

THE HIGH COURT

[2016 No. 747 S.]

BETWEEN

ALLIED IRISH BANKS PLC.

PLAINTIFF

AND

ALEC FLOOD AND DAVID FLOOD

DEFENDANTS

JUDGMENT of Mr. Justice McDermott delivered on the 11th day of May 2018

1. The defendants are brothers. The Plaintiff seeks summary judgment against both defendants.

The First Loan

2. The plaintiff's claim against the first defendant Alec Flood is for the sum of €13,640,829.08 on foot of loan account No. 932183-42602089 in respect of which the Bank originally advanced the sum of €12,715,000.00 to brothers Tom Flood and Alec Flood pursuant to a letter of sanction dated 21st May, 2007 subject to the terms and conditions set out therein and the Bank's General Terms and Conditions Governing Business Lending. The purpose of the loan was to purchase 1.987 acres at Railway Avenue, Sutton which was zoned residential and general industrial. The loan was payable on demand and at the pleasure of the Bank.

3. The security required was stated to be:-

"(1) All sums legal charge over 1.987 acre site at Railway Avenue, Sutton, Co. Dublin zoned residential to invest in the joint names of Tom and Alec Flood.

(2) Letter of guarantee from John J. Flood for €10 million for the obligations of Tom and Alec Flood, supported. Separate letter will issue to John J. Flood confirming the security we are relying upon in support of his guarantee.

(3) Letter of guarantee from David Flood for €12,715,000.00 for the obligations of Tom and Alec Flood.

(4) Security item(s) 1, 2 and 3 above must be in place before draw down. The Bank's costs and outlaying if any in taking the security will be advised to you in advance and debited to your account."

4. The special conditions stated that:-

"(1) All security to be in place prior to/in tandem with the draw down.

(2) Independent professional valuation to be carried out on security now being offered to the Bank.

(3) Land surveys being carried out by R.J.D. Survey's Ltd. to be provided to the Bank on quarry lands being offered as security. The Bank will then appoint an independent valuer to carry out valuations on the said lands.

(4) Planning survey being carried out by O'Mahony Pike Architects on the 1.85 acre site at Railway Avenue, Sutton to be provided to the Bank. The Bank will then appoint an independent valuer to carry out valuations on the site.

(5) John J. Flood to obtain Independent legal advice prior the providing of letter guarantee for €10 million."

The letter of sanction was signed by Declan O'Sullivan, Regional Director MNCD and Christine Meade, Assistant Manager AIB Navan. The terms and conditions were accepted on 22nd May, 2007 by Alec and Tom Flood and the monies were drawn down.

5. Section III of the General Terms and Conditions Governing Business Lending provided at para. 3.1.1 that loan account facilities were repayable on demand.

6. On 15th July, 2010 the plaintiff issued a letter of demand to the first named defendant in respect of the amount outstanding on this loan account.

7. The general terms also addressed the security to be provided in respect of a loan facility and provide:-

"7.9.1 Where a facility is expressed in the letter of sanction to be subject to security, the facility will be subject to such security being executed and delivered to the Bank and the Bank's satisfaction before the facility is drawn down or availed of in whole or in part. Any waiver by the Bank of the terms of this clause will be without prejudice to its rights to insist at a later stage to the provision of such security or to take any action as a result of the non-provision of such security.

7.9.2 Security will extend to cover all the present and future obligations of the Borrower to the Bank whether in the Borrower's sole name or jointly with another or others, whether as principal or surety and whether actual or contingent ...

7.9.8 The Bank does not warrant that the proceeds of realisation of any security and particularly the proceeds of any life policy held as security will be sufficient to clear the entire amount of the facility and any redemption fee which may arise ..."

The terms of the security are clearly and unambiguously drawn in favour of the bank and for its benefit. The principal borrowers' liability to repay the money is not made contingent on the other securities held by the bank nor is liability conditional on the bank seeking to enforce any separate security held by it prior to seeking to enforce its right to repayment from them.

Guarantee of David Flood

8. In accordance with the special conditions David Flood, the second defendant executed a guarantee in writing dated 22nd May, 2007 whereby in consideration of the loan facility granted to the first defendant and his brother Tom Flood, the second defendant agreed to pay and satisfy the Bank "on demand" all sums of money which were or would thereafter be owing to the Bank on any account whatsoever. The total amount recoverable was not to exceed the sum of €12,715,000.00.

9. Under clause 6 of the guarantee the Bank was at liberty without obtaining any consent from the guarantor or thereby affecting its rights or the guarantor's liability at any time:-

"(v) To enforce in whatever order it thinks fit all rights to recover and all securities and guarantees (including this guarantee) for the above mentioned liabilities of the Customer."

10. Clause 7 provided that:-

"This guarantee shall be in addition to and shall not be in any way prejudiced or affected by any collateral or other security now or hereafter held by the Bank for all or any part of the moneys hereby guaranteed, nor shall such collateral or other security or any lien to which the Bank may otherwise be entitled for the liability of any person or persons not parties hereto for all or any part of the moneys hereby secured be in anywise prejudiced or affected by this present guarantee. The Bank shall have full power at its discretion to give time for payment to or make any other arrangement with any such other person or persons without prejudice to this present guarantee or any liability hereunder. Without prejudice to the next following clause hereof all moneys received by the Bank from the Guarantor or from the Customer or any other person or persons liable to pay the same may be applied by the Bank to any account or item of account or to any transaction to which the same may be applicable as the Bank in its absolute discretion sees fit."

11. Clause 11 provides:-

"So far as the law permits this guarantee shall be and continue to be binding and shall not be impaired or revoked nor shall the Guarantor's liability hereunder be affected by reason of:-

(i) any failure of or irregularity defect or informality in the security given by or on behalf of the Customer or any other person in respect of the liabilities hereby secured or any part thereof; or

(ii) any failure of any other person to execute this guarantee or to grant any security in respect of the said liabilities or any part thereof ..."

12. Clause 13 provided that the guarantee "shall be in addition to and not in substitution for any other guarantee or security for the obligations of the Customer given by the Guarantor to the Bank". Clause 14 provides that any moneys guaranteed would become due and payable by the Guarantor to the Bank upon written demand made by the Bank.

13. A letter of demand was sent by the Bank to the second defendant for the payment of the entire amount guaranteed on 15th July, 2010.

14. The guarantee is also clearly and unambiguously separate from and not affected by any other security held by the bank. It is for the bank's benefit. Its enforcement is not dependent on the enforcement or enforceability of any other security. There is no suggestion in the written terms that its validity or enforceability is conditional upon or in any way dependent on the plaintiff's holding a valid guarantee or charge from the second defendant's late father.

Overdraft Facility

15. In 2007 an overdraft facility was granted to David Flood, Thomas Flood and Alec Flood – "the Flood Partnership". A renewed facility issued pursuant to a letter of sanction dated 1st March, 2010 in the amount of €781,586.00 for the purpose of "working capital". The term of repayment was "on demand and at the pleasure of the Bank subject to review by 31/05/2010." The security specified was:-

"(1) All sums mortgage dated 07/06/2007 over 1.987 acre site at Railway Avenue, Sutton, Co. Dublin registered in the names of Thomas and Alec Flood.

