (née Callinan), a solicitor employed by Byrne Wallace. She was the individual who first raised the issue of an error in the guarantee in the months that followed the execution of the 2009 facility letter. She was also involved in the various attempts to have the guarantee amended and she reviewed those attempts in her evidence.

12. Upon the conclusion of Ms. McCloskey's evidence, the first day of hearing came to an end. When the Court sat to commence the second day of the hearing, both parties sought a ruling from the Court. Following on from a discussion regarding legal submissions which had taken place the preceding afternoon, Mr. Blake sought a four-week adjournment to prepare his legal submissions. For its part, KBC sought clarity as to precisely what case Mr. Blake was putting forward; the line of cross-examination employed up to that point indicated that Mr. Blake intended to rely, at least in part, on a defence of duress and/or undue influence. While Mr. Blake is currently a litigant-in-person, he was represented by solicitor and counsel at the pleadings stage and the defence as pleaded makes no mention of such a defence. The Court's attention was drawn to O. 19, r. 5 of the Rules of the Superior Courts, which prescribes a certain level of specificity when allegations of undue influence are being made. In the circumstances, KBC sought a direction from the Court that Mr. Blake be required to provide that level of specificity before the hearing proceeded any further. The Court rose to enable Mr. Blake to gather the specifics and communicate them to counsel acting on behalf of KBC. Following that brief adjournment, the parties appeared to reach an understanding that the undue influence issue didn't come into being until after May, 2009 and they were happy to proceed on that basis. With regard to the four-week adjournment sought by Mr. Blake, that application was refused due to the lateness of the application and the advanced stage which the proceedings had reached.

13. The next witness was a Mr. Mark Kavanagh, who is currently a partner in Byrne Wallace. He was Ms. McCloskey's superior at the time they were seeking to have the guarantee amended. Overall, his evidence corroborated the account provided by Ms. McCloskey regarding the failed attempts to have Mr. Blake execute that guarantee. Mr. Kavanagh also reviewed an attendance note drawn up by him on 11th January, 2010. This note details a call between himself and Partners at Law, in which Partners at Law indicate that the

firm no longer represents Mr. Blake.

14. The final witness called by the plaintiff was Mr. Frank Kennan, who is head of the Recovery Dept. in KBC. He was an Associate Director in the Banking Dept. at the relevant time and worked with Ms. Fallon during the period of her employment with KBC. His evidence corroborated Ms. Fallon's account. He also provided an overview of communications between KBC, Mr. Gilhooly and the borrower regarding a number of different issues. He explained how the agreement contained in the 2009 letter, in which Mr. Blake affirms that the guarantee is for all sums due, came to be agreed. Insofar as there is an issue of KBC putting pressure on the borrower, Mr. Kennan denies this; KBC were facilitating the extension of an interest-only payment period and sought confirmation of the legal position they had always believed to be in place. In KBC's view, they were unwilling to provide such an extension if that legal position was in dispute. Mr. Kennan was then taken through an affidavit sworn by him in a 2012 set of proceedings brought by the borrower against KBC, at the end of which KBC's counterclaim for judgment against the borrower was granted. He stated that the borrower owes two forms of debt to KBC: the debts under the facility letter and the debt under the ISDA Master Agreement. Judgment is being sought against Mr. Blake only in respect of the debts under the facility letter. He then provided details of the process by which the borrower's debts were called in.

15. Under cross-examination, Mr. Kennan confirmed that he never met Mr. Blake. Mr. Kennan could not provide any information as to the how and why the original debt had been agreed in 2005, as he was not involved in this matter at that time. He denied exerting any pressure on the borrower. He confirmed that KBC does have a method by which guarantors are vetted to check if they can meet the guarantee sought from them, primarily via a prepared statement of affairs. He believed that that process had occurred in respect of Mr. Blake. Mr. Blake denied that he had ever prepared such a statement for KBC's use. Even if such a statement had been provided to KBC, Mr. Blake questioned why due diligence procedures had not been carried out to investigate the veracity of that statement's contents. In response, Mr. Kennan stated that KBC had received an independently certified statement of affairs for both of the Blakes and they had been happy to proceed on that basis. When asked whether KBC had reviewed those conclusions in 2009 following the economic crash, Mr. Kennan denied that there was any need to do so, as KBC was seeking rectification of an already-agreed guarantee, as opposed to the preparation of fresh security. When asked whether anyone in KBC explained to Mr. Blake the meaning of "all-sums" before he signed the 2009 letter, Mr. Kennan stated that he was unaware if anyone had done so. When Mr. Blake contended that a limitation clause had been originally included as an attempt to mislead him into executing an all-sums guarantee, Mr. Kennan could not comment on that. He confirmed that it is the responsibility of KBC's legal representatives to ensure that legal documentation is prepared correctly.

