Neutral Citation Number: [2012] IEHC 262

The High Court

Commercial

[2011 No. 1759 S]

[2011 No. 16 COM]

Between

Irish Bank Resolution Corporation Limited

plaintiff

and

Cambourne Investments Inc, Century City Limited and Peter Curistan

defendants

Judgment of Mr Justice Charleton delivered on the 14th day of June 2012

1. The plaintiff is the former Anglo Irish Bank, a financial entity nationalised in January 2009 and then renamed as in the title hereof. It is called "Anglo" hereafter. The first defendant, hereafter "Cambourne", is a company registered in the British Virgin Islands and owned by a family trust to the benefit of the third defendant Peter Curistan, a property developer, and his wife. The second defendant, hereafter "Century City", operates an amusement arcade and pool hall in the Parnell Centre in Dublin.

2. Anglo seeks the recovery of debts against Cambourne in the sums of €10,436,178 and €145,000 together with ongoing interest, which at the date of issuing the summons was €28,210. The final figures are given at the end of this judgment to account for interest. That money was lent pursuant to facility letters. Century City is a guarantor of the borrowings of Cambourne that gave rise to those debts and so is Peter Curistan. In the case of Century City and Peter Curistan the guarantees were signed by Peter Curistan on his own behalf and on behalf of Century City as an appendix to the facility letters. Century City also entered a separate guarantee to the facility letters and this was dated 5 February 2010. In the case of Peter Curistan the guarantee obligation also arises through a contract separate from the loan transactions through the facility letters and this guarantee is dated 2 March 2009.

3. Neither Cambourne nor Century City were represented at the 14 day hearing. Peter Curistan represented himself. He was entitled only to address the issue of the enforceability of any guarantee against him. Although he is the managing director and main shareholder of both corporate defendants, he was not entitled to represent them; only a solicitor can do that. The task of the court in such a default situation is to examine the case of the plaintiff against the two unrepresented defendants in order to see if the proof of entitlement to debt recovery is met. Where a defendant is represented a court will, in addition, examine the case of the represented defendant on its merits.

4. Central to this case are two large leisure centre developments: the Odyssey Centre in Belfast and the Parnell Centre in Dublin. The vast bulk of the hearing concerned the Belfast property, though the loan for which recovery is sought in these proceedings arises only on the Dublin property. The debt on the Belfast property, amounting to about £78,000,000, is central to other proceedings in the High Court in Northern Ireland. It is claimed that there is a link between the two properties and the two loans.

Defence

5. Anglo sought summary judgment in this case but that was refused. An elaborate defence was put before the court. In essence, the defendants, all then legally represented, claimed that the contract of loan on the Dublin property did not stand alone but was part of a wider agreement whereby Anglo agreed to support Peter Curistan in the development of both that property and the Dublin property, adopting a duty of care pursuant to a quasi-partnership agreement, in circumstances which rendered the bank liable to account on a fiduciary basis, which agreement was broken.

6. On the Belfast property, in essence, the defence is that when the money loaned on that development could not be repaid, Anglo undertook to find a purchaser to take over the Odyssey Centre but for internal and dishonest reasons turned down parties who were suitable in favour of a company with which it had conspiratorial links due to illegal dealing within the bank. In order to cover over this embarrassing relationship, Anglo is alleged to have appointed a receiver to the Odyssey Centre prematurely.

7. On the Dublin property, the core of the defence is that money was lent by Anglo in bad faith to Cambourne, and guaranteed by Century City and Peter Curistan, on the basis of a valuation which could not be accurate, and which was in breach of contract. The purpose of which, it was alleged, was to enable Anglo to gain control of the Parnell Centre. Peter Curistan, it is claimed, was induced to enter into the guarantee for the borrowing on a false basis; thereby the relationship of debtor and creditor upon which the guarantor relied was altered without his knowledge thereby giving rise to a right of disavowal in equity.

8. These complaints are both separate and are linked. The first task of the court is to explore the relevance of the allegations concerning the loan on the Belfast property to the debt due on the Dublin property. It is unnecessary, and would be unhelpful to the courts of Northern Ireland, for this Court to make any finding of fact on the allegations made concerning the relationship of the borrowers on the Odyssey Centre with Anglo unless it was shown as probable that there is a link that establishes a defence common to both loans. The nature of the Belfast loan will therefore be briefly set out, in the first instance, followed by any evidence which

appears to establish a commonality of purpose with the Dublin loan. The recoverability of that loan will then be analysed.

Odyssey Centre

9. The Odyssey Centre was developed on public land in Belfast from the mid-1990s. Peter Curistan was the main driving force behind the centre through a company. His vision was to offer to the public a centre where cinemas would interact with sporting areas and restaurants and bars in a way that would enhance the city. At the time, this was new. The Titanic Quarter is now nearby and several extra areas of land would also be available for further development should economic conditions improve. I have not been fully informed as to the circumstances but, from the evidence, it appears that some £45 million of public money was put into developing the centre. An additional sum was privately borrowed from Anglo by Peter Curistan using various corporate vehicles and, with interest payments, by 2008 these had grown to a debt of over £70 million. In the proceedings before the Belfast High Court, a complaint is made that the interest rates were unfair and were imposed in consequence of a misrepresentation. I make no comment on that. Apart from being the developer of the centre through a company called Sheridan Millennium Limited, Peter Curistan also held individual leases within the centre for various vehicles of entertainment that were run by him as business ventures. Central to any concerns that might arise on security for the borrowings was the question of the nature of the landholding. This was not in fee simple but by long leasehold for 150 years. The landlord of the centre is the Odyssey Trust Company Limited. In the event of breaches of covenants within the lease, it could exercise a right of re-entry. In which event, the value of the leases as a saleable asset, on which Anglo had secured the loaned money, would completely disappear. Optimistic forecasts as to returns in rent and use of the centre had not apparently fully materialised.

10. By letter dated 5 September 2008 the law firm of Johns Elliott wrote to the interested parties, who were Anglo and Sheridan Millennium Limited. The letter points out that under the main governing document, the long term lease, its client the Odyssey Trust Company Limited was entitled to exercise the right of re-entry upon giving 60 days prior written notice of intention to do so. The letter continues:

For the purposes of the deed of covenant and consent our client is required to set out in reasonable detail the grounds for the proposed re-entry. The primary event of default on the part of Sheridan Millennium Limited is the persistent failure to pay any rent, service charge and other sums due. Currently the total amount outstanding is in excess of £549,358.27… Please note that this includes a substantial sum – £293 367.91– recently invoiced in respect of accrued arrears consequent upon settlement of a rent review. The sum due also includes sums payable under clause 3.5 of the pavilion lease in respect of reimbursement of utilities. In addition the tenant is in breach of its obligations under the pavilion lease to the extent that it has purported to create rights in favour of a third party (inter alia by virtue of a management agreement for unit 7); has created new tenancies (in respect of unit 7) and accepted surrenders of existing tenancies (in respect of ATMs in the pavilion) without the required consent of the landlord and has consistently failed to provide information regarding rental income and copy letting documents as required by the express terms of the lease. Our client intends to rely upon some or all of these matters and exercising rights of re-entry or seeking forfeiture of the pavilion lease.

11. This threat was more than theoretical. It is apparent to me that this was a serious situation. In addition, Peter Curistan's interaction with his landlord was fraught in terms of personal relationship. Beyond that, a difficult situation was developing with debts due to suppliers. Some £3 million was owed to them. On some of the figures put before the court, it might have been possible, with the adjustment of the interest rate payments downwards for the centre, to improve the liquidity position of the business. That, however, is not a matter for me absent proof of a wider contractual relationship on the Dublin loan.