(2) AIB personal guarantee dated 25/05/2007 signed by John J. Flood for the obligations of Thomas, David and Alec Flood for €1.5 million. Supported. "

It was a term of the proposed facility that the security would be in place before draw down. The borrowers were obliged to comply with all pre-draw down conditions including the provision of security to the Bank's satisfaction. The only special condition of the facility was that all security was "to be in place".

16. Section II of the Bank's "General Terms and Conditions Governing Business Lending" also provided at para. 2.1.1 that overdraft facilities were repayable on demand. Clause 7.5 provided that each party to a facility on a joint account was jointly and severally liable to the Bank for repayment of the facility. Similar terms in respect of security and its enforcement applied to this facility as applied to the loan facility referred to above.

17. The loan facility expired on the 30th May, 2010 following which a letter of demand issued to each of the defendants on the 15th July, 2010 seeking the immediate payment of the sum of €782,867.58 in principal and interest.

18. The summary summons claiming all outstanding amounts issued on 4th May, 2016.

Summary Judgment Application

19. The principles applicable to whether the court should grant such judgment or grant leave to defend these proceedings are well established and summarised by McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 as follows:-

"9. ... it seems to me that the following is a summary of the present position:-

(i) the power to grant summary judgment should be exercised with discernible caution;

(ii) in deciding upon this issue the court should look at the entirety of the situation and consider the particular facts of each individual case, there being several ways in which this may best be done;

(iii) in so doing the court should assess not only the defendant's response, but also in the context of that response, the cogency of the evidence adduced on behalf of the plaintiff, being mindful at all times of the unavoidable limitations which are inherent on any conflicting affidavit evidence;

(iv) where truly there are no issues or issues of simplicity only or issues easily determinable, then this procedure is suitable for use;

(v) where however, there are issues of fact which, in themselves, are material to success or failure, then their resolution is unsuitable for this procedure;

(vi) where there are issues of law, this summary process may be appropriate but only so if it is clear that fuller argument and greater thought is evidently not required for a better determination of such issues;

(vii) the test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or *bona fide* defence; or as it is sometimes put, "is what the defendant says credible?", which latter phrase I would take as having as against the former an equivalence of both meaning and result;

(viii) this test is not the same as and should be not elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence;

(ix) leave to defend should be granted unless it is very clear that there is no defence;

(x) leave to defend should not be refused only because the court has reason to doubt the *bona fides* of the defendant or has reason to doubt whether he has a genuine cause of action;

(xi) leave should not be granted where the only relevant averment in the totality of the evidence, is a mere assertion of a given situation which is to form the basis of a defence and finally; and

(xii) the overriding determinative factor, bearing in mind the constitutional basis of a person's right of access to justice either to assert or respond to litigation, is the achievement of a just result whether that be liberty to enter judgment or leave to defend, as the case may be."

20. In *Aer Rianta c.p.t. v. Ryanair Ltd.* [2001] 4 I.R. 607 Hardiman J. stated at p. 623:

"... the fundamental questions to be posed on an application such as this remain: is it "very clear" that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

The court must look at the whole situation and consider whether the defendant has satisfied the court that there is a fair or reasonable probability of the defendants having a real or *bona fide* defence (see also *Allied Irish Banks plc. v. Higgins* [2010] IEHC 219 per Kelly J. (as he then was) at pp. 19-20).

21. The approach to be adopted in considering facts deposed to on affidavit was considered by the Supreme Court in *IBRC Ltd. v. McCaughey* [2014] 1 I.R. 749 in which Clarke J. stated (delivering the judgment of the court):-

"22. It is important, therefore, to re-emphasise what is meant by the credibility of a defence. A defence is not incredible simply because the judge is not inclined to believe the defendant. It must, as Hardiman J. pointed out in *Aer Rianta v. Ryanair Ltd.* ... be clear that the defendant has no defence. If issues of law or construction are put forward as providing an arguable defence, then the court can assess those issues to determine whether the propositions advanced are stateable as a matter of law and that it is arguable that, if determined in favour of the defendant, they would provide for a defence. In that context, and subject to the inherent limitations on the summary judgment jurisdiction ... the court may come to a final resolution of such issues. That the court is not obliged to resolve such issues is also clear from *Danske Bank v. Durkan New Homes* [2010] IESC 22,

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

22. The defendants advanced a number of grounds of defence.

Alleged Abuse of Process

23. Both defendants allege that these proceedings were initiated on 4th May, 2016 because the second defendant David Flood furnished an affidavit in a motion initiated for summary judgment against the estate of their late father in proceedings entitled "The High Court, Record No. 2014/1125 S. Between *Allied Irish Bank plc.* Plaintiff v. *Joan Flood (legal personal representative of the estate of J.J. Flood)* Defendant", for sums said to be due and owing on foot of two guarantees entered into by the late J.J. Flood on 25th May, 2007 in favour of the Bank in respect of the two accounts the subject matter of these proceedings.

24. In an affidavit sworn on the 27th January, 2016 David Flood stated that he was the director of J.J. Flood and Sons (Manufacturing) Ltd. since October 1994. His father the late J.J. Flood retired in 1994 was never an employee, director or contributory of that company. Sadly, his father died on 29th April, 2012 having been diagnosed in February 2009 with dementia caused by a tumour on the brain. The second defendant stated that his late father's medical records indicated that he was prescribed Aricept, a drug used in the palliative care of Alzheimer's disease in December 2004.

25. By way of background he set out how he formed a partnership with his brothers Alec and Tom Flood to purchase and renovate seven investment residential properties in the Dublin 6 area in 2002. His brothers were at that time structural engineers involved in the renovation of multiunit residential dwellings in and around Ranelagh and Rathmines. Up to that time finance for their projects was provided by Bank of Scotland (Ireland) Ltd. to the partnership and David Flood provided security by way of charges on quarry land

which was in his sole ownership and operated under license by his company. He stated that in early 2007 the partnership considered a venture into "speculative property development with the intention of purchasing residential zoned lands, obtaining planning permission for housing and then selling the entire site for a profit."

26. He then set out the following sequence of events in relation to the financing and acquisition of the Sutton site which is the subject of the loan facility agreement and his personal guarantee in these proceedings. He stated that on 8th February, 2007 his brother informed him of the proposed sale of approximately 1.85 acres on Railway Avenue, Sutton. He and his brother drove to the Sutton site on 9th February, 2007 and following a short telephone discussion with their brother Tom Flood, "[the] partnership decided to bid on the site." During that site inspection he states that he received a telephone call from Ms. Christine Meade, Assistant Manager with the plaintiff with whom he was well acquainted. She was looking for new business and inquired as to whether there were any opportunities to provide finance for his business affairs. He informed her of the partnership's intention to bid on the Sutton site and he was invited to attend at the Navan branch to discuss this proposal.

27. On 13th February, he visited Ms. Meade and discussed the partnership's financial requirements to fund a bid on the Sutton site. Ms. Meade informed him that if the partnership's bid was successful the plaintiff would be willing to advance all purchase money to the partnership at a more competitive loan rate than that offered by its previous bankers Bank of Scotland (Ireland).

28. The second defendant and his brothers Alec and Tom Flood attended a meeting with Bank of Scotland (Ireland) on 21st February, 2007 and submitted an application for a loan to assist with the purchase of the Sutton site. A meeting was arranged with Ms. Meade for 23rd February.