16. The first witness on behalf of the defence was Mr. Blake himself. Upon entering the witness box, he began to read out a prepared written statement. While the rules of Court would normally prohibit such practice, a certain amount of leeway was afforded to Mr. Blake, given that he is representing himself. The statement provides an overview of Mr. Blake's version of events. His alleged understanding of the contract differs significantly from the narrative proffered heretofore. He states on page 3 of the statement that the facility letter provided for a guarantee for "the full amount of the loan", subject to his interest in the properties. In his opinion, this rendered the guarantees worthless, as he has no interest in the properties, and the €50,000 limitation clause was therefore an improvement upon KBC's original position. He characterises these proceedings as an attempt by KBC to gain extra security to which they are not entitled.

17. Mr. Blake states that he attended at the offices of BCM Hanby Wallace in February, 2006 for the purposes of executing family home protection documentation and had not expected to be signing any other documents. He states that Mr. McKenna, who he allegedly met for the first time at that meeting, was the borrower's solicitor and he had no independent legal representation himself. He alleges that there has been a breach of his rights under the Consumer Credit Act 1995 due to the circumstances in which the execution of the guarantee was brought about. He says that he felt very uncomfortable in the meeting but wanted to support his wife; he noted the €50,000 limitation clause and believed this was a debt he could manage, so he signed the guarantee. In his opinion, this guarantee was inappropriate for a person such as himself, who held no interest in the properties and was not involved in dealings with KBC. Regarding the 2009 letter signed by him, Mr. Blake says that he read the document, concluded that the document did not make any changes to the 2006 master document signed by him and signed the 2009 letter on that basis. Mr. Blake makes no mention in the statement of duress or undue influence being exerted upon him by any party.

18. Under cross-examination, counsel for KBC sought to highlight Mr. Blake's extensive background in the farming business and his access to other land and financial assets. He was asked to comment on documents sent by Mr. Gilhooly to KBC, which refer to the borrower's property portfolio as having been built using both her own funds and those of Mr. Blake. Mr. Blake denied that this was so. He also denied having any substantive dealings with Mr. Gilhooly. He stated that the documents contained factual misrepresentations. In an attempt to determine what interest Mr. Blake may or may not have in the properties, reference was made to paperwork related to the original debt from First Active. This paperwork refers to both himself and his wife as co-borrowers on that loan. Mr. Blake could not explain why this was so. He admitted that, when he signed the guarantee in February, 2006, he knew it referred to a €50,000 limitation clause that was not contained in the facility letters he signed previously. Regarding the 2009 letter, Mr. Blake acknowledged that it refers to the guarantee as "all sums due". Counsel highlighted that the 2009 letter directly relates to the original facility letter of December, 2005, in which there is no limitation clause. It was put to Mr. Blake that this serves as an acknowledgement that the original guarantee was for the full amount of the loan. Mr. Blake continued to insist that the guarantee is capped by the limitation clause contained in the master document executed in February, 2006 and that this was the only guarantee ever intended to be given. When the alleged error in the guarantee came into focus in late-2009, Mr. Blake stated that he met with Mr. McKenna and instructed him to contact Byrne Wallace to determine why they were seeking a guarantee in excess of the €50,000 limit. Counsel highlighted that none of the correspondence from Mr. McKenna or the borrower refers to any such instruction from Mr. Blake, nor is there any reference to Mr. Blake's insistence that the €50,000 limit reflected his understanding of the agreement he had made with KBC. Mr. Blake stated that he had left it to Mr. McKenna to deal with, as he had thought this claim to an all-sums guarantee was some sort of joke.

19. Upon the conclusion of his own evidence, Mr. Blake called a Mr. Frank Reilly to the witness box. Mr. Reilly is a retired bank manager and Mr. Blake sought to call him as an expert witness. Counsel for KBC objected to this approach, as he had not been provided with any information on Mr. Reilly's expert status and what evidence he intended to give. This supposed expert evidence was not adverted to during the trial and none of the plaintiff's witnesses were asked to comment on it. The Court reminded Mr. Blake again that he had been under an obligation to put his case to the plaintiff's witnesses. Given Mr. Blake status as a litigant-in-person, the Court proposed to hear from Mr. Reilly first and determine the admissibility of his evidence afterward. Some of the plaintiff's witnesses could be recalled, if need be. This approach was proposed to Mr. Blake, but he elected not to call Mr. Reilly if it would raise complications in the running of proceedings. In the end, the Court did not hear from Mr. Reilly.

**Submissions**

20. The primary relief sought by KBC is rectification, on grounds of either common or unilateral mistake. The general principles on rectification are set out in Costello J.'s (as he then was) decision in *O'Neill v. Ryan (No. 3)* [1992] 1 I.R. 166 and Griffin J.'s decision in

*Irish Life v. Dublin Land Securities* [1989] I.R. 253. KBC submit that, based on the evidence adduced, Mr. Blake did not read the guarantee before he signed it on 24th February, 2006. They submit that, in light of the 2005 and 2009 facility letters signed by Mr. Blake and the communications with Partners at Law prior to the guarantee's execution, there was clearly a complete concluded antecedent agreement between the parties that Mr. Blake would provide a guarantee for the full amount of the loan. In assessing the credibility of Mr. Blake's insistence that he did see the limitation clause prior to signing the guarantee, the Court's attention was drawn to the inconsistent narrative in the plaintiff's case, his signature of the 2009 letter and Partners at Law's failure to advert to this supposed limitation during correspondence. The Court was also invited to draw inferences from Mr. Blake's failure to call Mr. McKenna to give evidence. KBC submit that such inferences are provided for by the decision of Laffoy J. in *Fyffes v. DCC* [2009] 2 I.R. 417.