12. On 14 September 2008, Peter Curistan agreed with Anglo that the way forward was for him to sell the Odyssey Centre and to exit from the personal guarantees which he had for the debts of Sheridan Millennium Limited. These guarantees covered the total indebtedness of that and related companies. On the face of it, the plan by Anglo was to find a purchaser for the Belfast property at a level which could reduce Peter Curistan's potential guarantee to a relatively smaller shortfall; which in one instance was mentioned at £1.5 million. In the crash in Irish property prices through 2008 running into 2009, which continue to the present day, purchasers with money were not available. Instead, any such purchaser would be taking over the borrowings from Anglo. To facilitate this programme, the holding of Sheridan Millennium Limited was to be placed into a new corporate vehicle and the unexpired term of the long leasehold was to be sold.

13. It is when we come to purchasers of the debt referable to the centre that a complex situation arises. It is necessary only to summarise it at this point. Joe McWilliams, director of lending in Anglo up to December 2009, has given evidence that the bank was approached by Peter Curistan to search through its books and to attempt to find a suitable relationship between the development and an existing customer. His evidence was that this was not a partnership or the commencement of a fiduciary relationship but was, instead, an attempt to assist Peter Curistan in off-loading the asset. Thereby the bank was seeking for a customer who could make the asset work and thus repay the loan. Peter Curistan points in particular to the way in which those interested in taking the place of Sheridan Millennium Limited were dealt with as evidence of both the relationship alleged by him and the breach of it. The potential purchasers were Séamus Jennings at an apparent level of £25 million; PBN Limited, which was a vehicle used by Neil Adare and Patrick Kearney, at an apparent level of £70 million with recourse in the event of non-payment only to the asset; PropInvest Limited, a Channel Islands entity, which had a similar offer but with recourse to their entire property portfolio in the event of non-payment; and later on the Coffer family, who were based in London. PBN and PropInvest were both seeking an additional loan for capital expenditure in amounts that varied from £10 million-£15 million. PBN was at the lower figure but as its attempt to take the asset progressed over 2009, the additional loan went to the higher sum. This sum, in both cases, was to refurbish the centre and to make it more attractive to customers.

14. Controversy arises as to the decision of Anglo that PBN was in the best position to take over the loan. Viewing the accounts of that company, it is difficult not to be concerned with the upward valuation of realty at a time of uncertainty in the property market and of investments in unit trusts which may not have held values constant in the way portrayed. In addition, when the share price of Anglo crashed in 2008, Patrick Kearney is alleged to have taken, together with nine other people close to the management of Anglo, a very large loan in order to purchase Anglo shares. It is alleged that the purpose of this loan to a group known as the Maple 10 was to restore credibility in the marketplace for Anglo shares. It was admitted in this case by the witnesses for Anglo that such dealing had taken place; the precise legal effect of it is not for decision now. They claimed that it had not influenced their decision in favour of PBN or against PropInvest. Insofar as it creates suspicion, Anglo can only blame itself. PropInvest, on the other hand, had provided only scanty details as to its solvency. The ratio of borrowings to debt on assets in excess of £2 billion was around 98% for this company. This Court is asked to accept that the greater experience in running leisure centres of that company was not sufficient for a decision in its favour and that it was for commercial reasons that Anglo chose PBN. The court has no view on this as it would be inappropriate to express a view absent the necessity for this Court to decide this issue. It might be added, in the context of whatever optimism existed at the time, that both choices have subsequently proven not to be sound financially.

15. The manner of ending the relationship proposed with PBN is put before the court as proof of dishonest dealing by Anglo. Patrick Whelan is the former managing director of lending in Anglo. On the 23 December 2009, he emailed a colleague in the bank on this issue in this way:

> … the only concern I have is that on the instructions of Peter Butler as acting head of risk, myself and Joe McWilliams were asked to tell Peter Curistan to withdraw from the deal with PBN, because Peter Butler felt the bank could not deliver a non-recourse deal with PBN because of the sensitivities around the Maple 10.

16. Shortly afterwards, the author of that communication started working for Peter Curistan while at the same time, as evidenced by an email dated 28 January 2010, apparently seeing no conflict of interest in keeping in with his former employers. This Court has heard evidence from Peter Butler. His account of the matter is that as acting chief risk officer he saw Patrick Whelan on 19 October 2009; that he did not instruct anyone to get Peter Curistan to withdraw from the proposed deal with PBN; that the increase to £15 million of capital expenditure sought by PBN would be hard to get through the bank's

credit committee; that the problems with members of the Maple 10 borrowing from the bank would militate against approval; and that publicity was a limited and peripheral concern. Patrick Whelan has since withdrawn this allegation against Peter Butler.

17. There was nothing in the evidence of Peter Butler to suggest dishonesty. He did not make the relevant decisions, rather they were made at a different level and put before him for approval. He had met with PropInvest personnel on one occasion and had regarded them as credible people. It would be rare for him to dig into submissions and decisions to find the reasoning behind them; on the contrary, he said he was dependent upon the good judgment and objective reasoning of those who reported to him. I accept Peter Butler's evidence.

Link between Parnell Centre and Odyssey Centre

18. There is little to suggest in any credible way a link between the property investments in Belfast and Dublin so as to establish an overarching contract. At the time in 2008 when it was becoming more and more urgent to disconnect Peter Curistan and Sheridan Millennium Limited from the Odyssey Centre, Patrick Whelan wrote the following by email to Joe McWilliams:

I know you are meeting Paddy and Neil tomorrow on Odyssey. Could you consider how they would link PC in, and some share of upside, if they express an interest. Ideally we would love to have them in, as they will work it, but PC is not going to walk away without a fight, so there has to appear to be something in it for him. To reduce his pain can we commit to supporting him on Parnell Street. Can we move the Cathriona [Hallahan] loan over to PC without incurring any additional cost? He can then give this 100% of his time and hopefully recover some of his equity. We need to be very sensitive, as Neil has a big mouth, if PC gets wind of this is would be difficult.

19. In addition, on 19 January 2010 an email within the bank from Ciarán McAreavey suggested an "enforcement strategy for Cambourne [as owner of the Parnell Centre] to ensure we dovetail and don't trigger problems". He explains this in evidence as not meaning what it appears to say. Finally, there is what has been referred to as the agreement of 13 January 2009. In reality, this is a proposal made by Anglo to Peter Curistan. In effect, it may be interpreted as following through on the email from Patrick Whelan quoted above. That email does not necessarily have to have a sinister significance. The principal terms suggest an exit from the Odyssey Pavilion and that Anglo would agree, as the letter says "subject to terms", to provide up to €16.1 million of funding for a project at the Parnell Centre in Dublin.

20. These documents, their context, the views of other witnesses and the possible interpretation that might be put on the evidence were widely debated during the case. Having regard to the entirety of the evidence, I am disposed to accept the testimony of Ciarán McAreavey as follows:

In relation to Parnell, what the bank was trying to do at that time was to ensure that every company in Mr Curistan's group remains solvent. That's the reason why creditors were circulated. So we checked the third party creditor positions in many companies because Mr Curistan was paying them through the funding that he was proposing to raise in Sheridan Millennium Limited. It doesn't imply a link between that any more than it does to Sheridan Entertainments, [which] was a company that the bank was not exposed to and had no relationship with.