29. At that meeting on the 23rd February the second defendant states that Ms. Meade raised her concerns regarding the loan to value ratio of the security associated with financing the purchase of the Sutton site. She told him that the plaintiff would refuse to provide finance for the purchase of this site unless some additional equity or asset could be provided to improve the loan to value ratio. As a result of these concerns, the second defendant agreed that he would provide additional security in the form of unencumbered land which he owned. Ms. Meade concluded that this land would be of insufficient value to provide the necessary loan to value ratio required and asked him whether his brothers or any third party were capable of providing additional equity as security. He then states:-

"21. Without my father's knowledge or consent, I suggested that my father act as a guarantor for the partnerships loan from the plaintiff.

22. The reason why I suggested my father as a guarantor for the partnerships loans was that I had already indicated to Ms. Meade that he would act as guarantor for a personal loan which I had requested from the plaintiff for a payment of a lump sum provision being offered to my wife as part of our divorce settlement but I had never sought his permission or consent to volunteer him as a guarantor to any loan.

23. Furthermore, I knew that my father owned 71 acres of quarry land, identified as land certificate Folio 5536 Co. Meath which was unencumbered and I asked if this land could be accepted as security by the plaintiff. ...

26. Ms. Meade agreed to accept my father as sole guarantor for the loans to the partnership on the condition that an independent valuation of €8 million could be obtained for these lands. Without my father's knowledge or consent, I agreed to provide access to an independent valuer appointed by the plaintiff for the purpose of valuing his land for the benefit of the plaintiff.

27. As bankers to the company, the plaintiff and Ms. Meade knew my father had never been involved with the company and had retired in 1994. Furthermore, I told Ms. Meade that my father was 76 years old and suffering from ill health."

30. Mr. David Flood then states that the plaintiff was in possession of title documents to his father's land because his father had previously banked with it but had never requested that the title documents be returned to him. He also claimed that the plaintiff held "on file" a copy of a lease between his father and the second defendant's company which permitted the company to operate 59 acres of land as a quarry. He stated that on the note attached to this lease a residence and adjoining farm land were clearly evident on the remaining 12 acres. He therefore claimed that Ms. Meade and the plaintiff were familiar with the landholding and the fact that his father's private residence was located on the land – a fact of which it is clear to the court he was himself undoubtedly aware.

31. Mr. David Flood then stated:-

"31. At the conclusion of the meeting held on 23rd February, 2007, Ms. Meade raised the issue of whether my father had a solicitor. In response, I said "no" and when Ms. Meade indicated that my father required a solicitor, I suggested ... a solicitor that could advise my father. At that time, I understood that [this solicitor] was to advise my father of his legal position in order to facilitate the signing of various documents required by the plaintiff."

32. This firm of solicitors was known to the second defendant and had represented his company frequently since 2001. He was aware that a different firm of solicitors had previously acted for his father both in family and commercial affairs and had drafted and negotiated the lease between his father and the company. He was also aware that although the firm he nominated was acquainted with his father it had never represented his father in his personal affairs.

33. At the same meeting Mr. Flood states that Ms. Meade agreed to arrange for the loans to be advanced by the plaintiff to the partnership and that they would be solely guaranteed by his father.

34. Bank of Scotland (Ireland) was also prepared to finance the purchase of the Sutton property and issued a letter of loan offer on 2nd March, 2007. Tender documents were submitted to the partnership's solicitors BCM Hanby Wallace for submission to the auctioneers later that week on 1st March, 2007. At this stage in order to fund the deposit for the Sutton site the second defendant's company provided a loan of €250,000.00 on 28th February, 2007 and the partnership drew down €500,000.00 from the partnership account held in the plaintiff's Navan branch to cover the preliminary deposit for the Sutton site.

35. On 7th March, 2007 the partnership's bid of €11,600,000.00 was accepted by the vendor Dublin City Council. Prior to 13th March Ms. Meade telephoned the second defendant to arrange a meeting between him, his brothers and Mr. Declan O'Sullivan, Regional Director for the plaintiff which took place in the Great Southern Hotel near Dublin airport. Mr. O'Sullivan is said to have indicated that the plaintiff was eager to conclude negotiations with the partnership and offered favourable terms.

36. Mr. Flood states:-

"42. It was at this meeting that the partnership (David, Tom and Alec) confirmed that we would accept the plaintiff's offer to finance the purchase of the Sutton site. As a result, Mr. O'Sullivan authorised a bank draft of €660,000.00 to be issued by the plaintiff to the partnership to assist with the remainder of the 10% deposit required for the purchase of the Sutton site. My brother Tom collected the bank draft that afternoon from the plaintiff's office in Ballsbridge ..."

37. A letter of sanction confirming the facilities to the partnership issued on 13th April, 2007.

38. The second defendant then outlined in his affidavit how he invited his father to furnish a guarantee and provide a charge to the plaintiff over his lands. He said that on or about 17th April, 2007 he asked his father if he would "sign some papers" in the AIB Navan branch as the company wished to raise additional finance. He was aware at the time that his father would not have the benefit of his own solicitors but would be relying on solicitors nominated by and engaged by him. The same firm gave an undertaking to act for the plaintiff to register a charge over his father's land. He said that he was aware that his father had been suffering at the time from ill health and memory problems for several years and was taking medication. He drove his father to the Navan Branch of AIB to meet with Ms. Meade on 18th April, 2007. Ms. Meade explained to his father that his consent was being sought for the provision of two guarantees for €10 million and €1.5 million on loans being provided by the plaintiff to his sons. His consent was also sought for the arrangement and provision of security for these loans by permitting the plaintiff to register a charge on his 71 acres in Folio 5536 County Meath and his undertaking was sought to engage a solicitor for the purpose of receiving independent legal advice. The second defendant avers that his father stated:-

"I agree with whatever David wants".

39. At the same meeting Ms. Meade produced a letter from the plaintiff addressed to his father setting out the terms of the guarantee and requesting authorisation to forward title documents for the proposed security to the solicitors. He states that:-

"Under my direction, guidance and advice my father signed this authorisation in the presence of Ms. Meade and myself."

Ms. Meade gave the second defendant a copy of the letter of authorisation.

40. Following this meeting the second defendant spoke to his father in the car and as a result states that at that time he formed the impression that his father neither understood, comprehended or acknowledged the meeting which he had just attended with Ms. Meade. He then stated that he believed that this was consistent with the fact that he had since 2004 been suffering from Alzheimer's disease as evidenced by GP records later obtained.

41. The second defendant stated that he received a letter dated 26th April, 2007 addressed to his father from the solicitors. Apparently his parents' mail was delivered to him at a company post office box rather than their private address. He had been dealing with all his father's financial affairs because of his long-term health issues and what he terms his inability to deal with his own affairs. He states that his father never saw the letter from the solicitor presumably because he never showed it to him. The second defendant arranged a meeting with the solicitor so that his father could sign the letters of guarantee.

42. This occurred on 2nd May, 2007 at the solicitor's office. The solicitor explained that the plaintiff was asking his father to provide two guarantees as set out above, to provide security for the loans by permitting the plaintiff to register a charge on his 71 acres and asked whether his father's family home was located on the 71 acres being offered as security for the loans. Again the second defendant said his father replied "I agree with whatever David wants" in relation to the letters of guarantee and the consent to the charge. He said that he responded on behalf of his father in respect of a query concerning the family home and stated "how could there be a family home in the middle of a quarry?". This response was apparently accepted by the solicitor as confirmation by his father that his family home was not located on the land. The solicitor did not request that his father obtain a family home declaration from his mother concerning the land. The late Mr. Flood then signed the two letters of guarantee dated 2nd May, 2007 in respect of the loans and a consent for the registration of a charge on his lands. Again the second defendant states that he spoke to his father in the car and as a result of the conversation he once again formed the impression that his father did not understand, comprehend or acknowledge the documents he had just signed in the presence of the solicitor.