21. In the event that the Court accepts that Mr. Blake did read the guarantee and he knew that it was limited to €50,000, KBC submit that the Court should nevertheless rectify the guarantee on grounds of unilateral mistake. In this respect, they rely on the decision of Ryan P. in *Slattery v. Friends First* [2015] 3 I.R. 292. They submit that it is unconscionable for Mr. Blake to take advantage of a difference between the intended agreement and the executed document, which arose through on error on the part of the plaintiff's former solicitors.

22. Should the application for rectification fail, KBC seek specific performance of the original agreement contained in the facility letter dated 12th December, 2005. They rely on the Supreme Court's decision in *Analog Devices (Ireland) Ltd v. Zurich Insurance* [2005] 1 I.R. 274 in this respect.

23. KBC also rebut a number of defences raised by Mr. Blake during these proceedings. With respect to the independent legal advice issue, KBC note that Mr. Blake failed to call either the borrower or Mr. McKenna, whose evidence could have provided substance to his argument. The Court's attention was also drawn to various documents, in which it would appear that Partners at Law did represent Mr. Blake. In any event, KBC refer to the Court of Appeal's decision in *ACC Loan Management Ltd. v. Connolly* [2017] IECA 119, in which Finlay Geoghegan J. held that the failure to ensure the provision of independent legal advice to a proposed familial guarantor does not give rise to a defence in and of itself.

24. As for Mr. Blake's reliance on consumer protection legislation, KBC object to same on grounds that such a defence was not pleaded. They also refer to Ryan J.'s (as he then was) decision in *Allied Irish Banks plc v. Smith* [2012] IEHC 381 and Kelly J.'s (as he then was) decision in *AIB v. Higgins* [2010] IEHC 219. It is submitted that, in line with those decisions, Mr. Blake was not acting in his capacity as a consumer at the relevant time.

25. At several points during the proceedings, Mr. Blake refers to a lack of comprehension on his part as to what he was signing when he executed documentation related to the guarantee. While not so called, Mr. Blake is effectively seeking to raise the defence of *non est factum*. KBC refer to Morris P.'s decision in T*ed Castle McCormack & Co. Ltd. v. McCrystal* (Unreported, High Court, Morris P., 15th March, 1999) as a statement of the test to be applied when raising this defence. In their submission, Mr. Blake has failed to meet the requirements on that test.

26. Mr. Blake also made a written submission to the Court. It should be stated that, during the course of the hearing, Mr. Blake did make brief reference to some caselaw, namely the decision of Clarke J. (as he then was) in *Ulster Bank v. Roche & Buttimer* [2012] 1 I.R. 765. However, the written submission does not serve to address legal argument in the traditional sense. Rather, he provides a further overview of his version of events. He argues that KBC prevented him from arguing an undue influence defence based upon the pressure allegedly exerted over him by his wife in 2009. He insists that the limitation clause was not erroneously included and that both parties were aware of it. With respect to the 2009 facility letter, Mr. Blake respectfully suggests that the reference to "all sums due" in this letter may be a typographical error. He argues that Mr. Gilhooly "took liberal licence" with the information he provided to KBC, that none of his funds were used to develop the borrower's property portfolio and that he was not a party to the loan from First Active. He submits that, when he originally read the 2005 facility letter, which stated that the loan was to be secured by his guarantee supported by his interest in the properties, he understood this to mean that the security was designed to withstand any claim he may have to the borrower's testamentary estate.

27. Mr. Blake states that he never received "a section 68 letter or an invoice in [his] name" from Mr. McKenna. He states that he spoke with Mr. McKenna over the phone on 20th June, 2018, the week before this matter came on for hearing. According to Mr. Blake, Mr. McKenna indicated that he had been subpoenaed by KBC to attend the hearing. Apparently, Mr. McKenna also affirmed that he met Mr. Blake for the first time at the offices of BCM Hanby Wallace and had not acted for Mr. Blake in respect of the matters at issue in this case. Mr. Blake said that he had expected Mr. McKenna to give evidence during the hearing and was deprived of the opportunity to cross-examine him. Appended to these written submissions is a letter from KBC's current solicitors, McDowell Purcell, to Mr. McKenna, which states that KBC intended to call Mr. McKenna as a witness and would be serving a subpoena on him shortly. In reply, KBC stated that they had subpoenaed Mr. McKenna for the purposes of proving the signature on the guarantee dated 24th February, 2006. Following Mr. Blake's answers to interrogatories, in which he affirmed that the signature was his, there was no longer any need for KBC to call Mr. McKenna. As a result, and in light of the fact that Mr. McKenna's legal advice to his client(s) cannot be probed by KBC, Mr. McKenna was not called in support of the plaintiff's case.