21. I can understand that Peter Curistan feels passionately about the Odyssey Centre; a project for which he rightly received civic honours. I further realise that withdrawal from this project was for him to be wrenched away from what he had devoted his life to. In terms of how such a situation should be commercially approached, however, the two banking experts who gave evidence in this case were very helpful. Both of them supported the proposition that in considering how to manage a loan that, even in the absence of cross default provisions, the nature of a bank's relationship with a borrower has to be fully considered, whether personally, through guarantees, or through corporate vehicles. David McGee, as a witness for the defence considered that it was prudent to withdraw funding on a project proposed by a borrower even though no cross default provision existed, where a different major project resulted in a loan default. I would regard that approach as prudent and correct.

22. Connor O'Malley, the banking expert on behalf of Anglo, emphasised that a bank should always keep itself appraised of the situation of common shareholders, even in different jurisdictions and even if there is no cross default provision. Everything that I have seen in the evidence points to this being a major concern and a legitimate focus of interest by Anglo. Where the experts differ is on the immediate calling in of a loan where another loan has failed. In that regard, it is possible that the expert on behalf of Anglo has not yet fully appreciated how abnormal a bank it was. The court has, nonetheless, derived great benefit from his evidence.

23. It was therefore legitimate in any application within a normal bank for credit committee approval to be considered not only on the basis of the particular loan proposal at issue, but also on the basis of such sums as were outstanding that were referable in any way to a proposed borrower, either personally or through a corporate vehicle, and to have regard to the performance of loans in the past and their prospect for repayment into the future. It appears to me that Anglo was more than unwise with the failure of the loans for the Odyssey Centre to even consider loans in respect of the Parnell Centre. That loan proposal, however, must be seen within the context of the foolish attitude that existed in the bank at that time. It is within that context that defences in relation to this particular application for judgment must be seen. In turning to that, the court is not at all convinced that it is probable that there was any overarching agreement on the Dublin loans which embraced the financial troubles in Belfast over the Odyssey Centre.

Parnell Centre loans

24. The background to the Parnell Centre in Dublin city centre is that it was developed in 1996 with money loaned by Anglo to a group

which has been referred to as the Parnell partnership. By an agreement dated 4 November 1996, the Parnell partnership entered into a put and call option agreement relating to units 3, 4, 5 and 6 at the Parnell Centre. The other party to that agreement was Sheridan Developments Limited, a company controlled by Peter Curistan. In consideration of the payment of £1.00, the Parnell partnership granted the purchase rights for the Parnell Centre to that company. By another agreement of the same day, the property was mortgaged to Anglo. Finally, by a third agreement of identical date, Peter Curistan guaranteed that the company which he controlled would duly perform all of the commitments in the put and call option.

25. The motivation for this was founded in legitimate tax avoidance. It is not necessary to explore revenue law in detail, save to note that the purpose of the put and call option was to enable tax relief to be gained by the various parties while at the same time enjoying profits out of the centre. The term required for tax planning, I am told, was 13 years. Hence, by 2009 Peter Curistan was obliged to buy back these units or otherwise liability under the guarantee would arise. An argument can be made that Anglo was in a position in 2009 whereby it was more convenient for Peter Curistan to take over the Parnell Centre rather than enforcing the deeds which I have outlined. That, however, has merely the status of an argument for which there is little or no proof. What is more probable is that Peter Curistan had the requirement because of his guarantee obligation to take over the centre through a corporate vehicle, which turned out to be Cambourne, and to transfer his guarantee obligations across from the put and call option to a guarantee in respect of the performance of that corporate vehicle on borrowing the necessary money from Anglo.

26. The Parnell Centre consists of a basement, which is called unit 9; eight other units, numbered 1 to 8; a car park to the rear which is multi-storey; and a multi-screen cinema. This case concerns only units 1-8. The cinema is a very busy theatre, but the design of the centre means that it is almost entirely unnecessary to leave the cinema area and to go down the corridor containing the units. People parking their car do this, but that would not be the maximum number of those visiting the cinema, or anything like that. By 2009 the centre had been badly underperforming financially for many years. Rents, set when the Irish property market had been overvalued beyond rationality, were extremely high. Units 7 and 8 were in the ownership of Cambourne but were empty; units 5 and 6 were used as a gaming arcade by Century City, a company owned by Peter Curistan; units 1 and 2 had been occupied four years previously by a "lap dancing" establishment but had been vacated, apparently following protests; unit 3 was leased by a profitable fast food chain; and unit 4 was leased by a cafe bar, which was not doing so well.

27. The only unit consistently paying the full rent was unit 3. The plan by Anglo and Peter Curistan was to bring units 1 to 8 into common ownership under Cambourne; to hopefully attract a major supermarket chain to take possession on a long lease of the units, remodelling a corridor in the process; to open up access to the cinema area; and to attract tenants to the empty units because of increased foot fall. As it turned out, units 1 and 2 were never taken ownership of by Cambourne. Any complaint of lack of involvement by that company or its controller announced in evidence is neither here nor there. For a time there was optimism over attracting a supermarket chain within the centre, but with the gloomy conditions prevalent in the economy from 2009 that did not happen. What is probable is that both Peter Curistan and Anglo were of the strong view that a synergy between the units would enable the centre to be managed into profit. Both took an over-optimistic idea on board with the result that their view of the capital value of the Parnell Centre was that it could be greatly enhanced. These views being held mutually by the parties, the making of a loan does not emerge as the sinister exercise claimed but, instead, it is wrongheaded foolishness on all sides.

28. By a letter of offer dated 4 February 2009, Anglo offered Cambourne a facility of €8,190,000 to purchase units 3, 4, 5, and 6; €4,410,000 to purchase units 1 and 2; and €430,000 to purchase the mall area. These last two facilities were never drawn down. In February 2010, the facility letter was amended so as to include a guarantee from Century City to Cambourne accepting that offer in the facility letter, Peter Curistan being the consistent guarantor all the way through on both facility letters. The loan was to be repayable on demand. The borrower was to certify the truth and accuracy of all information. The relevant interest rate was specified. As a condition subsequent, the bank was to receive a profit share of 25% in any units sold from the Parnell Centre. This offer was accepted.

29. As a contract it contained a number of conditions precedent. These are at the heart of the legal dispute as to enforceability. The facility was not to be available for drawdown unless an updated written valuation had been received from the valuer for Anglo to support a minimum combined value of units 1 to 8 in the Parnell Centre of €17.12 million. In addition, as a further condition precedent under the facility, the loan to value ratio was to remain at 80% at least. By a separate deed dated 4 February 2009, Peter Curistan added to the guarantees in the facility letters a formal deed of guarantee and indemnity in these terms:

In consideration of the bank at the request of the guarantor making or continuing advances or otherwise giving credit or affording banking facilities to or with the borrower [namely Cambourne] ... the guarantor as principal obligor and not merely as surety ... unconditionally and irrevocably covenants to pay and guarantees payment on written demand by the bank of ... all monies whether principal, interest are otherwise which now are, or at any time after the date of this deed may become, due and owing to the bank by the borrower either alone or jointly with any person or company ...