43. David Flood also states that the solicitor did not inquire as to his father's health or whether he was undergoing medical treatment and made no inquiry as to the identity of his father's doctor. He witnessed his father's signature on the consent to the registration of a charge on the lands contained in Folio 5536 County Meath.

44. The plaintiff has exhibited a declaration executed by the late John J. Flood also executed on 2nd May, 2007 which states that the property comprised in Folio 5536 Co. Meath is not a family home within the meaning of the Family Home Protection Act 1976 by virtue of the fact that the property consisted of agricultural land which has never been occupied. The late Mr. Flood declares that he understands the effect and import of the declaration which had been explained to him by his solicitor.

45. It is also clear from the evidence that at this stage the partnership of three brothers was represented by BCM Hanby Wallace solicitors.

46. A number of days later because of queries arising in his own matrimonial proceedings in respect of the purpose of the charge on his land which he was proposing to provide as security for the partnership's loan with the plaintiff and should have been advised to his wife or his wife's solicitors, the second defendant withdrew from the purchase of the Sutton site due to issues that might arise in his divorce proceedings. Ms. Meade on behalf of the Bank agreed that he could "step back from the purchase of the site" if he acted as guarantor for the loan. The plaintiff then agreed not to rely on the second defendant's land as security for the loan due to the refusal of his wife to provide a consent by way of a family home declaration. This resulted in the signing of fresh letters of sanction by his two brothers Tom and Alec Flood on 21st May, 2007. This facility was also guaranteed by his father. It is also clear that the second defendant executed the guarantee as a part of this new arrangement on his own evidence because the arrangement had to be reconfigured because of the complications caused by his matrimonial proceedings.

47. Two substitute guarantees were executed by the defendants' late father on 25th May, 2007 at the solicitor's office. At that meeting the solicitor explained to their late father that there had been a mistake in the previous letters of guarantee dated 2nd May, 2007 and that he was simply required to re-sign the revised letters of guarantee; no further explanation was given and no additional inquiries were made of his father. The second defendant witnessed his father's signature on the two guarantees on that date. Again the second defendant states that he spoke to his father in the car and formed the impression that he did not understand, comprehend or acknowledge the documents he had just signed in the solicitor's presence.

48. The solicitors who acted for his father in these matters invoiced Tom and Alec Flood for the fees. They discharged them.

49. Two letters of demand from the plaintiff addressed to his father issued on 15th July, 2010. However, his father's health had deteriorated at that time and they were not brought to his attention. The defendants' father died on 29th April, 2012. Up to that time the second defendant states that he continued to administer all of his father's financial affairs.

50. The plaintiff's case against the late Mr. Flood's estate was sent for plenary hearing. As part of the defendant's defence and counterclaim in those proceedings it is claimed that the deceased did not have the capacity or cognitive understanding in May 2007 to provide any guarantee or charge to the plaintiff and that the Bank knew or ought to have known or had constructive notice that he lacked such capacity or cognitive understanding to do so. It is also claimed that since the guarantees and charge were not enforceable, the loan agreements are therefore void. It is claimed that the plaintiff failed to ensure that the deceased received independent legal advice when signing the guarantees or security or in entering the agreements and/or that the plaintiff had knowledge of actual undue influence being exerted on the deceased by his eldest son the second defendant in these proceedings. In addition, it is claimed that in taking security for the agreements by way of charge over Folio 5536 the plaintiff intentionally or negligently admitted or presented the contents of an independent professional valuation which was intended to induce the deceased to enter into the guarantees and related agreements. I will turn to the issue of the valuation later.

51. Shortly after the receipt of Mr. David Flood's affidavit in the proceedings initiated against his late father's estate, the plaintiff's solicitors wrote to both defendants on 4th February, 2016. The letter to Alec Flood states:-

"...[David Flood] makes certain allegations regarding the provision of the Security by John J. Flood. These allegations, all denied, evince a clear intention from you, Alec Flood and David Flood to conspire to provide our client with no reliable Security in breach of contract.

Whilst our client denies the contents of the said affidavit for the purposes of the proceedings, and seeks to rely on the Security, we must take all necessary steps to protect our client's position.

In the circumstances and without prejudice to the proceedings, we now have our client's instructions to issue High Court proceedings against you in respect of both your wrongful actions and your obligations as principal debtor in respect of each facility for which the Security was provided.

We are also instructed to enforce any judgment/order obtained against you in the strongest possible terms.

Notwithstanding the above and the fact that previous demand has been made of you for repayment of your liabilities pursuant to the Borrowings, our client will refrain from issuing proceedings for a period of 7 days to allow you an opportunity to cover all loss suffered by our client as a result of your fraudulent actions."

52. A letter in similar terms was written to David Flood on the same date. Both defendants complain that the correspondence is evidence that the plaintiff's motive in initiating and maintaining the summary summons proceedings against each of them is a retaliatory response to the filing of his affidavit in the proceedings brought against his late father's estate. It is claimed that it is inappropriate to seek a determination of any dispute between the parties by way of summary summons procedure because of the extremely serious nature of the allegations made in the two letters relating to the 2014 proceedings and that all such issues should be determined at the same time or after the proceedings brought against their late father's estate.

53. Alec Flood denies that he had any "hand, act or part" in obtaining guarantees from his late father for the loan agreements of 21st May, 2007 and believes that the security provided by his father was arranged by his brother David Flood and Ms. Meade, on behalf of the Bank. He informed the Bank that he was not a party to the other proceedings and had not seen the affidavit. He complained about the inference of wrongdoing drawn by the Bank on his behalf derived from his brother's affidavit.

54. It was alleged by the defendants that the letter constitutes a threat that proceedings will issue in relation to the matter unless the defendants satisfy the plaintiff's claim in the proceedings brought against the estate. It is submitted that although the plaintiff had an entitlement to make a demand for money advanced and issue proceedings to recover same by way of summary summons, it could not do so if these proceedings were issued for an improper purpose.

55. In *Quinn v. An Bord Pleanála* [2001] 1 I.R. 505 Quirke J. granted an application to dismiss the plaintiff's proceedings as an abuse of process because the plaintiff's sole objective was to further its own commercial interests by gaining an advantage over a business competitor in the cement industry. The plaintiff sought to challenge the defendant's order granting planning permission to his business rival for the construction of a cement factory in Co. Meath. The learned judge found that the plaintiff's sole objective on the evidence was to further its own commercial interest. It was not suggested in any way that there was any planning issue which engaged the plaintiff or in which it had any interest; its only object was to secure its market advantage and prevent a loss of its profits. The court acknowledged that in exercising a jurisdiction to dismiss a case as an abuse of process it must proceed with great caution. However, it was satisfied that the proceedings had been commenced by the plaintiff in "a cynical, calculated and unscrupulous fashion for the sole purpose of seeking a commercial advantage over its competitor". It was not to address a wrong or a grievance, to right an injustice, to ensure compliance with planning legislation, or to ensure the proper and effective planning and development of the particular area.