**Decision**

28. Notwithstanding the latitude afforded to Mr. Blake as a litigant-in-person, the arguments he makes have either been improperly pleaded, are unsupported by sufficient evidence or are simply misconceived in law. It would seem that a number of witnesses for the plaintiff were cross-examined based on a pre-prepared list of questions. Whoever prepared this list of questions clearly has some familiarity with legal matters, but they possess no substantial understanding of the law, and still less of the facts-at-hand in this case. When Mr. Blake himself was cross-examined, he indicated that his examination-in-chief was at least partly based on searches he carried out on the internet. While the borrower assisted Mr. Blake as a McKenzie friend, she was never called to give evidence and the Court was denied any insight she could provide on what occurred between the parties at the relevant time.

29. If this matter is determined against Mr. Blake, he is liable for a multi-million euro debt held by KBC, with all the consequences that that entails. Unfortunately, as is often the case with litigants-in-person, Mr. Blake has come to court entirely unprepared to meet the case made against him. I do not say this as any kind of criticism of Mr. Blake. He has no legal training, without which any person would struggle to meet the comprehensive and complex case set out by KBC. I have drawn attention to these matters by way of an explanation as to how the Court intends to approach this dispute. Given the circumstances, and in the interests of doing justice between both parties, I will give a broad consideration to all the issues raised in the pleadings and at hearing, including the various defences relied on by Mr. Blake. Suffice it to say, had a legal team been on record for the defendant, a conclusion could have been reached much more smoothly on the case as argued at the hearing.

30. The equitable remedies of rescission, rectification and specific performance are familiar bedfellows, either on the same or on

opposite sides of the courtroom. However, rescission did not feature in these proceedings. Neither party alleges that there was no binding contract between them or that the contract should be set aside. The primary questions for this Court to determine are what the intentions of the parties were, whether the written documents executed by them reflect those intentions and what the consequences should be if the written document is at variance with those intentions.

31. The agreement between the parties is contained in two documents: the 2005 facility letter (as amended) and the guarantee document executed in February, 2006. Before addressing the events of February, 2006, it would be useful to first clarify the background up to that point, including the nature of the agreement contained in the facility letter. To start with, Mr. Blake has raised a number of points under consumer protection legislation. Those points are obviously premised on the argument that Mr. Blake and/or the borrower were acting in their capacity as consumers at the relevant time. Clause 8 of the facility letter states that the borrower was not borrowing as a consumer for the purposes of the 1995 Act. Irrespective of that, I have had cause to consider the consumer issue on multiple occasions, including my decisions in *Hogan v. Deloitte* [2017] IEHC 673 and *Barry v. Ennis Property Finance DAC* [2018] IEHC 766. My findings in those cases cohere precisely with the findings of Kelly P. in *Higgins* and Ryan P. in *Smith*. The concept of a consumer is to be construed strictly and objectively. In order to qualify as a consumer, one either must be operating outside one's trades, businesses or professions or be declared as such by the Minister for Finance. The latter does not apply in this case. As for the former, that condition is met in circumstances where the relevant contract is concluded for the purpose of satisfying an individual's own needs in terms of private consumption. In this case, the agreements executed by the Blakes have all the hallmarks of a commercial transaction. The loans provided and the guarantee executed involve no aspect of private consumption. I am completely satisfied that the Blakes were not acting in their capacity as consumers when they executed the agreement. The consumer point does not warrant any further consideration.

32. The next matter to consider is Mr. McKenna's role in these matters. The issue of legal representation was raised during the hearing primarily within the context of independent legal advice as a freestanding defence. Mr. Blake has repeatedly stated that Mr. McKenna, and Partners at Law, represented the borrower alone and did not represent him when dealing with this matter. It has to be said that the failure to call Mr. McKenna has caused immeasurable difficulties in reaching a decision in this case, if for no other reason than Mr. McKenna is interchangeably referred to throughout the paperwork as representing Mrs. O'Grady Blake alone and as representing both of the Blakes. In determining this point, the Court relies primarily on the one document put before it which was authored solely and independently by Mr. McKenna, that being correspondence sent by him to KBC on 13th January, 2006. That letter is printed on "Partners at Law" headed paper and is titled "Re: Our Clients Eileen O'Grady Blake and Bruce Blake". It seems clear from this title that, when engaging with KBC, Mr. McKenna held himself out as representing both borrower and guarantor.