30. Another separate deed of guarantee, apart from that in the guarantee to the facility letter of February 2010, was entered into Century City and this is dated 5 February 2010. That separate deed of guarantee for Century City was in similar terms to the separate deed of guarantee given by Peter Curistan and just quoted. Up to February 2010, the drawdown of funds on this loan by Cambourne was €1.15 million. In that month a valuation was alleged to have been orally received by Anglo from a firm of valuers acting on behalf of Anglo. This purported to show compliance with the valuation required as a minimum in the facility letters. This valuation was then reproduced in the documents put before the credit committee of Anglo. On 3 March 2010, Peter Curistan received a written valuation of €13.7 million, the day after he signed the guarantee. This was much less than what was required as a condition precedent for drawdown under the facility letter of February 2010 and it put the loan to value ratio at over 120%. Nonetheless, Cambourne then proceeded to drawdown €8.117 million. With interest charges, over time the relevant sum became €9.7 million and has eventually become the sum in the last paragraph of this judgment. The contention by Peter Curistan in defence to the action of Anglo based on the guarantees is that the guarantor should have been told of and assented to the change in valuation, whether as guarantor under the facility letter of February 2010 or under the separate deed of 4 February 2009, and that it was inequitable not to allow him at least the opportunity to dissent. That same argument, if correct, would apply to Century City both under the guarantee in the facility letter of February 2010 and under the separate deed of 5 February 2010. Peter Curistan also argues against the recovery of the loan, and thus the recoverability under the relevant guarantees, on the basis that the purchase of the units in the Parnell Centre from the Parnell partnership by Cambourne would not have gone ahead had the true valuation been known. He claims that as the conditions precedent in the facility letters as to value and as to the loan to value ration were not met, the contract of loan in the February 2010 facility letter never came into operation. The contract of guarantee within those facility letters was thereby rendered invalid, he asserts, for the same reason of failure of the same conditions precedent.

The valuation

31. In June 2008, CB Richard Ellis, a firm of valuers, assessed the worth of the eight units in the Parnell Centre at €19.1 million. I am

satisfied that all the parties were aware of this. In January 2009 another valuation was made by the same firm which showed that in the intervening seven months, their valuation had dropped to €13.7 million. This valuation was instructed by Anglo to be made on the basis of the value of leases, and not on the performance of any actual return in rent. That instruction by Anglo made no sense at all. Even the very best valuation in this case is therefore an overvaluation. Shortly thereafter the matter went before the credit committee with a valuation presented to the body as being in excess of €17 million. This valuation was purportedly based on a conversation with someone in the retail section of the firm of valuers. This was specifically disavowed in evidence by Guy Hollis of the firm. He further said that the firm was not made aware that the tenants were not paying rent and that if he had been told it would have had an effect on the valuation. Even more bizarrely, the application to the credit committee, ignoring all these factors, goes on to make an assumption of redevelopment with a new tenant, sourced as if by magic, raising the valuation to €20.725 million. The document proceeds to assume that yields may contract to 5% given a reduction in European Central Bank rates to provide liquidity returns within two or three years showing a potential rental element which would push the capital value up to €25.65 million. The credit committee, on this unreal and false basis, approved the waiver of the conditions precedent as to value and the loan to value ratio. Neither the borrower nor the guarantors were notified. In terms of the false assumption that the leases were performing, if the units could have been valued at €13.7 million at the beginning of 2009, then by the start of 2010 they were worth considerably less. There is now a receiver in place for the Parnell Centre and a buyer cannot be found. Any speculation as to value is within a fluctuating market as of this year and I do not propose to be drawn into a futile exercise.

32. On 15 June 2010 the credit committee of Anglo met and decided to call in the loans and put in a receiver. This is not done until January 2011. These proceedings commenced in April 2011.

33. Paula Moran was not part of Anglo during the time these unreal and astonishing decisions were made. She took over the file in February 2010 and tested the exposure of the bank on the basis of a letter to lend €16.71 million of which sums totalling €10.227 million had been drawn down. I find her evidence trustworthy. Enforcement did not arise until June 2010. By that stage BDO Simpson Xavier were chasing service charge arrears; Cambourne was not paying the required interest at the end of the year; and rents which were pledged under deed to Anglo were being received only partially, at best. No rent was received from Century City, and it is impossible to know why Peter Curistan is not responsible for that. Over 2008 and 2009 one tenant had remitted Cambourne €122,000 which was not paid to the bank and in respect of the other tenant the figures are disputed. There were other bills as well. At the same time, and in breach of his legal obligation under the mortgage deed, Peter Curistan paid out substantial sums of money to a company in Belfast controlled by his son, including £40,000 on 8 December 2010 and other amounts on 18 November 2010. It would not be unreasonable to regard the situation as serious. In a note handwritten on the credit committee application of 8 June 2010, Paula Moran wrote "good property not the right person". She decided that a receiver was the appropriate response. This decision was made for sound commercial reasons.

34. It is unfortunate that the decision came within six months of the apparent reliance by both sides on valuations that both lacked common sense and were outdated. As of January 2011, however, Anglo as a bank was seeing sense but it is difficult to see that Peter Curistan had moved his aspirations in accordance with the changed times. He prepared an "aspirational document", claiming to assume that the valuation of the premises was still €17.1 million but claiming that in the future should his plans be supported an estimated annual rent could be achieved of €436,000.

Mutuality in contract

35. Peter Curistan argues that since the loan to value ratio in the facility letters was never met and that the value of the property borrowed against was not achieved that these conditions precedent operate to prevent the facility letters ever crystallising as a contract of loan. These clauses, he claims, were not just for the benefit of the bank; they were for his benefit as well and thus cannot either be waived or be severed. He also seeks to imply that the deeds of guarantee separate to the two facility letters, his dated 2 March 2009 and that of Century City dated 5 February 2010, are not operative because both are dependant upon these facility letters. While Peter Curistan is not entitled to make an argument on behalf of Century City, it follows that this argument on his personal guarantee separate to the facility letters also applies to the separate guarantee apart from the facility letters of Century City. A brief comment on the construction of a commercial contract is thus appropriate in the first instance.

36. The proper approach to the interpretation of a written contract can be traced back to a decision given by Lord Wilberforce in Reardon Smith Line v Hansen-Tangen [1976] 1 WLR 989, where, at p. 995, he made the following statement of principle, later cited with approval by Clarke J in BNY Trust Company [Ireland] Ltd & Anor v Treasury Holdings [2007] IEHC 271 at paragraph 4.1:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

37. Lord Wilberforce went on, at pp. 996-997, to expand on the meaning of "the surrounding circumstances", in a passage cited with approval by Geoghegan J in the Supreme Court in Analog Devices BV v Zurich Insurance Company [2005] 1 IR 274, at p. 280:

When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties.

> […] what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.

38. A more comprehensive statement by Lord Hoffman in ICS Ltd v West Bromwich BS [1998] 1 WLR 896, at pp. 912-913, was also approved by the Supreme Court in Analog Devices at pp. 280-281. The principles may be summarised as follows:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which

would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201: "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

39. This summary has since been generally applied, including in the construction of trust documents; National Tourism Development Authority v Coughlan [2009] 3 IR 549. In the context of a guarantee, in Danske Bank A/S v Coyne [2011] IEHC 234, at paragraph 13 Clarke J stated:

The proper approach to the construction of a written contract is set out in Analog Devices B.V. v. Zurich Insurance Company [2005] 1 I.R 274. This contract of guarantee is no different. The meaning of the guarantee is the sense which reasonable persons would give to it by construing it against the relevant background of fact which led to it being agreed. By enforcing the guarantee, the Court would not be entitled to attribute to the parties an intention which they could not have held as evidenced from its written terms. The precise circumstances of negotiation of a written document are, in the ordinary course, irrelevant. The Court is entitled, in construing a written contract, however, to see it in the context which led the parties to draw it up as an agreement. In the context of inheritance, this is sometimes described as the judge placing himself or herself in the testator's armchair at the time of the drafting of the will ("the armchair principle"): see generally National Tourism Development Authority v. Coughlan [2009] 3 I.R 549 referring to O'Connell v. Bank of Ireland [1998] 2 I.R. 596. The matrix of fact against which a contract is entered into is relevant because such evidence requires the Court to be informed as to the background knowledge which was as a matter of fact, and not which merely could have been, available to the parties as reasonable people in entering into the contract.