56. The court is not satisfied that the letters advanced in the circumstances relied upon by the defendants give rise to any arguable basis upon which the plaintiff's proceedings could be dismissed as an abuse of process. It is quite clear that a letter of demand issued in respect of the sums claimed in 2010. The facts relied upon in the affidavit of David Flood justify the reasonable inferences drawn by the bank and its interpretation as set out in the correspondence of the manner in which security and guarantees were obtained from the defendants' late father and sending the letters in order to protect its position. The letters refer to the fact that proceedings were contemplated against the defendants in respect of any damage caused to the Bank by reason of the perceived wrongdoing of the brothers. It should be recalled that the brothers were initially dealt with by the Bank as part of a threesome who required facilities in respect of what is clearly a business development; the brothers were in partnership. The money had been given by way of loan. The Bank had a clear cause of action to recover the monies advanced to the brothers and due on foot of the guarantee from David Flood. It was clear to the Bank's solicitor that Mr. David Flood's affidavit raised serious concerns about the circumstances in which that money had been procured from and advanced by the Bank on the basis of a deception as to the nature and manner in which the guarantee and charge had been obtained from the defendants' late father by his son. If correct, the affidavit of Mr. David Flood itself indicates a degree of "cynical, calculated and unscrupulous" behaviour which might reasonably give rise to a separate cause of action for the bank than those which are the subject of the summary summons.

57. The court is satisfied that it is very clear that there is no arguable basis in law or fact upon which these summary proceedings could be successfully defended on the basis of this alleged abuse of process. The facts upon which reliance is placed are in no way comparable to the facts found to exist in the *Quinn* case or like authorities notwithstanding the low threshold requirement to establish an arguable, stateable, credible or *bona fide* defence.

Conditions Precedent

58. Both defendants claim in a related submission that the provision of a valid security and the provision of an €8 million valuation in respect of that security was a condition precedent to their entering into the loan and guarantee contracts which are the subject of these proceedings.

59. The second defendant, David Flood, accepts that knowing that his father owned 71 acres of quarry land in Folio 5536 Co. Meath which was unencumbered, he requested that it be accepted as security by the plaintiff. He avers that Ms. Meade the assistant manager of the plaintiff's Navan branch agreed to accept his father as a guarantor for the loans to the partnership on the condition that an independent valuation of €8 million could be obtained in respect of those lands. He states that it was the plaintiff's original intention that his father would be the sole guarantor. However, he accepts that he also subsequently guaranteed the loans on 22nd May, 2007 when he withdrew as a purchaser in the circumstances already outlined.

60. The valuation was carried out on behalf of the Bank. It indicated a valuation in excess of €8 million. The second defendant claimed that this valuation led him to believe that he was indemnified to a much higher level than was really the case. He states at para. 20 of his affidavit that it was this belief which induced him to proceed with the guarantee and overdraft facility on the understanding that the loan to value ratio of the security held by the plaintiff was in the order of 70%.

61. The second defendant draws attention to the letter of sanction dated 9th May, 2007 in respect of the overdraft facility. It is claimed that the plaintiff was in breach of the special conditions of the loan agreement by not ensuring that full and proper valuable security was put in place "before drawdown". The initial security from the late John J. Flood was to be provided by a letter of guarantee for €10 million in respect of the obligations of the first and second defendants and their brother Thomas Flood. It was indicated that a separate letter would issue to John J. Flood confirming the land security that they were relying upon in support of the guarantee. Special Condition 1 provided that all security would be in place prior to or in tandem with drawdown and Special Condition 2 provided that an independent professional valuation would be carried on the security offered.

62. He claims the obtaining of a proper valuation in excess of €8 million and an enforceable or adequate guarantee and charge from his late father by the plaintiff were conditions precedent to his agreement with the plaintiff to provide a guarantee or agreeing to the overdraft facility or its continuance. He claims that if the defence and counterclaim and the facts set out in his affidavit (the details of which are set out above) prevail and are accepted in the proceedings brought against his late father's estate and the guarantee and charge on the lands obtained from his late father are found to be void or voidable and therefore not "properly in place", the Bank would have no recourse against the estate. This, he claims, would breach the fundamental term or representation upon which he was induced to enter into the guarantee the subject matter of the proceedings and the overdraft facility: it would give rise to potential financial exposure for him personally which would otherwise have been covered by his late father's guarantee and charge. In essence he claims that he is entitled to avoid liability in respect of the sums due on the basis of the unenforceability of his late father's guarantee and charge on the basis of his own deception of his father as admitted and set out in the affidavit of January 2016. He has stated on oath that he obtained the charge and guarantee from his late father by deliberately taking advantage of his weak mental state knowing that he lacked the capacity or at least having serious concerns about his mental capacity to enter into such an arrangement and that it was grossly unfair to induce him to do so. If that is true he then deceived the Bank into parting with its money on foot of the loan facility thinking that it had procured an enforceable and valid security and guarantee and that it had thereby fulfilled this alleged condition precedent. David Flood now submits that he has a full defence to the Bank's claim because it did not obtain good and valuable security from his father though on his own evidence he knew at all material times that the security the Bank thought was good, was in fact bad because of his wrongdoing and deception. This is not an arguable, stateable, credible or *bona fide* defence. If his evidence is accepted, it is a claim that is rooted in dishonesty and deceit and to permit it to be advanced as a defence would itself be an abuse of the court's process. It would be unconscionable to permit a defendant who has wrongfully frustrated the implementation of what he now claims to be a condition precedent to his contract and which he concealed from the plaintiff to rely on that act of frustration to defeat the plaintiff's claim.

63. The first defendant Alec Flood also relies on the defence advanced in the proceedings brought against his late father's estate and claims that the Bank misrepresented the nature of the security provided in the letters of sanction for the loan and overdraft agreements signed by him on 21st May, 2007. He also claims that it was a condition precedent to his agreements that this security was in place prior to drawdown.

64. This point of proposed defence arose in his second affidavit. In his first affidavit Mr. Alec Flood acknowledged that the loan agreement of 21st May, 2007 was made "jointly and severally, with his brother Tom Flood and guaranteed by his brother David Flood and his late father". He also acknowledged the second agreement originally entered on 21st May, 2007 in respect of the "overdraft account" was also made jointly and severally with the second named defendant and his brother Tom Flood and separately guaranteed by his late father. He denies any involvement in the procurement of the guarantees obtained from his late father dated 21st May, 2007 or 25th May, 2007. He asserts at para. 10 that if the plaintiff is unsuccessful in the proceedings against his father's estate the bank in this case would not have a contractual entitlement to seek and charge interest in the within proceedings.

65. Alec Flood also raises the specific issue that it was a condition precedent to his loan agreement that the security from his late father be in place prior to drawdown and that since it was not having regard to the affidavit of his brother David and the defence raised by his late father's estate, he asserts that there "is a strong suspicion that any loan agreements between myself and the plaintiff may be invalid due to a breach of one or more conditions precedent". Both therefore submit that these proceedings should either be sent for plenary hearing and adjourned to a date subsequent to the conclusion of the proceedings brought against their late father's estate by the plaintiff or be determined at the same time as that case.

66. It is submitted on behalf of the plaintiff that these proceedings are brought to recover monies due and owing on foot of the two loan facilities and the guarantee set out in the special indorsement of claim. No allegation of fraud or conspiracy against the defendants is made in the course of these proceedings or relevant to the establishment of the plaintiff's claim. The reliefs claimed are not linked or connected to the other proceedings which are entirely separate in respect of guarantees and a charge given by their late father which were stand alone and entered into for the benefit of the bank not the borrowers.