33. It is important to clarify the precise context in which the Court proposes to rely on this letter. Obviously, the author of this document has not been called to prove its content. As a result, it doesn't seem to be open to the Court to rely on the letter as evidence that Partners at Law did indeed represent Mr. Blake. However, the letter is indisputable evidence that Partners at Law held themselves out as representing Mr. Blake. The letter was sent to a third party (i.e. IIB Homeloans, now known as KBC) who had dealings with the Blakes and could only have indicated to that third party that Partners at Law represented Mr. Blake. To conclude that Partners at Law did not hold themselves out as representing Mr. Blake would be to strip the documentary evidence, and the words contained therein, of any meaning connected to common sense. Given that Partners at Law held themselves out as representing Mr. Blake, I am therefore entirely satisfied that Partners at Law did indeed correspond with KBC on behalf of Mr. Blake.

34. Even if the letter from Mr. McKenna were not before the Court, and the only evidence on this issue was that of Mr. Blake, I would not find credibility in his claim that Mr. McKenna only represented the borrower. Such a claim is premised upon the instructions that were or were not provided to Mr. McKenna, which is a matter that is peculiarly within the knowledge of Mr. McKenna and the Blakes. It is therefore essential for Mr. Blake to produce substantiating evidence of that claim before I can find in his favour, as opposed to the bald assertion he offered at the hearing. Whatever about the failure to call Mr. McKenna (an issue which I explore in further detail at paras. 35 and 36 below), the borrower certainly could provide some insight on this issue. Mr. Blake did not call her to give evidence either. In the circumstances, I am satisfied on the balance of probabilities that Partners at Law did represent Mr. Blake at the relevant time and that, when Mr. McKenna engaged with KBC, he was acting on behalf of both Mr. Blake and Mrs. O'Grady Blake.

35. It would appear to be a recurring theme in these types of cases that one of the agents involved in negotiating the agreement is not called to give evidence, despite the high probative value that would attach to their testimony. In *Irish Life*, Mr. White was the agent for the respondent who received the communication about the missing term. He did not give evidence. Similarly, in *Slattery*, Mr. Wheeler was the solicitor dealing with the file on behalf of the party seeking rectification. He also did not give evidence. The case currently before the Court illustrates the significant difficulties that can arise from the failure to call all the relevant people involved in an impugned transaction. KBC stated in oral submissions that they had intended to call Mr. McKenna to prove Mr. Blake's signature on the guarantee, but that was no longer necessary following Mr. Blake's response to interrogatories. In their submission, Mr. McKenna's attendance before the Court was an issue for Mr. Blake to deal with from that point forward, as Mr. McKenna was his legal advisor and certain privileges attach to that relationship which KBC cannot interfere with. Setting aside whether it is an accurate statement of law to say that only Mr. Blake could have called Mr. McKenna to address such issues, it seems to me that there would nevertheless have been value to KBC calling Mr. McKenna to give evidence before the Court in his capacity as a witness to the meeting on 24th February, 2006. There is a significant point of controversy between the parties as to whether Mr. Blake read the guarantee document before he signed it. Just as Mr. McKenna would be able to speak to the issue of whether Mr. Blake signed the guarantee, he would also have been able to speak to the issue of whether Mr. Blake read the document before signing it. That evidence could have been given without touching upon any aspect of a privileged relationship between Messrs. Blake and McKenna (nor, incidentally, on the facts of this case, would Mr. McKenna's confirmation of who his client(s) was have infringed on that privilege). It is most unfortunate that this evidence was not provided, as it would have effectively determined the issue of whether this is a case of unilateral or common mistake. As it is, the Court must make do with the evidence that was put before it by the parties and reach its determination on the information currently available.

36. KBC have invited the Court to draw inferences adverse to Mr. Blake based upon his failure to call Mr. McKenna to give evidence. In this respect, they rely on Laffoy J.'s decision in *Fyffes*. As stated above, Mr. McKenna was subpoenaed by KBC to give evidence. According to Mr. Blake's written submission, he was aware of this subpoena and had expected Mr. McKenna to be available for cross-examination during the hearing. The Court can place a very limited reliance on the written submission, as it speaks to facts not stated by Mr. Blake when giving oral evidence during the hearing and it contains a significant amount of hearsay evidence. That said, there is no evidence before me that Mr. Blake knew KBC no longer intended to call Mr. McKenna and consciously failed thereafter to call Mr. McKenna himself. The Court cannot overlook the fact that Mr. Blake is a litigant-in-person in these proceedings. In my view, it would not be in the interests of justice for this Court to draw the adverse inferences that KBC suggests I do. I therefore refuse that invitation.

37. It is within the context set out at paras. 28 & 29 above that the Court will comment briefly on the expectation/reasoning for an agreement versus the intentions for an agreement. Having heard Mr. O'Donohoe's evidence, it seems clear that KBC were concerned

Mr. Blake may have some equitable claim to the properties by virtue of the financial dealings between First Active & the Blakes and the manner in which the borrower's property portfolio was first established. These concerns were based, at least in part, upon the information communicated to them by Mr. Gilhooly. In order to bring any potential equitable claim within the scope of its security, a guarantee by Mr. Blake supported by his interest in the properties was proposed. It seems to me that KBC's expectation for this term was that it would shore up their security and nullify any possible equitable claim to the properties. If KBC seriously expected to recoup a debt in excess of €5 million from Mr. Blake, such a proposition was not stated in evidence.