40. This approach to the interpretation of contracts has been described as the "objective principle"; see Peel, E., Treitel – The Law of Contract (13th Ed. 2011 Sweet & Maxwell), at paragraph 1-002 and see also Edwards v O'Connor (1991] 2 NZLR 542 as to contracts to be construed against a background of statutory regulation. One of the exceptions to the objective principle identified in Treitel is that a subjective qualification exists to mitigate against the harshness of a completely objective rule where, for example, notwithstanding the terms of a contract between the parties, one of them actually knows that the other has no intention to contract with him either at all or on the terms set out.

41. In New Zealand, in instances where a contract term has no plain meaning it has been decided that the factual matrix of a contract can include anything affecting the way in which the language of the document would be understood by a reasonable person; Yoshimoto v Canterbury Golf International Ltd [2001] 1 NZLR 523.

42. The nature of the terms agreed between the parties in many loan cases may ultimately have largely been produced as a result of an inequality of bargaining power. That the terms of a contract, while not expressly, may nevertheless implicitly be by and large to the benefit of a bank can be said to be merely reflective of the position of comparative economic strength that financial institutions tend to find themselves in. On the basis of the objective principle, there is not at present authority in this jurisdiction in favour of the proposition that it is for the court to seek to subjectively assess the value of the consideration that passes between parties to a transaction. This may go some way to explaining why no general principle of unconscionability based on an inequality of bargaining power, and as advocated for, inter alia, by Lord Denning in series of cases commencing with the decision in Lloyds Bank Ltd v Bundy [1975] 1 QB 326, at p. 342 et seq., has found its way into decisions in this jurisdiction.

43. The case made by Anglo is that the conditions precedent in the two facility letters as to the value of the property and the loan to value ratio were for the exclusive benefit of Anglo; hence, that it was entitled to waive them, unilaterally and without notice to either the borrower or the guarantor.

44. The starting point to any analysis of the terms of a contract must be the background against which it was made. Here the circumstances were that an over-eager borrower asked for funds from a bank that was intent on lending despite at least some of its officers either being aware, or being required by ordinary prudence to be aware, that the loan would not be fully supported by the property offered as security for the purchase. The expert witness on behalf of Peter Curistan described the conditions precedent as to value and as to loan to value ratio as being an assurance for the bank that it would not lend were the conditions not met. The expert witness on behalf of Anglo went further, describing the conditions precedent as being entirely for the benefit of the bank in terms. This approach suggested that any consideration of the position of the borrower clashed with good banking practice. What is left out of that equation is that anyone who borrows money from a bank must pay it back. While it is correct that there is no tort of reckless lending, and while the circumstances within which the principle of undue influence will intervene are limited, it remains universally the case that parties to a proposed contract bargain as to its terms so that each side will benefit. The rule that a contract written by one side to a bargain, or put on the table as an unalterable, or barely to be changed, document may in the case of ambiguity be construed contrary to the preference of that party is an acknowledgment of commercial reality. While no presumption arises in law, the mutuality of obligations in contract establishes a starting point that terms are generally to be seen as the collection of obligations and benefits that a contract will bring to each party. The courts regularly see the kind of clauses at issue in the facility letters in this case followed by a term which allows disavowal on the part of the bank with no consequent effect on the remaining obligations in the document. That clause is not present here.

45. If on a proper construction of a contract, a term is exclusively for the benefit of a particular party by whom it is waived, that term may be rendered inoperative by that waiver. In Maloney v Elf Investments Ltd [1979] ILRM 253 a term supporting a contract for the sale of land required that there be the grant of planning permission before a particular date. On that date passing without planning permission, the vendor sought a declaration that the contract had terminated. The purchaser argued that since the term was for his benefit he was entitled to waive it. The planning permission, however, would not simply benefit the purchaser as his interest was in developing other houses on contiguous sites and the services that these would require. On an analysis of the relevant authorities, McWilliam J stated that: "The principle with regard to waiver appearing from these decisions is that a condition inserted exclusively for the benefit of one party can be waived by that party." Thus, the issue becomes whether a term is for the exclusive benefit of one party alone or may also benefit the other. For instance, in a contract for the sale of land, the vendor must show title, but if that requirement is waived by the purchaser, such waiver is lawful since title to the land benefits the purchaser. An example of this is the decision of Lord Langdale in Bennet v Fowler (1840) 2 Beav 302 at 304 where he stated that "the obligation to which a vendor is subject to make out a title is intended for the benefit of the purchaser only, and … if he thinks fit to waive it, he has a right to do so."

46. The test to be applied for determining whether a contract term is for the exclusive benefit of one party was considered by Blackburne J in Irwin v Wilson & ors [2011] EWHC 326 (Ch) where, at paragraph 23 he quoted with approval the decision of Brightman J in Heron Garage Properties Ltd v Moss [1974] 1 All ER 421 at 426:

Without seeking to define the precise limits within which a contracting party seeking specific performance may waive a condition on the ground that it is intended only for his benefit, it seems to me that in general the proposition only applies where the stipulation is in terms for the exclusive benefit of the plaintiff because it is a power or right vested by the contract in him alone … or where the stipulation is by inevitable implication for the benefit of him alone … If it is not obvious on the face of the contract that the stipulation is for the exclusive benefit of the party seeking to eliminate it, then in my opinion it cannot be struck out unilaterally. I do not think that the court should conduct an enquiry outside the terms of the contract to ascertain where in all the circumstances the benefit lies if the parties have not concluded the matter on the face of the agreement they have signed.

47. Blackburne J also cited with approval the following passage from the New Zealand Court of Appeal in Hawker v Vickers [1991] 1 NZLR 399, at pp. 402-3:

A party may waive a condition or provision in a contract which is solely for that party's own benefit and is severable. In such a case the other party is denied the right to treat the condition as unsatisfied and is obliged to complete notwithstanding the loss of that advantage. The question is one of construction of the contract. It turns on whether the stipulation is in terms or by necessary implication for the exclusive benefit of the party, and the answer is derived from consideration of the contract as a whole in the light of the surrounding circumstances …

48. I agree with these propositions. The test as to whether a contract term is for the sole benefit of one party is therefore twofold: the condition must of its nature be exclusively for the benefit of one party and, in addition, it must be severable from the contract. If the condition is so bound up with the proper performance of the contract that the unilateral waiver of it by the party in whose favour it is said to be alters the entitlements of the other party to the contract so that a different bargain may then be said to be present, then exclusive benefit cannot characterise the clause.