67. It is denied that the second defendant was induced by the plaintiff into signing the guarantee based on the valuation of his father's lands or that it was a condition precedent to his furnishing his own guarantee and/or entering the agreement in respect of the overdraft account in 2007 or its extension in 2010, that a valid and enforceable guarantee and/or charge would be obtained from

his late father. In that regard Mr. David Flood accepts that the Bank is correct in noting that his guarantee does not mention that the loan to value ratio of security held should be 70% or that the bank were obliged to have recourse to it before pursuing the principal debtors but he continues to assert that "as far as [he] was concerned" if the Bank was satisfied that the valuation in the order of €8 million was correct this "gave him comfort" that he would be indemnified to a sufficient level and on that basis he entered the agreement.

68. The Bank claims that the assertions by the defendants as to why they entered the agreements do not provide an arguable defence when the written contractual terms to which they agreed are examined.

69. It is difficult to understand how if at the time of the execution of the guarantees and charge by his late father David Flood believed, as he deposed on affidavit, that his father did not understand, comprehend or acknowledge what had just transpired that he would have permitted the drawdown of funds which had not yet occurred to proceed when he himself allegedly had full knowledge of the alleged deficiency of the guarantee and charge given by his late father. If their validity and enforceability were a condition precedent with which he knew the Bank was obliged to comply it is simply not credible on any logical basis (and within the principles applicable to this case) that David Flood would allow the drawdown of the monies or the transaction to proceed any further without informing his brother Alec and the Bank of those circumstances. This was in circumstances in which Ms. Meade on the part of the Bank had requested that their late father go to an independent solicitor for independent advice in relation to the guarantee and charge proposed - advice the acceptance of which was thwarted on his own evidence by David Flood.

70. There is no evidence at all in the affidavits submitted on behalf of the defendants of any specific representation or assurance on the part of the Bank that any guarantee or charge to be obtained or obtained from their late father was or would be valid and enforceable: nor is there any correspondence, representation or condition in any of the agreements relied upon in evidence indicating that the obtaining of the said guarantee or charge from their late father was a condition precedent to their entering into the loan agreements or guarantee. The affidavits submitted on behalf of the defendants do not contain any evidence that the contractual terms in the second defendant's guarantee required the Bank to seek recovery on foot of their late father's guarantee and charge before proceeding against the second defendant. The second defendant's guarantee on his own evidence was required by the Bank when he withdrew from the triumvirate who sought the original sum of €12,715,000.00 for the reasons already set out. He was then required to enter a guarantee in respect of the sum before the bank would agree to advance the loan to the remaining two borrowers, his brothers. The court is satisfied that there is nothing in either of these contracts which supports the existence of a condition precedent for their validity or entry into force.

71. The general terms of the loan agreements in respect of security have already been quoted earlier in this judgment. The facility was subject to security and under Clause 7.9.2 that security had to be executed and delivered to the Bank's satisfaction before the facility was drawn down or availed off in whole or in part. It was clearly for the benefit of the Bank.

72. Under the terms of the guarantee agreed by David Flood clause 6 provided that the bank was entitled to enforce all securities and guarantees including the second defendant's guarantee in whatever order it thought fit. Clause 8 provides that insofar as the law permits David Flood's guarantee was binding and would not be impaired nor would his liability to the Bank be affected by the failure or an irregularity, defect or informality in security given by or on behalf of the customer or any other person in respect of the liabilities secured under the guarantee or the failure of any person to grant any security in respect of the liabilities. The guarantee is in addition to and did not affect or in any way prejudice any collateral or other security held or later held by the Bank. Clause 7 emphasises the standalone nature of the guarantee.

73. The court is not satisfied that there is any arguable, credible or stateable *bona fide* defence available to the defendants on the basis of the purported existence of a condition or conditions precedent to the validity or entering into force of the loan agreements or to their liability thereunder. In that regard in *Tennants Building Products Ltd. v. Dennis O'Connell* [2013] IEHC 197 Hogan J. considered a proposed defence that a guarantee was only given on foot of an oral representation by the plaintiff's agent that it was simply "for presentational purposes and that it would never be used". In that case, the defendant sought to supplement the written guarantee agreement with parol evidence where there was no written evidence of any kind to suggest that the assurance concerning the guarantees non-enforceability was given or in contemplation. Hogan J. stated:-

"The effect of [the] case-law may be said to be that while the courts will permit a party to set up a collateral contract to vary the terms of a written contract, this can only be done by means of cogent evidence, often itself involving ... written pre-contractual documents which, it can be shown, were intended to induce the other party into entering the contract. By contrast, generalised assertions regarding verbal assurances given in the course of the contractual negotiations will often fall foul of the parol evidence rule for all the reasons offered by McGovern J. in *[Ulster Bank v. Deane* [2012] IEHC 248]."

74. In *Deane* the Bank sought summary judgment on foot of two loan agreements and a guarantee. The loan agreements were evidenced by two facility letters. Each defendant had executed a guarantee in respect of all present and future liabilities of the other to the Bank. The defendants contended that the loans were due only on the sale of a number of relevant sites. The Bank claimed the loans were repayable on demand. The defendants in their affidavits claimed that throughout their commercial relationship with the Bank loans were advanced on a long term basis. McGovern J. concluded that the defendants were seeking to alter the terms of the facility letters which were clear on their face by means of parol evidence which was inadmissible if introduced in an attempt to contradict the terms of a written agreement between the parties. In that case, also it was alleged that there was a collateral agreement in the main loan agreement. The Bank denied the existence of any such agreement and the defendants offered no evidence other than verbal discussions which they said altered the terms of the facility letter. The learned judge concluded that the existence of a collateral agreement was not supported by any credible evidence that would meet the criteria for such an agreement.

75. The court is satisfied that the alleged existence of a condition precedent, whether by collateral agreement or otherwise in this case is not supported by any cogent or credible evidence. It is not evidenced by any pre-agreement documentation and is contrary to the written conditions of the loan facility agreements and the guarantee. The defendants have attempted to alter the terms of these written agreements by making assertions supplemented by inadmissible parol evidence. Furthermore, it is clear to the high degree required in an application such as this that these agreements are separate and distinct agreements from the guarantee and charge entered into by the defendants' late father and give rise to stand alone obligations which are independent thereof.

Valuation

76. It was a special condition of the loan granted to Alec and Tom Flood of 21st May, 2007 that an independent professional valuation would be carried out on the security being offered in respect of the loan facility. There is nothing in the guarantee signed by David Flood in respect of obtaining a valuation concerning his late father's lands. There is nothing in the overdraft agreement dated 1st March, 2010 or its 2007 predecessor requiring that such a valuation be obtained whether as a condition precedent or otherwise

for his benefit. There is a reference in the latter agreement under "next steps" that the borrowers would "comply with all pre-drawdown conditions including provision of security to the Bank's satisfaction".