38. Of course, there is a great deal of difference between the expectations for an agreement and the intentions when making that agreement. There are any number of scenarios where a contract proves to be more valuable than it was expected to be when it was originally negotiated. This is not an issue which the Court has to concern itself with in an application for rectification; the Court is focused on what the parties actually intended when they reached their agreement. There can be situations where the expectation translates into intent. In order to determine whether the expectation and the intent are the same, the usual evaluation of intent must be carried out, i.e. an objective assessment of the outwards acts of the parties and what can be reasonably understood from those acts to have been their intentions.

39. KBC argue that they intended an all-sums guarantee to be given. The relevant term in the facility letter runs as follows: "The guarantee of Bruce Blake supported by his interest in [the properties]". At no point in the facility letter is it specifically stated that the guarantee is for the full amount of the loan. Mr. Blake claims in his written submission that this term limits the guarantee to his interests in the properties (this is notwithstanding his continued attempt to stand behind the €50,000 limitation actually contained in the guarantee document, which he maintains is the agreement binding the parties). For KBC's part, Ms. McCloskey stated under cross-examination that, if there was supposed to be a limitation on a guarantee, it would be specifically referenced in the facility letter. The issue therefore becomes 1) whether the phrase "…supported by his interest in [the properties]" constitutes a limitation, and 2) whether there is any ambiguity in the facility letter as to the scope of the guarantee, which would have to be resolved as against KBC. In considering these issues, the Court is cognisant of the fact that the terms of a guarantee are to be strictly construed.

40. In respect of that first question, the key element in the term is "supported by". The phrase used was not "subject to", "limited to", "comprising of" or even the more commonly used "of" ("of" was the limitation used in Clause 5(d) of the facility letter to set the value of the life policies at €500,000). Similarly, the word "supported" is not qualified as "solely supported" or "supported only". In my view, the word "supported" by itself does not serve to limit the scope of the guarantee in any way. On the contrary, its purpose is to expand the scope of the guarantee to specifically include any interest held by Mr. Blake in the properties. I am therefore satisfied that there is no limitation element contained in Clause 5(e) of the facility letter.

41. The Court now turns to the second question of whether there is any ambiguity in the facility letter as to the overall scope of the guarantee, which would attract the *contra proferentem* rule. It should first be noted that the rule does not apply unless an ambiguity already exists in the agreement; the rule cannot be used to create ambiguity in the first instance. The presence of ambiguity is assessed not just by reference to the wording of the agreement, but also based upon the general circumstances in which the parties were operating. In this respect, the letter sent by BCM Hanby Wallace to Mr. McKenna, dated 3rd January, 2006, is highly relevant. This letter states as follows:-

> "…We are instructed that this loan facility will be secured as follows:-
>
> …
>
> (d) The guarantee of Mr. Bruce Blake for the full amount of the loan, plus interest, costs and expenses thereon, supported by his interest in the above mentioned properties."

In my view, the above quoted section nullifies any doubt as to what Clause 5(e) of the facility letter meant and what KBC intended it to mean. This intention was clearly and unambiguously expressed to Mr. McKenna, who, as I have already found, was acting as Mr. Blake's solicitor at the time. Armed with that knowledge, Mr. Blake nevertheless took the various steps required to facilitate the drawdown of the loan monies. In carrying out those outward acts, it seems clear to me that Mr. Blake both agreed and intended to execute a guarantee for the full amount of the loan. Thus, it can be said that a common intention came into being. Mr. Blake continues to insist that he did not know the guarantee required of him was for the full amount of the loan. I cannot accept his evidence in this regard and it cannot affect the entitlements held by KBC pursuant to its legally binding agreement with him.

42. I think it is necessary to state that, on the issues of agency and notice, the facts of this case distinguish themselves from those in the case of *Irish Life*. In reaching this finding, I have also considered the judgment of Keane J. (as he then was), who delivered the High Court decision in the case [1986] I.R. 332. His judgment gives a broader consideration to the doctrine of notice and agency within the context of a claim for rectification, and the Supreme Court did not find it necessary to disturb those findings on appeal. Keane J. found that the doctrine of notice by imputation was insufficient to also amount to notional assent where the relevant term was not reflected in the final agreement due to a mistake on the part of the person seeking to both rely on it and have the document rectified. The defendant had no actual knowledge of the omitted term and played no part in bringing about the plaintiff's error. While the doctrine of notice was important for the efficient conduct of business, it was defeated by the high standard of convincing proof required in order to establish a common continuing intention between the parties.