49. The valuation precondition to the operation of a contract in the facility letters is claimed by Anglo to be for the benefit of Anglo in that it provided comfort as to the level of security being provided by the borrower against the facilities through the units. However, the borrower also offered to procure a guarantee as a further element to the security proffered for the facilities. As such, it may be claimed that it is difficult to see how the borrower took any benefit from the precondition except insofar as satisfaction of same was a precursor to the release of the funds. However, from the point of view of the ordinary borrower seeking funds on the basis of a valuation conducted by a bank, such a condition offers comfort as to the security of the bargain. It is not unreasonable on entering the matrix of fact within which such loans take place for the potential borrower also to rely on a valuation conducted independently of the aspiration of the borrower. Reliance on such a valuation cannot be excluded from the terms of a clause drafted in the manner in issue here. When clauses allowing waiver of any condition by a bank occur in a contract of loan, ordinarily, as in the decision of Birmingham J in Zurich Bank v McConnon [2011] IEHC 75, effect may be given to same. Any other remark by Birmingham J is not essential to his decision and was therefore obiter dicta. My view is that the conditions precedent as to loan to value ratio and value of the property were for the benefit of both sides. The nature of the contract is also such that these conditions cannot be severed.

50. The effect of a condition precedent for the benefit of both parties not being met is that the contract of loan on the two facility letters, which includes the guarantee on the facility letters made by Peter Curistan and Century City, does not come into operation. The action of parties upon the failure of a written agreement can evidence what their bargain was. The issue as to profit share, a specific term in the facility letter, establishing a partnership and also fiduciary duty between Anglo and Peter Curistan therefore falls away. Fundamentally, in place of these terms for which there is no evidence apart from the facility letters, a contract of loan remains. In general, unless the behaviour of the parties shows that they intended a different bargain, monies lent on overdraft are repayable on demand; Williams and Glyn's Bank Ltd v Barnes [1981] Com LR 205. This was a loan for a project. The project was to proceed on terms of diligence by the borrower Cambourne, as separately guaranteed by a document apart from the facility letters by Peter Curistan. There is nothing in this case which establishes a contrary intention to repayment on demand. Insofar as it might be argued that the expectation of the parties might have been that the borrowings should have been allowed to continue until the market improved, such a contention is so vague as to lack commercial reality. Even were that capable of proof, this situation was one of large drawdowns of funds under the loan and of a fundamental failure by the borrower to remit rental income or service interest payments. That situation, under any commercial view of the transaction, could not be allowed to continue indefinitely. No aspect of any contract construed in place of the failed facility letter contracts could possibly allow for that.

51. The decision of the bank to lend money was foolhardy, and the decision to borrow it was as bad. Once lent, money is repayable. It is this principle which establishes, unless excluded, the preservation of mutuality of obligations in contracts of loan. The defendant Cambourne is therefore liable to repay the monies. I turn now to the guarantees.

The guarantees

52. Century City guaranteed the loan on the facility letters together with Peter Curistan and its position is not defended. Such guarantees, however, were within the facility letters. It was thus made on a contract with conditions precedent to its operation which were never met. That particular contract obligation to guarantee under the facility letters entered into by Century City and by Peter Curistan therefore must fail. That, however, is not the end of the matter.

53. Peter Curistan and Century City, as has been noted, also entered into separate guarantees to the facility letters; in his case

dated 2 March 2009; that of Century City being dated 5 February 2010. These guarantees are in similar terms; set out above at paragraph 29. Peter Curistan's position as surety must now be considered. He has argued that the guarantee separate from the facility letters is not to be construed as imposing liability separate from the loan to Cambourne. He claims that the wording of the guarantee in this separate document does not support such a construction.

54. The court must give effect to the terms of that written bargain. Liability to repay is established on the face of the document. The first question is whether the wording of the guarantee separate to the facility letters binds Peter Curistan through that contract to repay the loan. In my view the wording is unambiguous. It refers to current and future liabilities and it embraces borrowings made by Cambourne. In Bank of Scotland PLC v Fergus [2012] IEHC 131 a clause similar to these two separate guarantees was analysed by Finlay Geoghegan J. I gratefully adopt her analysis as to the scope of the obligations defined. The relevant passage is from paragraph 31 of her judgment:

The applicable principles are not in dispute. Counsel for Mr. Fergus relied upon the treatment of O'Donovan and Philips "The Modern Contract of Guarantee" English Edition (Sweet and Maxwell) of the circumstances in which a guarantee will be construed as encompassing future restructuring arrangements between the principal and the bank. At p. 309, they state:

> "The determination of whether or not the guarantee embraces the restructured facility will depend in each case on the precise scope of the guarantee and the effect of the subsequent contractual arrangements between principal debtor and creditor ..."

Considerable reference is then made to the decision of the Court of Appeal in Triodos Bank N.V v. Dobbs [2005] EWCA Civ. 630, and in particular the judgment of Longmore L.J. The facts of that case were that [the] guarantee at issue was given in respect of all monies due and owing to the bank "under or pursuant to" two specified loan agreements. Subsequently, there was a financial restructuring and the creditor and borrower entered into three new agreements. The Court of Appeal determined that the "replacement" loan agreements did not come within the terms of the guarantee. The reasoning turned on the facts of that case and the terms of the guarantee. O'Donovan and Philips, at p. 312, then state:

> "Finally, the scope of liability of the original guarantee can be drafted in such a way as to encompass future agreements on substantially different terms. The usual 'all monies' clause is the obvious mechanism, or, somewhat more narrowly, the guarantee can be limited to any future loan agreement between creditor and borrower on any term whatsoever. In any event, it is clearly vital to avoid limiting the guarantee to specific and identified loan agreements (as in Triodos Bank NV. v. Dobbs)."

In my judgment, the guarantee of 1st June, 2006, when objectively construed in accordance with the words used is one which encompasses all future liabilities of the Company to the Bank on whatever account or agreement. It includes, in the terms used by O'Donovan and Philips, the usual "all monies" clause or analogous clauses.

55. The second question is whether Peter Curistan may be relieved from his obligation under the guarantee. Circumstances may put a bank on notice, or at least on inquiry, that undue influence may arise as between a debtor and the surety guaranteeing that debt where the relationship between them is non-commercial. If undue influence by the debtor has brought about the guarantee, the surety may be relieved of liability; Ulster Bank Ltd v Roche & Buttimer [2012] IEHC 166. That defence is not available here. Apart from undue influence, the principles under which a guarantor is entitled to be discharged from liability as a surety arise in equity. It is claimed that as Peter Curistan did not do equity in taking the rent from the properties in the Parnell Centre and discharging it to the benefit of his son, he may not receive equity. As between a creditor and a debtor a contract of loan will exist. A guarantor will often have the relevant rights and obligations defined under a separate contract. Divorced from involvement in any change that the debtor and creditor may make to their arrangements, but depending upon what is known and assented to by the guarantor as to the recourse for the loan, a substantial alteration without the assent of the guarantor in the position in which the guarantor agreed to act as surety may result in inequity. Not every alteration in the debtor and creditor contract is sufficient to require, as a matter of fairness, that the surety be released. The courts will not act on alterations which are insubstantial in the sense that they do not prejudice the surety. The result of an alteration unassented to by the guarantor is that the creditor puts the enforcement of the guarantee at risk; see Mary Donnelly – The Law of Credit and Security (Round Hall, Dublin, 2011) chapter 19. A guarantor who agrees to such an alteration in the creditor debtor relationship is excluded from any entitlement in equity to discharge of the agreement to guarantee as against him. In Danske Bank v McFadden [2010] IEHC 116, Clarke J approved the following statements from Wittmann (UK) Limited v Willdav Engineering SA [2007] EWCA Civ 824: firstly that of Moore-Bick LJ at paragraph 27:

Moreover, I think it is at least arguable, even in relation to a variation of the underlying contract which does not alter the obligation guaranteed, that when Cotton L.J. said that "the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged", he had in mind that the surety must in some way communicate his consent to the creditor before he can be held to the guarantee under the changed circumstances. That would be consistent with the remarks of Blackburn J. in Polak v. Everett (1876) 1 Q.B.D. 669, 673 drawing a distinction between knowledge of a variation and assent to it, and indeed if he has not done so, it is difficult to see why as a matter of principle he should be held to his contract or how in practice the creditor can know where he stands. In the present case, although Willdav, through Mr. Keech, clearly did privately consent to the restructuring of the contractual arrangements, there is no finding that it communicated to Wittman its willingness to remain liable under the guarantee. However, this question does not arise for decision in the present case and on the whole I prefer not to express a concluded view on it.