77. The second defendant in his January 2016 affidavit claimed that Ms. Catherine Meade, the assistant manager of the plaintiff, originally agreed to accept his father as the sole guarantor for the loan to the partnership on condition that an independent valuation of €8 million could be obtained on his lands. This was at a stage when the three brothers sought a loan jointly and severally as part of their land speculation purchase. Mr. David Flood claims that the plaintiff then retained a valuer which led him to believe that he was indemnified to a much higher level than what transpired to be the case. He claims that it was this belief that induced him to proceed with the guarantee and the subsequent overdraft facility on the understanding that the loan to ratio value of the security held by the plaintiff in respect of his late father's lands was in the order of 70%. He claims that he would never have entered either agreement in the absence of this understanding. He also claimed that the Bank misrepresented to him the value of the land constituting the security provided by his father.

78. The first defendant Mr. Alec Flood made no mention of the valuation issue in his first affidavit. In his third affidavit dated 18th March, 2017 he claims that Ms. Meade made a misrepresentation to him and failed to obtain a true independent valuation prior to the drawdown of the loans. He states that he was not required to provide security nor was he responsible for obtaining the independent valuation report. This he said was made clear by his solicitor Ms. Ann Fitzgerald of BCM Hanby Wallace in a conversation with Ms. Meade by telephone dated 7th June, 2007. The memo of that conversation reads as follows:-

"I spoke to Christine Meade of AIB regarding the drawdown of funds. She told me that there was a difficulty with drawdown in that they do not have a report by an independent valuer in relation to the property in the ownership of John J. Flood.

I checked with her that we were not required to provide security in relation to this property and also that she had the guarantees completed by John Flood and by David Flood. She confirmed that all of this was in hand.

She said that the only difficulty that had arisen was the valuer who had attended to value that particular property has now explained to the Bank that he was not in a position to provide the valuation not being familiar with the valuations for quarry land.

Christine told me that they have organised another valuer but he will not be able to attend the property until sometime mid to late next week and therefore next Friday is probably the earliest they would have the appropriate valuation.

She says she was trying to agree with the Bank that some or all of the drawdown could proceed without this additional valuation."

It is clear that this memo simply states the obvious fact which is clear from the loan agreement that the first defendant was not obliged to provide security by the bank: Ms Meade was providing an update of progress concerning the completion of the securities which the bank required prior to permitting drawdown. It does not in any way suggest the existence of a condition precedent of the type claimed.

79. The first defendant in his fourth affidavit expands upon this proposition and makes further criticisms of the valuation obtained. By the time of swearing of this affidavit on 26th July, 2017, the first defendant said that having reviewed the professional valuation of 20th June, 2007 he was satisfied that Ms. Meade had misrepresented the nature of the loan and security provided by the late John J. Flood in that she had represented that everything was in order to his solicitors. He stated that Ms. Meade had indicated to him and Ms. Fitzgerald that the purpose of the valuation was to value "security now being offered to the Bank" and "the property and the ownership of John J. Flood".

80. He complains that the valuation actually obtained was for a separate and entirely different purpose and was procured for a beneficial interest which was the property of a third party. He said that this third party was completely unrelated to the loan agreements dated 22nd May, 2007. He relies on the fact that the valuer having been appointed by the plaintiff to carry out the valuation of quarry lands at "The Murrens, Old Castle, Co. Meath" noted that the lands were a quarry operated by J.J. Flood & Sons (Manufacturing) Ltd. The purpose as stated in the valuation was "to provide supporting information to Allied Irish Banks plc. in relation to future financing arrangements with J.J. Flood & Sons (Manufacturing) Ltd".

81. The first defendant then states that he "made enquiries of the directors of this third party ... and they stated that they were unaware [that] this purported independent professional valuation was obtained by the plaintiff on the company's behalf. Furthermore, they inform me that they neither consented or approved of the company being part to the loan agreement dated 22nd May, 2007." On inquiry by the court counsel confirmed that the director of the third party consulted was in fact his brother David Flood, the second defendant. Alec Flood then observed that his late father had no involvement with J.J. Flood & Sons (Manufacturing) Ltd. In fact, his late father had operated the quarry but had retired at a time when it was not doing well and is the sole registered owner thereof. The quarry was then operated by the company which was operated by his son David Flood and held a lease from his late father. In essence the reference to the company in the valuation report is said by the plaintiff to be an error. Alec Flood chose not to describe his brother's involvement in that company when outlining his proposed defence on affidavit to the court and conveyed an ignorance of the reality of this arrangement which in the court's view lacked candour.

82. The first defendant makes six criticisms of the valuation report:-

(a) A valuer was instructed to carry out a valuation of the quarry lands when they were being operated by the company under a lease rather than instructing them to correctly value the legal interest retained by John J. Flood.

(b) As a result, a true financial valuation of Folio 5536 as the security offered by the late J.J. Flood was not appropriately valued.

(c) The first defendant states that "he now know(s) that the family home of John J. Flood and his spouse was located on the remaining 12 acres of land which is clearly indicated in Folio 5536 and inspected by the Bank's valuer ..." This adversely effected the valuation of the security.

(d) The consent of the late John J. Flood's spouse i.e. the defendants' mother was not obtained.

(e) Ms. Meade failed to advise their mother of the consequences of providing the family home as sole security or that she

should avail of independent legal advice.

(f) The valuer should not have been directed to obtain a valuation of the aggregate reserves under the entire 71 acres because the entirety would not all be considered quarry lands and this was not addressed in permission obtained.

(g) The true value of the security provided by their late father in June 2007 was approximately €560,000.00 rather than €8,041,000.00 as indicated by the valuation obtained by the Bank.

The court is not satisfied that these criticisms offer any basis for a defence to the first defendant as a principal debtor. If there is a frailty in the security obtained it will operate to the detriment of the bank. The security under the terms of the two loan contracts is wholly separate from the liability of Alec Flood.

83. In para. 16 of his affidavit Mr. Alec Flood states that he was of the view that Folio 5536 in May 2007 was "actually worth significantly less than the purported value provided by Ms. Meade". He then sets out an extract from a memo of a telephone conversation which occurred between Ms. Meade and Ms. Fitzgerald on 15th June, 2007:-

"I told Christine that when I spoke to Tom and Alec about the valuation I understood the lands in question are not part of our security but form part of security already available to the Bank and were valued at considerably more than the Bank would require. She said that she had a similar conversation and Alec in particular mentioned the valuation needing to be and around €5 million. She told me realistically it was to be over €7 million in order to meet their lending/value ratios.

She said it is possible that the land is that valuable but much would depend upon the amount of reserves."

84. It is clear from this memo that the Bank was very concerned that the valuation of the proposed security on the late Mr. Flood would be of a particular level. The court is not satisfied that there is any arguable credible, reasonable or *bona fide* defence arising on the basis of any alleged misrepresentation by Ms. Meade from any perceived or alleged representation contained in this memo. It is very clear that the guarantees and charge obtained were for the benefit of the bank. For the reasons already set out above and on the basis of the authorities (*Tennants Building Products Limited* and *Deane*) I am not satisfied that there is any stateable credible arguable defence on the basis that the obtaining of a valuation of a particular level in respect of the security offered was a condition precedent for entering the respective agreements.

85. Furthermore, the evidence adduced by the defendants does not indicate any terms sought, advised or obtained by BCM Hanby Wallace on their behalf or on their instructions in respect of an appropriate valuation or any conditions precedent which would have taken the terms outside the standard conditions applicable to the agreements. There is no affidavit from Ms Fitzgerald or any other solicitor supporting this proposition. Indeed, the court would have expected clear documentation to have been created or advised by their solicitors in the normal course of such a commercial transaction, which this clearly was, but of which there is no evidence. The court is satisfied that the proposed defence of misrepresentation or the existence of conditions precedent based upon the valuation or the enforceability of their late father's guarantee and security is, on the materials produced and in the absence of other evidence and the chronology of events outlined in the affidavits, untenable (see Hardiman J. in *Aer Rianta v. Ryanair* supra. as quoted and applied by Ryan J. in *Allied Irish Banks plc. v. Farrell* [2014] IEHC 395 at para. 36).