43. I find myself to be in complete agreement with that conclusion. However, that is not what happened in the case currently before the Court. Firstly, the only person who appears to suggest that there is any confusion in the 2005 facility letter is Mr. Blake himself. KBC, who is the claimant in these proceedings, do not seek any relief in respect of the facility letter and Mr. Blake has not sought any relief in respect of it either. The requirement of a guarantee was not mistakenly left out of the facility letter. The guarantee was included in the letter and Mr. Blake was aware of its existence. There is no deficit in the drafting of the facility letter. There was a clear, specific and unambiguous communication made by KBC as to what the terms of the facility letter meant. There is no evidence of Mr. McKenna replying to this letter to indicate that it did not reflect his understanding of the agreement reached with the Blakes. Mr. Blake cannot raise the spectre of past advices to obfuscate an accord which, on any objective assessment of the facts, the parties clearly entered into.

44. Having reviewed the background to these matters, the Court now turns to the events of February, 2006. The first matter that has to be determined is whether this is a case where the test for common or unilateral mistake applies. This question is disposed of by determining whether there was a common continuing intention between the parties in respect of the guarantee. In considering this issue, and all issues related to mistake, KBC must meet the high standard of convincing proof to establish its entitlement to rectification. This standard is all the more onerous when one considers that this is a guarantee, that KBC was legally advised and that there was some exchange of drafts of the facility letter before a final agreement was reached. It seems to me that the question of

common continuing intent can be disposed of by a finding of fact as to whether Mr. Blake read the guarantee document before he signed it. The only evidence before me on that question is the evidence of Mr. Blake himself, when he gave oral testimony. Again, it is most unfortunate that the Court did not hear from the borrower or Mr. McKenna on this issue. The Court has to determine this issue based on the credibility that is to be attributed to Mr. Blake's evidence. This is not a situation where Mr. Blake could have forgotten that he did something and therefore claim that he didn't do it. He is claiming that he actively remembers reading the guarantee before he signed it. It seems to me that I can reach only one of two conclusions: either Mr. Blake did indeed read the guarantee before he signed it or he repeatedly lied, both under oath and throughout the hearing. I am not satisfied that the evidence establishes Mr. Blake to have lied to the Court. Therefore, I must accept that he did read the guarantee document and did see the limitation clause of €50,000. The common continuing intention between the parties was vitiated from that point forward. I am therefore satisfied that this is a case of unilateral mistake.

45. The test for securing rectification on grounds of unilateral mistake is set out by Ryan P. at para. 39 of his decision in *Slattery*. The claimant must establish: 1) that they executed the document under a mistake, 2) that the other contracting party was aware of that mistake, and 3) that there is some unconscionability in all the circumstances or some element of sharp practice in the other party's behaviour that would warrant rectification of the contract document. In meeting those criteria, the claimant must satisfy the standard of proof referenced at para. 44 above.

46. The evidence of Mr. O'Donohoe and Mr. Egan was quite clear that there was never any intention to limit the guarantee to €50,000 and no one in KBC or BCM Hanby Wallace was aware of its inclusion. The guarantee is not a free-standing agreement, but an extension of the agreement contained in the facility letter. As identified by Ms. McCloskey, there was no basis for that limitation clause in the terms contained in the facility letter. As I have already found at para. 41 above, an objective assessment of the parties' intentions in respect of the facility letter clearly indicates that they intended for an all-sums guarantee to be given. In *Slattery*, Ryan P. referred to apparent conflicts between the impugned term and other terms of the agreement. I am satisfied that similar comment can be made about the guarantee document at issue in this case. Several security reports were completed by BCM Hanby Wallace between 2006 and 2009, all of which refer to the guarantee as being "all-sums due" in nature. There can be no doubt that the guarantee document was executed by KBC on foot of a mistaken understanding as to what it contained, which was brought about by an error on Mr. Egan's part in the drafting process. As for Mr. Blake's knowledge of this error, I have already accepted that he read the guarantee document and saw the limitation clause. I have also found that the facility letter he signed provides for an all-sums guarantee. Under cross-examination by counsel for KBC, he admitted that he knew the limitation clause was at variance with the agreement he had with KBC, as expressed in the facility letter. There can be no doubt that the first two criteria of the test for rectification on grounds of unilateral mistake have been satisfied.

47. The final criterion relates to unconscionability in the circumstances or sharp practice on the part of Mr. Blake. In considering this question, it is difficult to overlook the fact that Mr. Blake knew that the guarantee document did not reflect the terms of the agreement he had already reached with KBC. The fact of knowledge is not determinative under the third criterion; if it were, there would be no need for a third criterion at all and the question could be disposed of based on the first two elements of the test. However, it seems to me that there is something inherently unconscionable about a contracting party who, in full knowledge that a document contains a term of materially increased benefit to them that is unfounded in their actual agreement with the other side, nevertheless signs that document and does not draw the unfounded term to the other side's attention. There can be any number of circumstances that excuse such behaviour. In *Irish Life*, the respondent's solicitor suspected that the contract did not reflect the real terms of the intended agreement. However, the appellant's agent had forced his hand and declared that the deal would be aborted if the respondent did not execute it there and then. On that basis, the respondent signed the contract. The demands made by the appellant clearly exculpated the respondent from any kind of sharp practice and dissolved any unconscionability in the circumstances. The Court must therefore determine whether a similar finding can be made in this case.