Secondly, Clarke J also approved the statement of Buxton LJ at paragraphs 33-34 of his judgment:

The right of a surety to discharge if the terms of or obligations under the principal contract are altered is founded in equity: see per Blackburn J. in Polak v. Everett (1876) 1 Q.B.D. 669 at p. 673. The surety therefore cannot assert that right in circumstances where it would be inequitable for him to do so: most obviously, where he has assented to the alteration. In the present case the alteration is substantial; but provided that new terms fall within the matrix or general ambit of the obligation guaranteed the guarantor will continue to be bound if he has assented to those terms. It is assent to, and not merely knowledge of, the new terms that is required: so emphasised by Blackburn J. in the passage already referred to.

56. In the Canadian case of Gabbs v Bouwhuis [2007] BCJ 1380, the Supreme Court of British Columbia dealt with a similar situation. The defendant signed a document giving rise to loan obligations in his capacity as the key decision maker in a corporation called Cannon Machine Works Ltd and in addition guaranteed the repayment of the loan. At every relevant stage of the transaction, any alteration in the terms of the loan was assented to. Masuhara J for the court accepted that a material variation of the terms of the contract of loan, referred to as the principal contract, that is made after giving the guarantee without the consent of the surety will discharge the liability of the surety. A material variation was described as a change in the principal contract which alters the business

effect of the relationship so as to vary the risk. A variation was material if it was one that a prudent person might take into consideration in deciding whether to enter a transaction. In that jurisdiction there is a presumption that all variations to the principal contract will be held to be material unless they are plainly insubstantial or necessarily beneficial to the surety; see paragraph 59 of the judgment. The concurrence with the law as previously set out renders persuasive the analysis by that court of the inapplicability of relief in equity where there is assent by the guarantor, as set out at paragraphs 68 – 69 of the judgment:

The decision of E.A. Towns Ltd. v. Harvey, [1945] 2 D.L.R. 782 (B.C.S.C.) aff'd, [1946] 4 D.L.R. 160 (S.C.C.) provides an example of how a guarantor can be deemed to consent to a material change due to their actions within their corporate capacity. In that case, the defendant alleged that there was a material change when relations between the creditor and debtor became those of vendor-purchaser rather than a principle-agent. Coady J. held, in part, that the guarantor had consented to this, based on the guarantor's corporate capacity with respect to the debtor. Coady J. stated at 785:

> …. it is apparent from the evidence that the practice which prevailed with respect to the handling of the products of Shingle [the debtor] by the plaintiff from almost the very inception of the contract was on the basis of vendor and purchaser. The deceased Ruck [the guarantor] was the Managing Director of Shingle Company from the time the first chattel mortgage was given up to the time of his death in December, 1942. He therefore had full knowledge of the deviation from the contract, if there was a deviation, and he acquiesced in and consented to the business relationship that grew up between the plaintiff and Shingle with respect to the handling of its products. With this knowledge of the manner in which the business had been carried on he acknowledged the indebtedness of Shingle to the plaintiff as of December 31, 1941, when he executed the second chattel mortgage. Certainly it seems to me, under the circumstances, he could not; during his lifetime, have successfully resisted a claim against him by the plaintiff based upon the submission that he was a surety only and that the contract, on the basis of which he had become surety, had been deviated from.

In High Mountain Feed Distributors Ltd. v. Paw Pleasers Ltd., 2004 MBQB 220, the court relied on E.A. Town and found the following:

15 While the defendants correctly assert that a material change in the risk of the original guarantee which is not consented to by the guarantor will discharge the guarantor, there is precedent to support the contention that a surety will be bound where he has full knowledge of, and participates in, the making of an alteration [see E.A. Towns Ltd. v. Harvey et al., [1945] 2 D.L.R. 782 (B.C.S.C.) affirmed [1946] 2 D.L.R. 72 (B.C.C.A.) and K.P. McGuiness: The Law of Guarantee, Carswell, 1986, at paras. 10.23 and 10.24].

16 I agree with the plaintiff that here the guarantor - the individual defendant - was well aware of the increases in credit and admitted in her affidavit that "from approximately 1998 until approximately 2003, the plaintiff allowed Paw Pleasers to increase its credit account with the plaintiff to an amount in excess of $100,000.00". This was because the defendant corporation continued to place orders with the plaintiff. As president and officer of the defendant corporation, the individual defendant must have not only known of this but actively participated. This is not a situation where the guarantor was a third party at arms length; it would, in my view, be absurd and contrary to equitable principles to exonerate the individual defendant in these circumstances.

57. In that case, in consequence of that defendant's involvement in material changes to the loan contract with what in effect was his own corporation, the surety was deprived of relief in equity as such amount to knowledge and assent. As Clarke J stated the principle of relief in equity in the Mc Fadden case at paragraphs 6.4 – 6.5:

It does not appear that it is necessary that there be a formal assent by the guarantor to the relevant change. A guarantor who is a principal or significant player in a corporate entity whose liabilities are guaranteed may be taken to assent by virtue of active participation in the relevant changes. … It would seem, therefore, that at the level of principle a guarantor will not be discharged where the guarantor actually agrees or assents to a change which might otherwise give rise to a discharge. In addition, a guarantor will not be discharged where that guarantor is an active participant in arranging the alteration concerned, albeit not in the capacity of guarantor but rather as a significant player in the entity that is the principal debtor.

Application to the facts

58. An expansion of the factual matrix is required at this point. After signing the guarantee on 2 March 2009, Peter Curistan received a copy of the valuation for the Parnell Centre on the following day. That gave a lower valuation than either the bank or its customer expected. However, it was not until 31 March 2009 that the first substantive drawdown of funds in excess of €1 million took place. As earlier implied, an initial drawdown had been made before then to meet various transaction costs, such as legal and valuation fees; small sums but only by comparison. In February 2010 an amended facility letter was signed and a further substantial drawdown followed. Who made these decisions and with what knowledge? Peter Curistan is the promoter behind both Cambourne and Century City. The incorporation of those companies grants him the privilege of limited liability which may protect him from his companies' creditors in a variety of circumstances. Incorporation as the creation of a separate legal person must be given effect to by the courts. In terms of equity, the reality of the complete identification of Peter Curistan with the Cambourne and Century City as the corporate entities involved in the Parnell Centre does not put him as a distant guarantor; as a person operating at a remove from the relevant transaction and without assent to a change in valuation, and thus in the security impliedly referenced in the separate guarantee. While this valuation was more than optimistic and thus changed the nature of the security to which recourse was to be made in the event of debt default, that change was made with the full assent of the debtor, the creditor and the guarantor. The fact is that when Peter Curistan became aware of the valuation in March 2009, he did so both in his capacity as guarantor and also as agent for the first defendant. As such, knowledge of the purported waiver or breach of the precondition in the facility letters was communicated to both the corporation and the natural person simultaneously to both the corporation and to the person guaranteeing the corporation. Had he, as the guarantor, objected at that point to the advance of facilities and the maintenance of his guarantee in those circumstances, then it was entirely within his power, as agent for Cambourne, to refrain from the drawdown of facilities and instead to make a formal objection to the bank. That he did not so act makes any remedy in equity inapplicable.