Statute of Limitations

86. The first defendant Alec Flood proposes a defence based on s. 11 of the Statute of Limitations Act 1957 (as amended) which provides a limitation period of six years within which an action for breach of simple contract must be initiated: it is said that this period had expired by the time the proceedings herein were issued in respect of the loan and overdraft facility. It is also claimed that a defence arises under s. 36(1) of the 1957 Statute which provides that no action shall be brought to recover any principal sum of money secured by a mortgage or charge on land after the expiration of twelve years from the date when the right to receive the money accrued.

87. The defining fact relevant to the first loan to the first named defendant Alec Flood is a letter of demand which issued on 15th July, 2010. Under clause 14 of the guarantee given in respect of that loan by the second defendant the monies guaranteed also became due upon written demand made by the Bank which also issued to him on 15th July, 2010. The summary summons issued on 4th May, 2016 a number of months before 15th July, 2016 and therefore within the period of limitation. The court is satisfied that in accordance with the respective agreements the relevant date upon which the cause of action accrued was therefore the 15th July, 2010 (see Breslin 2nd Edition, para. 1014 and *Norton v. Ellam* (1837) 150 E.R. 839 cited therein). Consequently, there is no stateable defence under the Statute of Limitations in respect of the claim concerning the first loan agreement or the guarantee given by the second defendant in respect thereof.

88. The defendants claim that the monies due in respect of the overdraft account became due and payable at any time after drawdown on 17th July, 2007. The final withdrawal from the overdraft account was made in August 2009. Consequently, it is claimed that the period of limitation had expired by the time proceedings issued. It should be noted that the original overdraft facility furnished to the Flood partnership was on 9th May, 2007. A further letter of sanction dated 1st March, 2010 replaced that agreement with a new agreement providing an overdraft facility in the amount of €781,586.00 as working capital which was repayable on demand and at the pleasure of the Bank (see also Clause 2.1.1 General Terms and Conditions Governing Business Lending – June 2009). Letters of demand also issued in respect of this facility on 15th October, 2010. It was not necessary that any further facility be provided by the Bank to enable it to issue the letter of demand (see *Moorview Development Ltd. v. First Active plc.* [2009] IEHC 214 per Clarke J. at para. 10.1). The fact that the last drawdown was made in August 2009 does not assist the defendants. The court is not satisfied that there is any credible or arguable defence open to the defendants on this proposed ground.

Consumer

89. The second defendant David Flood claims that the Bank dealt with him as a consumer. This is based on two letters sent to him as provider of the guarantee dated 7th July, 2008 and 1st July, 2009. In each letter the Bank notifies Mr. Flood that they have agreed with the borrower to change the terms of the facilities as set out in attached correspondence. The second defendant relies upon the sentence "This notice is sent to you in compliance with the Consumer Protection Code" which is contained in each letter which post-date the guarantee dated 22nd May, 2007.

90. It is clear that the loan account facility made available to Tom Flood and Alec Flood the first defendant was for the purchase of 1.987 acres site at Railway Avenue. Mr. David Flood has clearly stated in his affidavits including that of January 2016 that he initially entered a partnership with his brothers Tom and Alec Flood to purchase, renovate and sell investment residential property in the Dublin 6 area. By early 2007 the partnership considered venturing into speculative property development with the intention of purchasing residential zoned lands, obtaining planning permission for housing and then selling the entire site for a profit. This was the

purpose of the loan originally sought by the three brothers including David Flood as part of a commercial enterprise to generate profit from land speculation. He was obliged to withdraw from that project due to the intervention of his wife's solicitors and queries raised by them in respect of the matrimonial proceedings and his proposal to offer his own lands as security for the intended loan to the partnership. The Bank then permitted him to withdraw from the arrangement agreeing to provide the finance requested for this commercial venture on condition that he would provide a guarantee in respect of the loan granted to his two brothers. He agreed to do so. There is no mention in the guarantee executed by the second defendant that he is acting in any sense as a consumer. The overwhelming body of evidence is that this entire transaction the furnishing of guarantees and security took place as part of a commercial enterprise in which David Flood was a prime mover and organiser. His assertion in subsequent affidavits that he acted as consumer is untenable in the light of the chronology of events which he himself outlined. It is in the nature of a mere assertion for which there is no evidence other than the two letters relied upon *ex post facto*. He then made arrangements to ensure that guarantees and a charge were procured from his late father and that the overdraft facility for the partnership which included him was procured and extended for "working capital".

91. The court is satisfied that the contention made that the second defendant was a consumer in entering the guarantee is in the category of a mere assertion, lacks credibility (under the principles applicable to this application) and offers no arguable, reasonable or *bona fide* defence to the plaintiff's claim on foot of the guarantee.

Disputed Current Account Balance

92. The second defendant claims that there is a clear factual difference between the parties as to the application of the proceeds of sale of the Sutton site which was sold and applied to the first loan account but not to the higher interest bearing overdraft account. Following the sale of the 1.987 acres at Railway Avenue, Sutton the sum of €728,514.50 was lodged into the first loan account of Tom Flood and Alec Flood, thereby reducing the outstanding amount on 15th May, 2013. The Sutton site had been put on the market for sale in February 2011 and disposed of on 29th April, 2013.

93. In a letter of 7th February, 2011 the partnership brothers Thomas Flood, David Flood and Alec Flood were informed *inter alia* that if monies outstanding on their overdraft account were not discharged the Bank would request that the 1.987 acres site at Railway Avenue, Sutton would be put on the open market for sale. It is submitted that though he was not a party to the loan account in respect of Tom Flood and Alec Flood concerning the purchase of that property that the Bank held as security, he was, entitled to rely upon the letter of 7th February as an indication that any proceeds of sale would be applied to the overdraft account in respect of any liability which he had arising on foot of that account. It is submitted that the proceeds of sale should have been applied to reduce his indebtedness on the overdraft account.

94. The plaintiff avers that the charge over the site was primary security for the loan advanced to Tom Flood and Alec Flood under letter of sanction dated 21st May, 2007 which was specifically for the purchase of the site which was sold and in respect of which David Flood was liable as guarantor. It was only held as secondary security to the overdraft account as set out in the letter of sanction dated 1st May, 2010. The solicitors for the borrowers remitted the proceeds of sale to the Bank in 2013 in full knowledge that the loan account of the two brothers would be credited as it was.

95. I am satisfied that under the terms of the agreements the bank was entitled to allot the proceeds of sale in discharge of the first loan liability. The agreements provide a very wide discretion to the bank in this regard. No objection was taken by the second defendant or on his behalf as guarantor of the first loan to this course of action nor was any objection taken by the first defendant who was a party to both loans. I am not satisfied that this constitutes an arguable, credible or *bona fide* defence to the plaintiff's claim.

Conclusion

96. The court is satisfied that the plaintiff is entitled to summary judgment against each of the defendants as follows:

- (i) in the amount of €14,423,696.65 against Alec Flood
- and
- (ii) in the amount of €13,497,857.50 in respect of David Flood.