48. Over the course of the hearing, Mr. Blake raised a number of matters for the Court to consider, including reckless lending, a requirement for independent legal advice and undue influence. These issues will be considered as outright defences to the claim to enter judgment against Mr. Blake for the debt outstanding under the facility letter. However, they are also worth considering under the third criterion. In this particular case, I am satisfied that nothing turns on any of these issues. As seen in *Irish Life*, the behaviour of the claimant is a highly relevant factor when determining unconscionability in the circumstances. However, the offending behaviour must arise from the circumstances in which the contract was negotiated and concluded. Mr. Blake's allegations relate to the issue of KBC agreeing to do business with him in the first place. KBC, in their wisdom, saw fit to take a guarantee from Mr. Blake and Mr. Blake, in his wisdom, saw fit to offer one. Mr. Blake was a fully competent adult at the time who was responsible for his own decisions. Despite his attempts to portray himself to the Court as "a simple sheep farmer", it is clear that he is an experienced businessman. As such, he cannot rely on the allegedly imprudent nature of this transaction in order to resist the claim for rectification. As for the issue of independent legal advice, Mr. McKenna was available to provide such advices, and presumably did so. The fact that the legal advice was not independent of his wife has no impact on the rectification issue. Similarly, undue influence would go toward the enforceability of the debt overall, and not toward the unconscionability of Mr. Blake accruing the benefit of a term he knew the parties never intended to include in the contract.

49. In my view, there is no factor at play in these proceedings that would remove the unconscionability in the circumstances as established over the course of this judgment. I am therefore satisfied that all three criteria for securing rectification on grounds of unilateral mistake have been satisfied. For those reasons, I am satisfied to grant the relief sought to rectify the guarantee document by amending Clause 5(e) to state that the guarantee is for all sums due.

50. As the relief of rectification has been granted, there is no need to consider the issue of specific performance. The final issue to consider is whether judgment should be entered against Mr. Blake for the debt arising from the facility letter. For KBC's part, their claim is relatively straight forward: the borrower has failed to carry out her obligations under the facility letter and they now seek repayment pursuant to the all-sums guarantee Mr. Blake agreed to give when he executed the facility letter. Mr. Blake raised a number of defences to that claim: the three issues identified at para. 48 above, the impropriety of the ISDA Master Agreement entered into by the parties and a defence of *non est factum*. For the following reasons, I am not satisfied that any of those issues provide Mr. Blake with a defence to KBC's claim:

> -The ISDA Master Agreement: Counsel for KBC has already stated that they are not seeking to enforce the debt under the ISDA Agreement against Mr. Blake.
>
> - Non Est Factum: The defence as pleaded relates to the 2009 facility letter. The determination of this issue in favour of Mr. Blake would have no real impact on his defence, as he had already agreed to provide an all-sums guarantee in 2005/6.
>
> - Reckless Lending: As has been stated repeatedly by the Courts over the years, there is no tort of reckless lending. Similarly, there is no defence to be found in claiming that the lender could not have reasonably believed the debtor would

be able to repay the debt. Such a factor could perhaps go towards establishing some other notional defence but does not serve as a free-standing defence in its own right.

- Independent Legal Advice: The Court of Appeal has clearly stated in a series of decisions, most notably the decisions delivered in Connolly, that there is no onus on a lender to ensure that a guarantor obtains legal advice that is independent of all other parties involved in a transaction. Like reckless lending, this is an issue that can go toward establishing another defence but does not serve as a defence by itself.

- Undue Influence: Even taking Mr. Blake's undue influence claim at its absolute height, and overlooking the numerous evidential infirmities it contains, the alleged undue pressure could only have come into being in 2009, when he signed the facility letter amending the original agreement. While the 2009 facility letter undoubtedly militates against Mr. Blake's claims, it seems to me that the insuperable obstacle to Mr. Blake defending against this claim is the letter dated 3rd January, 2006, in which his appointed solicitor was explicitly told that the guarantee was for the full amount of the loan. From that point forward, there can be no doubt that Mr. McKenna, Mr. Blake and Mrs. O'Grady Blake were all on notice of the guarantee's value and none of them saw fit to dispute it. On the contrary, they proceeded with the completion of the loan agreement. Any undue influence that was or was not exerted on Mr. Blake in 2009 is irrelevant, given that he freely entered into an agreement to give an all-sums guarantee in 2005/6.

51. For the reasons set out above, the Court will make an order rectifying the guarantee document in the manner set out at para. 49 above, and an order entering judgment against Mr. Blake for the debt that is outstanding under the facility letter. I will hear the parties further as to the precise sum to be entered against Mr. Blake, once the debt under the ISDA Master Agreement is subtracted from the overall total of the debt.