59. That Peter Curistan went on to draw down further sums when he knew that the valuation of the Parnell Centre did not meet the requirements of the bank is telling in the circumstances. Further, his proposals to Anglo of January 2011 to further develop the Parnell Centre and borrow more money despite the light that might otherwise be cast by the property price decline and the poor financial situation of trading conditions in the centre indicate Peter Curistan's assent as a guarantor in the fullest possible way to the alteration in the conditions of loan between Anglo and Cambourne of which he was the guarantor.

60. As the decided cases illustrate, in some guarantee cases there is a division between the creditor to debtor relationship and the surety. Alterations to the security that are material can disentitle recourse to such a surety. No such divide, however, exists in this case. Every decision was made by Peter Curistan on behalf of his companies Cambourne or Century City. By whatever complex means, he was not only the main shareholder in each company but, for every relevant purpose, he was the directing mind of the borrower.

61. There is no question arising on the facts of this case of either undue influence, or of the bank forcing a loan upon a borrower, or of the bank making use of a vulnerable position of a borrower to further the interests of the lender, or of a co-guarantor manipulating a personal relationship with another co-guarantor so as to share the potential burden of a secured loan that might not perform into the future.

62. There is therefore no warrant for equitable relief for Peter Curistan from repayment of the sums guaranteed by a contract separate to the facility letters. It follows that on the separate guarantee of Century City, entered into apart from the facility letters, of 5 February 2010, the same findings of law and of fact are applicable.

Banking Practices

63. Since the court has heard extensive expert evidence on proper banking practices in the context of the kind of heedless lending behaviour that has caused fathomless damage to the Irish economy, a brief comment may be apposite. It became obvious from the testimony that there must be guidance, and more, provided to banks as to when to loan money. More essentially, banking culture must become honest and prudent. This case was one of an optimistic developer meeting with a bank that was intent on lending money without proper analysis. Through countless repetition in other similar instances, such activities have caused ruination to not only those involved in imprudent transactions but also to the wider community that has been required to assume responsibility for debt on a gigantic scale for fear that banks, with their cross obligations through mutual loans to each other and the risk of wider contagion to the international banking industry would, through failing, undermine more than the Irish economy.

64. While this case is about a leisure centre, people will not have money for recreation if they are encouraged or allowed to assume unsustainable debt. A ratio of borrowings of a maximum of 3:1 of property debt to gross income used to be regarded as a good mean for lending to couples buying houses. Where that is exceeded, it may be reasonable to predict trouble. Analysing a national economy on the basis of a consumer price index which excludes the cost of purchasing property may be useful for some purposes. If the result of not measuring inflation in property prices as a real form of damaging inflation is that the multiplication of dwelling, retail and business premises costs is ignored, crucial information for planning will be absent. An index of inflation on purchase and rental of property can provide pointers to a particularly damaging kind of inflation that potentially affects the entire community. Where there is a disparity between that index and the index of consumer prices, controls of an inflationary property market can very quickly be introduced. One of the main of those controls is the availability of money.

65. Regrettably, human transactions are at the mercy of human emotions. The regulation of markets is therefore prudent. When property as an investment over-rewards those speculating, it will draw money out of investment in business. That trend can undermine the fundamentals of a society. People may also be unfairly excluded from house ownership through property inflation. Wages and costs will be put under pressure. Banks should never be allowed the power to distort a national economy; experience has shown that they cannot be expected to act solely in the national interest.

66. Where there is a general view of prosperity based on financial or property speculation, the first guide should be as to the transparency of the market; if people know what they are buying and selling, together with a relevant set of comparable values from similar national economies, then consumers may be less likely to succumb to the emotion of greed. Financial transactions which are of "products" that incorporate debt of various kinds, or which move through several layers, may also need to be made transparent and then controlled.

67. Transparency extends to bank accounting. The evidence in this case was that when Anglo was nationalised in January 2009, the bank's management made estimates of impaired loans in the order of €5 billion. When outside analysts were engaged shortly after, the uppermost figure was put at €10 billion. By 2011, according to an answer given in this case, the correct figure for impaired loans was of the order of €35 billion. No contradictory figures were offered.

68. Borrowers are more likely to be responsible where their own money is put into a project as a substantial part of the funding. A startling aspect of this case was that full loans were advanced for hugely expensive properties in Dublin and Belfast. Even worse, on the Belfast property those negotiating any take over of the debt were demanding further loans to remodel the premises. Recourse to the property only as security was part of the deal to be offered by Anglo for this speculation. Even were the bank to have recourse to wider guarantees, as was said in testimony, such recourse to the supposed assets of a property company tends to be fragile.

69. A reasonable person who sat through the evidence in this case could not think that banks were immune from excitement or were not prone to lend on emotion. One of the puzzling aspects of the Dublin transaction was that Anglo was to obtain a 25% profit share had the Parnell Centre loan resulted in an enhancement of its capital value on eventual sale. Anglo heedlessly adopted an inappropriate risk. Banks are traditionally remunerated on the basis of coldly assessing risk and setting an appropriate interest rate. Profit sharing draws banking directly into property speculation. That is not prudent. In addition, such profit sharing with a borrower by a bank gives rise to the real possibility that a bank will be seen by those on the other side of a transaction as a partner to the business in hand. That is a serious risk but the court does not have to rule on the applicable legal principles due to the failure of the main contract under the facility letters.

70. Finally, any attitude that a bank on considering a loan does not have to take the requirement of the borrower to repay into account is redolent of exploitation as opposed to sound commerce. It is an incorrect viewpoint. In this case, as in many others, both sides are equally to be faulted for the improvidence of their arrangements.

Result

71. The facility letters contained conditions precedent which were not met. In consequence, the guarantees within the facility letters fail. There were two other separate deeds of guarantee, however, entered into by Peter Curistan and by Century City in respect of any loans made to Cambourne. These are valid. Because of the identification of Peter Curistan as the controller of Cambourne and of Century city, the Court is not entitled to intervene in those guarantees given apart from the facility letters. These deeds of guarantee are those entered into by Peter Curistan and dated 2 March 2009 for the advance of monies to Cambourne and the guarantee separate from the facility letters entered into by Century City on 5 February 2010.

72. The primary debt was money borrowed by Cambourne on facility letters that made a loan offer by Anglo. The failure of the conditions precedent as to valuation and as to loan to value ratio in the facility letters offering the loans to Cambourne prevent the operation of that written contract. The main debt is thus not recoverable under those facility letters. It is otherwise recoverable because Cambourne agreed to borrow the money and Anglo agreed to lend it. As a matter of law, Cambourne is obliged to repay the money borrowed. There is no warrant for construing into the relationship between the Anglo and Cambourne any entitlement other than an ordinary obligation to repay that money. Even were the terms of the guarantees given by Peter Curistan and Century City

outside the facility letters to have inserted into them a condition that the principal sum borrowed by Cambourne would only require repayment after a reasonable time, such time has passed. Further, the manner in which the bank was treated by Cambourne, through Peter Curistan, entitled the bank to demand its money and to bring the loan to an end.

73. In the result, judgment against the first, second and third defendants for the amount claimed must follow. That sum is €11.080, 593.75. Having heard argument as to costs, 12 days of the 14 day hearing will be awarded to the plaintiff together with all costs that were heretofore made costs in the cause.